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SEC Re-Proposes Rules Establishing a “U.S. Personnel” Test for Application of Dodd-Frank Security-Based Swap Requirements

On April 29, 2015, the U.S. Securities and Exchange Commission (“**SEC**”) re-proposed rules that would apply certain requirements under the Securities Exchange Act of 1934 (“**Exchange Act**”) that were added by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Title VII**”) to certain security-based swap (“**SBS**”) transactions arranged, negotiated, or executed on behalf of a non-U.S. person by personnel located in the non-U.S. person’s U.S. branch or office or in a U.S. branch or office of its agent (“**Proposed U.S. Personnel Test Rules**”).¹ Comments on the proposal are due on or before July 13, 2015.

The SEC previously adopted final rules regarding the application of the SBS dealer (“**SBSD**”) and major SBS participant (“**MSBSP**”) definitions to cross-border SBS activities (“**Final SBS Cross-Border Definitions**”)² and final rules regarding the reporting and public dissemination of SBS information (“**Final SBS Reporting Rules**”).³ However, those rules did not fully address the application of Title VII to conduct by U.S.

¹ See Application of Certain Title VII Requirements to Security-Based Swap 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 or in a U.S. Branch or Office of an Agent, 80 Fed. Reg. 27444 (May 13, 2015), available [here](#).

² See Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, 79 Fed. Reg. 47278 (Aug. 12, 2014), available [here](#); see also Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30968 (May 23, 2013) (“**Original SBS Cross-Border Proposal**”), available [here](#). For additional background, refer to Cleary Gottlieb’s Alert Memorandum entitled SEC Adopts Final Rules Regarding the Application of the “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities (June 30, 2014), available [here](#).

³ See Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14564 (Mar. 19, 2015), available [here](#). At the same time, the SEC also proposed additional rules, rule amendments, and guidance that would address, among other matters, the duties of certain reporting parties and SBS data repositories (“**SB SDRs**”) and an interim compliance schedule for certain provisions of the Final SBS Reporting Rules. See Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14740 (Mar. 19, 2015) (“**Additional Proposed SBS Reporting Rules**”), available [here](#). For additional background, refer to Cleary Gottlieb’s Alert Memorandum entitled SEC Adopts Rules Regarding Reporting and Dissemination of Security-Based Swap Information and Proposes Further Amendments to the Reporting Rules (Apr. 20, 2015), available [here](#).

personnel acting on behalf of non-U.S. persons.⁴ To fill this gap, the Proposed U.S. Personnel Test Rules would:

- address the application of the SBSD *de minimis* exception in the context of SBS dealing transactions arranged, negotiated or executed by U.S. personnel acting on behalf of a non-U.S. person;
- address the application of the Title VII external business conduct requirements to SBS transactions arranged, negotiated or executed by U.S. personnel acting on behalf of a non-U.S. person registered as an SBSD or a foreign branch of a U.S. person registered as an SBSD; and
- amend its SBS reporting rules to address the reporting and public dissemination requirements applicable to SBS transactions involving non-U.S. persons that engage in SBS dealing transactions arranged, negotiated or executed by U.S. personnel, as well as non-U.S. persons that engage in SBS transactions effected by or through a registered broker-dealer.

In developing its proposal, the SEC states that it reviewed letters submitted in response to a request for comment from the U.S. Commodity Futures Trading Commission (“**CFTC**”) regarding CFTC Staff Advisory 13-69, which had addressed the application of Title VII to swaps regularly arranged, negotiated or executed on behalf of non-U.S. swap dealers by U.S. personnel or agents.⁵ Although the SEC’s proposed guidance regarding the meaning of “arrange, negotiate, or execute” applies solely to the application of Title VII to cross-border SBS activity, consistent interpretation of these terms by the SEC and CFTC for purposes of Title VII and by the various agencies responsible for administering the Volcker Rule (a key exemption to which includes a

⁴ See Final SBS Cross-Border Definitions at 47279-81; Final SBS Reporting Rules at 14568 n.21; and Additional Proposed SBS Reporting Rules at 14763 n.140; see also Original SBS Cross-Border Proposal at 30999-31002.

⁵ On November 14, 2013, the CFTC staff issued an advisory stating that the CFTC’s “transaction-level” rules apply to swaps between a non-U.S. swap dealer and a non-U.S. person if the swaps are regularly arranged, negotiated, or executed by personnel or agents of the non-U.S. swap dealer located in the United States. See CFTC Staff Advisory 13-69 (Nov. 14, 2013), available [here](#). Through a series of no-action letters, the CFTC staff has largely delayed the effectiveness of CFTC Staff Advisory 13-69 until September 30, 2015. See, e.g., CFTC No-Action Letter 14-140 (Nov. 14, 2014), available [here](#). The CFTC has solicited public comment on CFTC Staff Advisory 13-69, but has taken no further action on it yet. See Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014), available [here](#).

version of the “arrange, negotiate, or execute” test)⁶ would seem desirable for regulators and market participants alike.

Because it is central to the SEC’s overall approach in the Proposed U.S. Personnel Test Rules, we first discuss generally the SEC’s proposed test for whether activities by U.S. personnel would trigger application of Title VII requirements. Then, in subsequent sections, we discuss this proposed test in connection with the SBSD *de minimis* exception (Section II), external business conduct standards (Section III), the mandatory clearing and trade execution requirements (Section IV), and SBS reporting rules (Section V).⁷ Finally, we discuss the availability of substituted compliance (Section VI).

I. The U.S. Personnel Test

In addressing the application of Title VII to activity of U.S. personnel acting on behalf of non-U.S. persons, the Proposed U.S. Personnel Test Rules consider whether personnel of the non-U.S. person or its agent located in a U.S. branch or office “arrange, negotiate, or execute” an SBS transaction (referred to herein as the “**U.S. Personnel Test**”).

Covered Personnel. The U.S. Personnel Test would cover personnel located in a U.S. branch or office of a non-U.S. person (such as the U.S. branch of a foreign bank) or a U.S. branch or office of an agent of the non-U.S. person (such as a U.S. broker-dealer), whether or not that agent is affiliated with the non-U.S. person and even if the agent and its personnel are already regulated by the SEC. The Proposed U.S. Personnel Test Rules would apply to activities engaged in by personnel performing sales or trading functions, regardless of whether such personnel are formally

⁶ Although it generally prohibits banking entities from engaging, as principal, in the purchase or sale of a financial instrument for a trading account, the Volcker Rule includes an exception from the proprietary trading prohibition for foreign banking entities conducting transactions solely outside the United States (the “trading outside the United States” or “**TOTUS Exemption**”). Among the conditions for a foreign banking entity to rely on the TOTUS Exemption is that personnel of the foreign banking entity or its affiliate that “arrange, negotiate or execute” such purchase or sale may not be located in the United States. See §__.6(e)(3)(i) of the Volcker Rule; see also §__.6(e)(3)(v)(A) of the Volcker Rule (permitting a foreign banking entity to conduct a purchase or sale with the foreign operations of a U.S. entity in reliance on the TOTUS Exemption if, among other requirements, no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale).

⁷ The Proposed U.S. Personnel Test Rules are generally not relevant to activity by U.S. personnel acting on behalf of non-U.S. MSBSPs (except with respect to the proposed revisions to the reporting hierarchy in Regulation SBSR, discussed below). See also note 9, *infra*.

designated as salespersons or traders.⁸ However, by requiring that such personnel be located in a U.S. branch or office, the SEC intends to avoid covering activity by personnel of the non-U.S. person or personnel of its agent who are only incidentally present in the United States when they arrange, negotiate, or execute a transaction (e.g., personnel of a foreign office who happen to be traveling within the United States).⁹

In addition, the Proposed U.S. Personnel Test would focus only on activities by covered U.S. personnel acting on behalf of a non-U.S. person engaged in SBS dealing activity, not U.S. personnel acting on behalf of such a non-U.S. person's non-dealer counterparty. In contrast, the Original SEC Cross-Border Proposal would have treated any transaction solicited, negotiated, executed, or booked, by either party, within the United States as a "transaction conducted within the United States" subject to certain Title VII requirements.

Covered Activity. In the preamble of the Proposed U.S. Personnel Test Rules, the SEC proposes to interpret "arrange, negotiate, or execute" to include the following types of "market-facing" activity by covered U.S. personnel in connection with a particular SBS transaction:

- "Arrangement" of an SBS transaction, which appears to cover both solicitation of prospective counterparties and responses to requests by counterparties to enter into dealing transactions;
- "Negotiation" of the "economic terms" of an SBS transaction;

⁸ The SEC proposes to interpret the term "personnel" in a manner consistent with the definition of "associated person of [an SBSD]" contained in Section 3(a)(70) of the Exchange Act, regardless of whether the non-U.S. person is an SBSD. This definition would encompass a broad range of relationships that may be used by market participants to engage in and effect transactions, and would not depend solely on whether a natural person is technically an "employee" of the non-U.S. person. The SEC states that it expects to examine whether a particular entity is able to control or supervise the actions of an individual when determining whether such person is considered to be "personnel" of a U.S. branch, office, or agent of a non-U.S. person.

⁹ Notably, the SEC did not propose a corresponding change to the definition of "transaction conducted through a foreign branch," which requires that the transaction be arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States. See Final SBS Cross-Border Definitions at 47321. Therefore, without further action by the SEC, market participants may question whether this clarification regarding personnel of a foreign office who happen to be traveling within the United States is relevant to rule exceptions applicable to a "transaction conducted through a foreign branch" (e.g., the exceptions from the SBSD *de minimis* calculation and the MSBSP thresholds for transactions conducted through a foreign branch and the exception, discussed below, from the application of the external business conduct standards to transactions conducted through a foreign branch).

- “Execution” of an SBS transaction, *i.e.*, the market-facing act that, in connection with an SBS transaction, causes the person to become irrevocably bound under the SBS under applicable law, whether such act is undertaken in person, over the phone or electronically; and
- “Direction” of the relevant market-facing activity of a non-U.S. person.

Unlike under CFTC Staff Advisory 13-69, under the Proposed U.S. Personnel Test Rules such activities by covered U.S. personnel would trigger the application of certain Title VII requirements even if a non-U.S. person does not “regularly” use U.S. personnel to engage in such activities. For example, even though some have argued that the U.S. Personnel Test should not cover transactions of a non-U.S. dealer executed by U.S. personnel on an irregular basis during off-market hours, the SEC’s preliminary view is that these transactions raise Title VII concerns regardless of either counterparty’s motivation for entering into them, and the assignment of the relevant personnel to a U.S. branch or office suggests that their presence in the United States is not “incidental.” As a result, the Proposed U.S. Personnel Test Rules would cover such activities.

On the other hand, the U.S. Personnel Test would not cover the following types of activities:

- activity of personnel who design an SBS but do not communicate with a counterparty regarding a contract in connection with a specific transaction and do not execute trades in the contract;
- activity of personnel who prepare documentation for an SBS transaction, including negotiation of a master agreement and related documentation;
- activity of a U.S. attorney involved in negotiations regarding the terms of an SBS transaction;
- activity of personnel who perform ministerial or clerical tasks in connection with an SBS transaction as opposed to negotiating with a counterparty regarding the specific economic terms of a particular SBS transaction;
- activity of personnel who perform internal functions (such as the processing of trades or other back-office activities) in connection with an SBS transaction;
- collateral management activities (*e.g.*, the exchange of margin payments) that may occur in the United States or involve U.S. banks or custodians;
- submission of an SBS transaction for clearing in the United States; or

- reporting an SBS transaction to an SB SDR in the United States.

Key Open Questions. Despite the guidance summarized above, questions remain regarding certain types of activities and trading scenarios. For example, some market participants have raised questions regarding the extent to which U.S. personnel can provide ancillary services, such as market color or indicative pricing information, with respect to a particular SBS transaction without being considered to have “arranged, negotiated, or executed” the transaction for purposes of the U.S. Personnel Test. Also, the SEC has introduced the new concept of “directing” the arrangement, negotiation or execution of an SBS transaction, and market participants might wonder how much discretion must be maintained by non-U.S. personnel before the SEC will consider U.S. personnel not to have “directed” their non-U.S. activity. The SEC also did not specify which terms of an SBS transaction would constitute “economic terms” the negotiation of which by U.S. personnel would trigger Title VII, even though the SEC did clearly exclude the negotiation of master documentation and activity by U.S.-based attorneys. Finally, while the SEC clarified that the U.S. Personnel Test would apply to the electronic execution of SBS transactions, questions may arise about how the test will apply to transactions executed pursuant to algorithms.

II. **Amendments to the SBSD *De Minimis* Exception Calculation**¹⁰

The Exchange Act provides an exception from the SBSD definition if an entity engages in a *de minimis* amount of SBS dealing activity.¹¹ The Final SBS Cross-Border Definitions did not include a provision proposed in the Original SEC Cross-Border Proposal that would have required a non-U.S. person to include an SBS transaction entered into in a dealing capacity with another non-U.S. person toward its SBSD *de minimis* threshold if the SBS were a “transaction conducted within the United States.” To fill this gap, the Proposed U.S. Personnel Test Rules would require a non-U.S. person to include in its *de minimis* exception calculation any dealing transaction with a non-U.S. person counterparty that is covered by the U.S. Personnel Test.¹² In contrast, CFTC Staff Advisory 13-69 would not require swaps arranged, negotiated, or executed

¹⁰ Appendix A contains a redline showing the proposed changes to the final rules relating to the SBSD and MSBSP definitions contained in the Proposed U.S. Personnel Test Rules.

¹¹ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 Fed. Reg. 30596 (May 23, 2012), available [here](#).

¹² Under the Final SBS Cross-Border Definitions, a non-U.S. person also is required to count SBS dealing transactions with a non-U.S. person counterparty (other than a majority-owned affiliate) if such counterparty has legally enforceable rights of recourse against a U.S. affiliate of the non-U.S. person in connection with the non-U.S. person’s obligations under the SBS. This requirement does not depend on the location of personnel of either party to the transaction.

by U.S. personnel on behalf of a non-U.S. person to be included in the non-U.S. person's swap dealer *de minimis* calculation.

In addition, the Final SBS Cross-Border Definitions permit a non-U.S. person to exclude an SBS transaction from counting toward the SBS *de minimis* threshold if the non-U.S. person enters into the transaction anonymously on an execution facility or national securities exchange and clears the transaction through a clearing agency. Under the Proposed U.S. Personnel Test Rules, transactions that are covered by the U.S. Personnel Test would not be eligible for this exception and, therefore, would count toward the non-U.S. person's SBS *de minimis* threshold even if executed anonymously on an execution facility and cleared.

One alternative to the SEC's proposal that was considered but preliminarily rejected by the SEC would be to regulate SBS transactions executed by a non-U.S. person through a U.S. agent by regulating the agent under the Exchange Act's existing broker-dealer regulatory regime. In rejecting this alternative, the SEC argued, among other things, that (i) banks acting as agents would fall outside the SEC's broker-dealer regulatory regime (pursuant to exemptions from the definition of "broker" in the Exchange Act)¹³ and (ii) the SEC's enforcement of the Exchange Act's antifraud provisions could be frustrated by difficulties in obtaining the books and records of the non-U.S. person dealer on whose behalf the agent is acting.¹⁴ The SEC also argues that, without this rule, non-U.S. persons could simply carry on a dealing business within the United States with other non-U.S. persons through agents and remain outside of the application of the dealer requirements of Title VII. Query, however, whether there might be other, more targeted approaches to addressing these concerns.¹⁵

¹³ Because SBS are securities for purposes of the Exchange Act, a person that acts as a broker as defined in Section 3(a)(4) of the Exchange Act in connection with an SBS would be required to register as a broker-dealer by Section 15(a)(1) of the Exchange Act, unless eligible for an exemption. Section 3(a)(4)(B) of the Exchange Act excepts banks, including the U.S. branches of foreign banks, from the definition of "broker" with respect to certain activities. In addition, in connection with SBS transactions, the SEC has provided temporary exemptions from the registration requirements under Section 15(a)(1) of the Exchange Act and the other requirements of the Exchange Act, and the rules and regulations thereunder, that apply to a broker-dealer that is not registered with the SEC. 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, 79 Fed. Reg. 7731 (Feb. 10, 2014), available [here](#).

¹⁴ See Proposed U.S. Personnel Test Rules at 27470-71.

¹⁵ For example, some of these objections could potentially be addressed in a targeted way by conditioning such an approach on the requirements that (i) the U.S. agent be registered as a broker-dealer with the SEC and (ii) the SEC have access to books and records of the non-U.S. dealer. Such conditions would be consistent with the SEC's longstanding approach under Exchange Act Rule 15a-6. In addition, more targeted anti-evasion measures could prevent U.S. persons from reorganizing their SBS dealing activity through offshore booking entities so as to avoid SBS *de minimis* regulation.

III. Application of the External Business Conduct Requirements

In the Original SEC Cross-Border Proposal, the SEC proposed to apply Title VII SBS external business conduct requirements¹⁶ only to the “U.S. business” of registered SBSDs, not their “foreign business” (defined as any business that is not “U.S. business”).¹⁷ The Proposed U.S. Personnel Test Rules contain the same general approach as the Original SBS Cross-Border Proposal, but conform the proposed definition of “U.S. business” with respect to both U.S. SBSDs and foreign SBSDs to track the re-proposed U.S. Personnel Test.

Accordingly, with respect to a foreign SBSD, “U.S. business” would mean:

- any SBS transaction entered into, or offered to be entered into, by or on behalf of such foreign SBSD, with a U.S. person (other than a transaction conducted through a foreign branch of that U.S. person);¹⁸ or
- any SBS transaction that is covered by the U.S. Personnel Test.

As a result of the foregoing, a foreign SBSD would not be subject to Title VII SBS external business conduct standards with respect to (i) transactions conducted through the foreign branch of a U.S. person that are not covered by the U.S. Personnel Test or (ii) transactions with non-U.S. persons that are not covered by the U.S. Personnel Test.

¹⁶ The SEC has proposed, but not yet adopted, its Title VII SBS external business conduct requirements. See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 42396 (July 18, 2011), [available here](#) and a [correction here](#). For additional background, refer to Cleary Gottlieb’s Alert Memorandum entitled SEC Proposes Business Conduct Standards (July 15, 2011), [available here](#).

¹⁷ The Proposed U.S. Personnel Test Rules do not address application of any of the other substantive requirements applicable to SBSDs, including those related to the application of “entity-level” requirements (capital and margin, risk management procedures, recordkeeping and reporting, supervision, and designation of a chief compliance officer) or the application of segregation requirements under Section 3E of the Exchange Act. In the Original SBS Cross-Border Proposal, the SEC proposed a rule that would provide that a foreign SBSD would not be required to comply with the segregation requirements set forth in Section 3E of the Exchange Act, and the rules and regulations thereunder, with respect to SBS transactions with non-U.S. person counterparties in certain circumstances.

¹⁸ “Transaction conducted through a foreign branch” is defined in the Final SBS Cross-Border Definitions to mean an SBS transaction that is conducted by a U.S. person through a foreign branch provided (i) the foreign branch is the counterparty to such transaction and (ii) the transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States. The Final SBS Cross-Border Definitions define a “foreign branch” as any branch of a U.S. bank if the branch (i) is located outside the United States, (ii) operates for valid business reasons, and (iii) is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located. See note 9, *supra*.

As with the *de minimis* calculation, the involvement of a non-U.S. counterparty's U.S. personnel or agent would not trigger the application of the Title VII SBS external business conduct requirements to an SBS transaction under the U.S. Personnel Test. Instead, the focus is solely on the activity of the foreign SBSD and the status of the counterparty as a non-U.S. person.

Nonetheless, the fact that external business conduct standards would be triggered if a transaction were intermediated by a U.S. broker-dealer agent of a foreign SBSD raises the possibility that the transaction could be subject to three separate sales practice regimes: (i) Title VII SBS external business conduct standards applicable to SBSDs; (ii) sales practice rules applicable to registered broker-dealers; and (iii) foreign sales practice rules. As a result, unless the sales practice regimes applicable to SBSDs and broker-dealers are fully harmonized or substituted compliance is permitted (see Section VII below), transactions by foreign SBSDs covered by the U.S. Personnel Test may be subject to duplicative or inconsistent requirements.

With respect to a U.S. SBSD, "U.S. business" means any transaction by or on behalf of such U.S. SBSD, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with:

- a non-U.S. person; or
- a U.S. person counterparty in a transaction conducted through a foreign branch of the counterparty.

As a result of the test described above, a U.S. SBSD would not be subject to Title VII SBS external business conduct standards if it conducts a transaction through a foreign branch with a non-U.S. person counterparty, even if the transaction is covered by the U.S. Personnel Test from the perspective of the non-U.S. person counterparty.

IV. Application of the Mandatory Clearing and Trade Execution Requirements

In a significant departure from the Original SEC Cross-Border Proposal and CFTC Staff Advisory 13-69, the Proposed U.S. Personnel Test Rules would not subject SBS transactions between two non-U.S. persons to the mandatory clearing requirement because the transactions are arranged, negotiated, or executed by personnel located in a U.S. branch or office. Because the key objective of the mandatory clearing requirement is to mitigate systemic and operational risk to the United States, the SEC recognizes that it is not necessary to apply the mandatory clearing requirement to a transaction between two non-U.S. persons, where the counterparty credit risk and

operational risk of the transaction is outside the United States, solely because the transaction involves activity by personnel located in the United States.¹⁹

The SEC also believes that an SBS transaction is potentially subject to the trade execution requirement only if it is first subject to the clearing requirement. Accordingly, to the extent that the clearing requirement does not apply to a particular SBS transaction, the trade execution requirement also would not apply under the Proposed U.S. Personnel Test Rules.

V. Application of SBS Reporting Rules²⁰

The Proposed U.S. Personnel Test Rules would amend the Final SBS Reporting Rules and the Additional Proposed SBS Reporting Rules to address the application of the regulatory reporting and public dissemination requirements to certain cross-border SBS transactions. Specifically, the Proposed U.S. Personnel Test Rules would:

- Require any SBS transaction connected with a non-U.S. person's SBS dealing activity that is covered by the U.S. Personnel Test to be reported to a registered SB SDR and publicly disseminated. This requirement would apply even if the non-U.S. person is engaged in dealing activity under the SBSD *de minimis* threshold (such person, a "***De Minimis Dealer***").
- Require any SBS transaction that is executed on a national securities exchange or security-based swap execution facility ("**SB SEF**") that is registered or exempt from registration to be reported to a registered SB SDR and publicly disseminated if such exchange or SB SEF has its principal place of business in the United States;
- Require the reporting and public dissemination of any SBS transaction that is effected by or through a registered broker-dealer (including a registered SB SEF). A registered broker-dealer would be required to report an SBS transaction effected by or through it only when neither side of that transaction includes a U.S. person, a registered SBSD or registered MSBSP, or a non-U.S. person that has, in connection that transaction, engaged in dealing activity that is covered by the U.S. Personnel Test.

¹⁹ The SEC notes, however, that it is likely that a non-U.S. person engaged in significant SBS dealing activity would be a registered SBSD under the proposed approach and therefore subject to Title VII capital and margin requirements, which the SEC suggests would be a more narrowly tailored and appropriate way of mitigating any such risk in this context.

²⁰ Appendix B contains a redline showing the proposed changes to the final rules governing the reporting and public dissemination of SBS information contained in both the Proposed U.S. Personnel Test Rules and the Additional Proposed SBS Reporting Rules.

The Proposed U.S. Personnel Test Rules would also amend the reporting hierarchy so that when a non-U.S. *De Minimis* Dealer faces an unregistered U.S. person in a transaction covered by the U.S. Personnel Test, the parties may choose who reports (rather than placing the reporting obligation on the U.S. person, as originally proposed). In cases, however, where an unregistered U.S. person enters into a transaction with a non-U.S. *De Minimis* Dealer that does not use personnel located in the United States to arrange, negotiate, or execute the transaction, the reporting obligation would continue to apply to the U.S. person.

VI. Substituted Compliance

The Proposed U.S. Personnel Test Rules deliberately do not propose an amendment that would limit the availability of substituted compliance for transactions based on the location of the relevant activity. Rather, the SEC states that it anticipates addressing substituted compliance in the context of its consideration of final rules regarding each of the respective substantive requirements applicable to SBSDs. In this regard, it will be important to see how the SEC addresses implementation timing differences and whether it adopts a “strictest-rule applies” approach that could undermine the usefulness of substituted compliance.

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Please call any of your regular contacts at the firm or any of the partners and counsel listed under Derivatives in the Practices section of our website (www.cgsh.com) if you have any questions.

Appendix A: Final and Proposed Rules Relating to SBSD and MSBSP Definitions²¹

§ 240.3a67-10 – Foreign major security-based swap participants.

(a) Definitions. As used in this section, the following terms shall have the meanings indicated:

- (1) Conduit affiliate has the meaning set forth in § 240.3a71-3(a)(1).
- (2) Foreign branch has the meaning set forth in § 240.3a71-3(a)(2).
- (3) Transaction conducted through a foreign branch has the meaning set forth in § 240.3a71-3(a)(3).
- (4) U.S. person has the meaning set forth in § 240.3a71-3(a)(4).

(b) Application of major security-based swap participant tests in the cross-border context. For purposes of calculating a person's status as a major security-based swap participant as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person shall include the following security-based swap positions:

- (1) If such person is a U.S. person, all security-based swap positions that are entered into by the person, including positions entered into through a foreign branch;
- (2) If such person is a conduit affiliate, all security-based swap positions that are entered into by the person; and
- (3) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of security-based swap positions that are entered into by the person:
 - (i) Security-based swap positions that are entered into with a U.S. person; provided, however, that this paragraph (i) shall not apply to:
 - (A) Positions with a U.S. person counterparty that arise from transactions conducted through a foreign branch of the

²¹ In this Appendix text in black indicates text that has been adopted under the Final SBS Cross-Border Definitions; text in red indicates proposed text of the Proposed U.S. Personnel Test Rules.

counterparty, when the counterparty is a registered security-based swap dealer; and

(B) Positions with a U.S. person counterparty that arise from transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(ii) Security-based swap positions for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against a U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap.

(c) Attributed positions.

(1) In general. For purposes of calculating a person's status as a major security-based swap participant as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, a person also shall include the following security-based swap positions:

(i) If such person is a U.S. person, any security-based swap position of a non-U.S. person for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against that U.S. person.

Note to paragraph (c)(1)(i). This paragraph describes attribution requirements for a U.S. person solely with respect to the guarantee of the obligations of a non-U.S. person under a security-based swap. The Commission and the Commodity Futures Trading Commission previously provided an interpretation about attribution to a U.S. parent, other affiliate, or guarantor to the extent that the counterparties to those positions have recourse against that parent, other affiliate, or guarantor in connection with the position. See Intermediary Definitions Adopting Release, <http://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf>. The Commission explained that it intended to issue separate releases addressing the application of the major participant definition, and Title VII generally, to non-U.S. persons. See id. at note 1041.

(ii) If such person is a non-U.S. person:

(A) Any security-based swap position of a U.S. person for which that person's counterparty has rights of recourse against the non-U.S. person; and

(B) Any security-based swap position of another non-U.S. person entered into with a U.S. person counterparty who has rights of recourse against the first non-U.S. person, provided, however, that this paragraph (B) shall not apply to positions described in § 240.3a67-10(b)(3)(i)(A) and (B).

(2) Exceptions. Notwithstanding paragraph (c)(1) of this section, a person shall not include such security-based swap positions if the person whose performance is guaranteed in connection with the security-based swap is:

(i) Subject to capital regulation by the Commission or the Commodity Futures Trading Commission (including, but not limited to regulation as a swap dealer, major swap participant, security-based swap dealer, major security-based swap participant, futures commission merchant, broker, or dealer);

(ii) Regulated as a bank in the United States;

(iii) Subject to capital standards, adopted by the person's home country supervisor, that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision; or

(iv) Deemed not to be a major security-based swap participant pursuant to § 240.3a67-8(a).

* * * * *

§ 240.3a71-3 Cross-border security-based swap dealing activity.

(a) Definitions. As used in this section, the following terms shall have the meanings indicated:

(1) Conduit affiliate—

(i) Definition. Conduit affiliate means a person, other than a U.S. person, that:

(A) Is directly or indirectly majority-owned by one or more U.S. persons; and

(B) In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as security-based swap dealers, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as security-based swap dealers or major security-based swap participants) who are controlling, controlled by, or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.

(ii) Majority-ownership standard. The majority-ownership standard in paragraph (a)(1)(i)(A) of this section is satisfied if one or more persons described in § 240.3a71-3(a)(4)(i)(B) directly or indirectly own a majority interest in the non-U.S. person, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

(2) Foreign branch means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(3) Transaction conducted through a foreign branch—

(i) Definition. Transaction conducted through a foreign branch means a security-based swap transaction that is arranged, negotiated, and executed by a U.S. person through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.

(ii) Representations. A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(3)(i)(B) of this section in determining whether a security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(4) U.S. person—

(i) Except as provided in paragraph (a)(4)(iii) of this section, U.S. person means any person that is:

(A) A natural person resident in the United States;

(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

(C) An account (whether discretionary or non-discretionary) of a U.S. person; or

(D) An estate of a decedent who was a resident of the United States at the time of death.

(ii) For purposes of this section, principal place of business means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.

(iii) The term U.S. person does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and

pension plans, and any other similar international organizations, their agencies and pension plans.

(iv) A person shall not be required to consider its counterparty to a security-based swap to be a U.S. person if such person receives a representation from the counterparty that the counterparty does not satisfy the criteria set forth in paragraph (a)(4)(i) of this section, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(5) United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(6) U.S. security-based swap dealer means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is a U.S. person.

(7) Foreign security-based swap dealer means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person.

(8) U.S. business means:

(i) With respect to a foreign security-based swap dealer:

(A) Any security-based swap transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than a transaction conducted through a foreign branch of that person); or

(B) Any security-based swap transaction arranged, negotiated, or executed by personnel of the foreign security-based swap dealer located in a U.S. branch or office, or by personnel of an agent of the foreign security-based swap dealer located in a U.S. branch or office; and

(ii) With respect to a U.S. security-based swap dealer, any transaction by or on behalf of such U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or with a U.S.-person

counterparty that constitutes a transaction conducted through a foreign branch of the counterparty.

(9) Foreign business means security-based swap transactions that are entered into, or offered to be entered into, by or on behalf of, a foreign security-based swap dealer or a U.S. security-based swap dealer, other than the U.S. business of such person.

(b) Application of *de minimis* exception to cross-border dealing activity. For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71-2(a)(1), except as provided in § 240.3a71-5, a person shall include the following security-based swap transactions:

(1) (i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch;

(ii) If such person is a conduit affiliate, all security-based swap transactions connected with the dealing activity in which such person engages; and

(iii) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of transactions:

(A) Security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person; provided, however, that this paragraph (A) shall not apply to:

(1) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered security-based swap dealer; and

(2) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(B) Security-based swap transactions connected with the dealing activity in which such person engages for which the counterparty to

the security-based swap has rights of recourse against a U.S. person that is controlling, controlled by, or under common control with the non-U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap; and

(C) Security-based swap transactions connected with such person's security-based swap dealing activity that are arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office; and

(2) If such person engages in transactions described in paragraph (b)(1) of this section, except as provided in § 240.3a71-4, all of the following types of security-based swap transactions:

- (i) Security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch;
- (ii) Security-based swap transactions connected with the dealing activity in which any conduit affiliate controlling, controlled by, or under common control with such person engages; and
- (iii) Security-based swap transactions connected with the dealing activity of any non-U.S. person, other than a conduit affiliate, that is controlling, controlled by, or under common control with such person, that are described in paragraph (b)(1)(iii) of this section.

(c) Application of customer protection requirements. A registered foreign security-based swap dealer and a registered U.S. security-based swap dealer, with respect to their foreign business, shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o-10(h)), and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o-10(h)(1)(B)).

§ 240.3a71-4 – Exception from aggregation for affiliated groups with registered security-based swap dealers.

Notwithstanding §§ 240.3a71-2(a)(1) and 240.3a71-3(b)(2), a person shall not include the security-based swap transactions of another person (an “affiliate”) controlling, controlled by, or under common control with such person where such affiliate either is:

- (a) Registered with the Commission as a security-based swap dealer; or
- (b) Deemed not to be a security-based swap dealer pursuant to § 240.3a71-2(b).

§ 240.3a71-5 – Exception for cleared transactions executed on a swap execution facility.

- (a) For purposes of § 240.3a71-3(b)(1), a non-U.S. person, other than a conduit affiliate, shall not include its security-based swap transactions that are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency; and
- (b) For purposes of § 240.3a71-3(b)(2), a person shall not include security-based swap transactions of an affiliated non-U.S. person, other than a conduit affiliate, when such transactions are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency.
- (c) The exceptions in paragraphs (a) and (b) of this section shall not apply to any security-based swap transactions of a non-U.S. person connected with its security-based swap dealing activity that are arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office.

Appendix B: Final and Proposed Rules – Regulation SBSR²²

§ 242.900 Definitions.

Terms used in §§ 242.900 through 242.909 that appear in Section 3 of the Exchange Act (15 U.S.C. 78c) have the same meaning as in Section 3 of the Exchange Act and the rules or regulations thereunder. In addition, for purposes of Regulation SBSR (§§ 242.900 through 242.909), the following definitions shall apply:

- (a) Affiliate means any person that, directly or indirectly, controls, is controlled by, or is under common control with, a person.
- (b) Asset class means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives.
- (c) [Reserved].
- (d) Branch ID means the UIC assigned to a branch or other unincorporated office of a participant.
- (e) Broker ID means the UIC assigned to a person acting as a broker for a participant.
- (f) Business day means a day, based on U.S. Eastern Time, other than a Saturday, Sunday, or a U.S. federal holiday.
- (g) Clearing transaction means a security-based swap that has a registered clearing agency as a direct counterparty.
- (h) Control means, for purposes of §§ 242.900 through 242.909, the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:
 - (1) Is a director, general partner or officer exercising executive responsibility (or having similar status or functions);
 - (2) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

²² Final rules in Regulation SBSR are shown in black. Proposed rule amendments to Regulation SBSR contained in the Additional Proposed SBS Reporting Rules are shown in green, and proposed rule amendments contained in the Proposed U.S. Personnel Test Rules are shown in red.

(3) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(i) Counterparty means a person that is a direct counterparty or indirect counterparty of a security-based swap.

(j) Counterparty ID means the UIC assigned to a counterparty to a security-based swap.

(k) Direct counterparty means a person that is a primary obligor on a security-based swap.

(l) Direct electronic access has the same meaning as in § 240.13n-4(a)(5) of this chapter.

(m) Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), as amended.

(n) Execution agent ID means the UIC assigned to any person other than a broker or trader that facilitates the execution of a security-based swap on behalf of a direct counterparty.

(o) Foreign branch has the same meaning as in § 240.3a71-3(a)(1) of this chapter.

(p) Indirect counterparty means a guarantor of a direct counterparty's performance of any obligation under a security-based swap such that the direct counterparty on the other side can exercise rights of recourse against the indirect counterparty in connection with the security-based swap; for these purposes a direct counterparty has rights of recourse against a guarantor on the other side if the direct counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the guarantor in connection with the security-based swap.

(q) Life cycle event means, with respect to a security-based swap, any event that would result in a change in the information reported to a registered security-based swap data repository under § 242.901(c), (d), or (i), including: an assignment or novation of the security-based swap; a partial or full termination of the security-based swap; a change in the cash flows originally reported; for a security-based swap that is not a clearing transaction, any change to the title or date of any master agreement, collateral agreement, margin agreement, or any other agreement incorporated by reference into the security-based swap contract; or a corporate action affecting a security or securities on which the security-based swap is based (e.g., a merger, dividend, stock split, or bankruptcy). Notwithstanding the above, a life cycle event shall not include the scheduled expiration of the security-based swap, a previously described and anticipated

interest rate adjustment (such as a quarterly interest rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap.

(r) Non-mandatory report means any information provided to a registered security-based swap data repository by or on behalf of a counterparty other than as required by §§ 242.900 through 242.909.

(s) Non-U.S. person means a person that is not a U.S. person.

(t) Parent means a legal person that controls a participant.

(u) Participant, with respect to a registered security-based swap data repository, means: ~~a counterparty, that meets the criteria of § 242.908(b), of a security-based swap that is reported to that registered security-based swap data repository to satisfy an obligation under § 242.901(a).~~

(1) A counterparty, that meets the criteria of § 242.908(b), of a security-based swap that is reported to that registered security-based swap data repository to satisfy an obligation under § 242.901(a);

(2) A platform that reports a security-based swap to that registered security-based swap data repository to satisfy an obligation under § 242.901(a); or

(3) A registered clearing agency that is required to report to that registered security-based swap data repository whether or not it has accepted a security-based swap for clearing pursuant to § 242.901(e)(1)(ii); or

(4) A registered broker-dealer (including a registered security-based swap execution facility) that is required to report a security-based swap to that registered security-based swap data repository by § 242.901(a).

(v) Platform means a national securities exchange or security-based swap execution facility that is registered or exempt from registration.

(w) Platform ID means the UIC assigned to a platform on which a security-based swap is executed.

(x) Post-trade processor means any person that provides affirmation, confirmation, matching, reporting, or clearing services for a security-based swap transaction.

(y) Pre-enactment security-based swap means any security-based swap executed before July 21, 2010 (the date of enactment of the Dodd-Frank Act (Pub. L. No. 111-203, H.R. 4173)), the terms of which had not expired as of that date.

(z) Price means the price of a security-based swap transaction, expressed in terms of the commercial conventions used in that asset class.

(aa) Product means a group of security-based swap contracts each having the same material economic terms except those relating to price and size.

(bb) Product ID means the UIC assigned to a product.

(cc) Publicly disseminate means to make available through the Internet or other electronic data feed that is widely accessible and in machine-readable electronic format.

(dd) [Reserved].

(ee) Registered clearing agency means a person that is registered with the Commission as a clearing agency pursuant to section 17A of the Exchange Act (15 U.S.C. 78q-1) and any rules or regulations thereunder.

(ff) Registered security-based swap data repository means a person that is registered with the Commission as a security-based swap data repository pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and any rules or regulations thereunder.

(gg) Reporting side means the side of a security-based swap identified by § 242.901(a)(2).

(hh) Side means a direct counterparty and any guarantor of that direct counterparty's performance who meets the definition of indirect counterparty in connection with the security-based swap.

(ii) Time of execution means the point at which the counterparties to a security-based swap become irrevocably bound under applicable law.

(jj) Trader ID means the UIC assigned to a natural person who executes one or more security-based swaps on behalf of a direct counterparty.

(kk) Trading desk means, with respect to a counterparty, the smallest discrete unit of organization of the participant that purchases or sells security-based swaps for the account of the participant or an affiliate thereof.

(ll) Trading desk ID means the UIC assigned to the trading desk of a participant.

(mm) Transaction ID means the UIC assigned to a specific security-based swap transaction.

(nn) Transitional security-based swap means a security-based swap executed on or after July 21, 2010, and before the first date on which trade-by-trade reporting of security-based swaps in that asset class to a registered security-based swap data repository is required pursuant to §§ 242.900 through 242.909.

(oo) Ultimate parent means a legal person that controls a participant and that itself has no parent.

(pp) Ultimate parent ID means the UIC assigned to an ultimate parent of a participant.

(qq) Unique Identification Code or UIC means a unique identification code assigned to a person, unit of a person, product, or transaction.

(rr) United States has the same meaning as in § 240.3a71-3(a)(5) of this chapter.

(ss) U.S. person has the same meaning as in § 240.3a71-3(a)(4) of this chapter.

(tt) Widely accessible, as used in paragraph (cc) of this section, means widely available to users of the information on a non-fee basis.

§ 242.901 Reporting obligations.

(a) Assigning reporting duties. A security-based swap, including a security-based swap that results from the allocation, termination, novation, or assignment of another security-based swap, shall be reported as follows:

(1) [Reserved]. Platform-executed security-based swaps that will be submitted to clearing. If a security-based swap is executed on a platform and will be submitted to clearing, the platform on which the transaction was executed shall report to a registered security-based swap data repository the information required by §§ 242.901(c), 901(d)(1), 901(d)(9), and 901(d)(10).

(2) All other security-based swaps. For all security-based swaps other than platform-executed security-based swaps that will be submitted to clearing, the reporting side shall provide the information required by §§ 242.900 through 242.909 to a registered security-based swap data repository. The reporting side shall be determined as follows:

(i) [Reserved]. Clearing transactions. For a clearing transaction, the reporting side is the registered clearing agency that is a counterparty to the transaction.

(ii) Security-based swaps other than clearing transactions.

(A) If both sides of the security-based swap include a registered security-based swap dealer, the sides shall select the reporting side.

(B) If only one side of the security-based swap includes a registered security-based swap dealer, that side shall be the reporting side.

(C) If both sides of the security-based swap include a registered major security-based swap participant, the sides shall select the reporting side.

(D) If one side of the security-based swap includes a registered major security-based swap participant and the other side includes neither a registered security-based swap dealer nor a registered major security-based swap participant, the side including the registered major security-based swap participant shall be the reporting side.

(E) If neither side of the security-based swap includes a registered security-based swap dealer or registered major security-based swap participant:

(1) If both sides include a U.S. person, the sides shall select the reporting side.

(2) ~~[Reserved]~~. If one side includes a non-U.S. person that falls within § 242.908(b)(5) or a U.S. person and the other side includes a non-U.S. person that falls within rule § 242.908(b)(5), the sides shall select the reporting side.

(3) If one side includes only non-U.S. persons that do not fall within § 242.908(b)(5) and the other side includes a non-U.S. person that falls within rule § 242.908(b)(5) or a U.S. person, the side including a non-U.S. person that falls within rule § 242.908(b)(5) or a U.S. person shall be the reporting side.

(4) If neither side includes a U.S. person and neither side includes a non-U.S. person that falls within § 242.908(b)(5) but the security-based swap is effected by or through a registered broker-dealer (including a registered security-based swap execution facility), the registered broker-dealer

(including a registered security-based swap execution facility) shall report the information required by §§ 242.901(c) and 242.901(d).

(3) Notification to registered clearing agency. A person who, under § 242.901(a)(1) or § 242.901(a)(2)(ii), has a duty to report a security-based swap that has been submitted to clearing at a registered clearing agency shall promptly provide that registered clearing agency with the transaction ID of the submitted security-based swap and the identity of the registered security-based swap data repository to which the transaction will be reported or has been reported.

(b) Alternate recipient of security-based swap information. If there is no registered security-based swap data repository that will accept the report required by § 242.901(a), the person required to make such report shall instead provide the required information to the Commission.

(c) Primary trade information. The reporting side shall report the following information within the timeframe specified in paragraph (j) of this section:

(1) The product ID, if available. If the security-based swap has no product ID, or if the product ID does not include the following information, the reporting side shall report:

(i) Information that identifies the security-based swap, including the asset class of the security-based swap and the specific underlying reference asset(s), reference issuer(s), or reference index;

(ii) The effective date;

(iii) The scheduled termination date;

(iv) The terms of any standardized fixed or floating rate payments, and the frequency of any such payments; and

(v) If the security-based swap is customized to the extent that the information provided in paragraphs (c)(1)(i) through (iv) of this section does not provide all of the material information necessary to identify such customized security-based swap or does not contain the data elements necessary to calculate the price, a flag to that effect;

(2) The date and time, to the second, of execution, expressed using Coordinated Universal Time (UTC);

- (3) The price, including the currency in which the price is expressed and the amount(s) and currenc(ies) of any up-front payments;
- (4) The notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed;
- (5) If both sides of the security-based swap include a registered security-based swap dealer, an indication to that effect;
- (6) Whether the direct counterparties intend that the security-based swap will be submitted to clearing; and
- (7) If applicable, any flags pertaining to the transaction that are specified in the policies and procedures of the registered security-based swap data repository to which the transaction will be reported.

(d) Secondary trade information. In addition to the information required under paragraph (c) of this section, for each security-based swap for which it is the reporting side, the reporting side shall report the following information within the timeframe specified in paragraph (j) of this section:

- (1) The counterparty ID or the execution agent ID of each counterparty, as applicable;
- (2) As applicable, the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID of the direct counterparty on the reporting side;
- (3) To the extent not provided pursuant to paragraph (c)(1) of this section, the terms of any fixed or floating rate payments, or otherwise customized or non-standard payment streams, including the frequency and contingencies of any such payments;
- (4) For a security-based swap that is not a clearing transaction, the title and date of any master agreement, collateral agreement, margin agreement, or any other agreement incorporated by reference into the security-based swap contract;
- (5) To the extent not provided pursuant to paragraph (c) of this section or other provisions of this paragraph (d), any additional data elements included in the agreement between the counterparties that are necessary for a person to determine the market value of the transaction;
- (6) If applicable, and to the extent not provided pursuant to paragraph (c) of this section, the name of the clearing agency to which the security-based swap will be submitted for clearing;

(7) If the direct counterparties do not intend to submit the security-based swap to clearing, whether they have invoked the exception in Section 3C(g) of the Exchange Act (15 U.S.C. 78c-3(g));

(8) To the extent not provided pursuant to the other provisions of this paragraph (d), if the direct counterparties do not submit the security-based swap to clearing, a description of the settlement terms, including whether the security-based swap is cash-settled or physically settled, and the method for determining the settlement value; and

(9) The platform ID, if applicable, ~~or~~ or if a registered broker-dealer (including a registered security-based swap execution facility) is required to report the security-based swap by § 242.901(a)(2)(ii)(E)(4), the broker ID of that registered broker-dealer (including a registered security-based swap execution facility);

(10) If the security-based swap arises from the allocation, termination, novation, or assignment of one or more existing security-based swaps, the transaction ID of the allocated, terminated, assigned, or novated security-based swap(s), except in the case of a clearing transaction that results from the netting or compression of other clearing transactions.

(e) Reporting of life cycle events.

(1) (i) Generally. A life cycle event, and any adjustment due to a life cycle event, that results in a change to information previously reported pursuant to paragraph (c), (d), or (i) of this section shall be reported by the reporting side, except that the reporting side shall not report whether or not a security-based swap has been accepted for clearing.

(ii) ~~[Reserved]~~ Acceptance for clearing. A registered clearing agency shall report whether or not it has accepted a security-based swap for clearing.

~~(2) All reports of life cycle events and adjustments due to life cycle events shall, within the timeframe specified in paragraph (j) of this section, be reported to the entity to which the original security-based swap transaction was reported and shall include the transaction ID of the original transaction. All reports of life cycle events and adjustments due to life cycle events shall, within the timeframe specified in paragraph (j) of this section, be reported to the entity to which the original security-based swap transaction will be reported or has been reported and shall include the transaction ID of the original transaction.~~

(f) Time stamping incoming information. A registered security-based swap data repository shall time stamp, to the second, its receipt of any information submitted to it pursuant to paragraph (c), (d), (e), or (i) of this section.

(g) Assigning transaction ID. A registered security-based swap data repository shall assign a transaction ID to each security-based swap, or establish or endorse a methodology for transaction IDs to be assigned by third parties.

(h) Format of reported information. ~~A reporting side shall electronically transmit the information required under this section in a format required by the registered security-based swap data repository to which it reports.~~ A person having a duty to report shall electronically transmit the information required under this section in a format required by the registered security-based swap data repository to which it reports.

(i) Reporting of pre-enactment and transitional security-based swaps. With respect to any pre-enactment security-based swap or transitional security-based swap in a particular asset class, and to the extent that information about such transaction is available, the reporting side shall report all of the information required by paragraphs (c) and (d) of this section to a registered security-based swap data repository that accepts security-based swaps in that asset class and indicate whether the security-based swap was open as of the date of such report.

(j) Interim timeframe for reporting. The reporting timeframe for paragraphs (c) and (d) of this section shall be 24 hours after the time of execution (or acceptance for clearing in the case of a security-based swap that is subject to regulatory reporting and public dissemination solely by operation of § 242.908(a)(1)(ii)), or, if 24 hours after the time of execution or acceptance, as applicable, would fall on a day that is not a business day, by the same time on the next day that is a business day. The reporting timeframe for paragraph (e) of this section shall be 24 hours after the occurrence of the life cycle event or the adjustment due to the life cycle event.

Appendix to 17 CFR 242.901 Reports regarding the establishment of block thresholds and reporting delays for regulatory reporting of security-based swap transaction data.

This appendix sets forth guidelines applicable to reports that the Commission has directed its staff to make in connection with the determination of block thresholds and reporting delays for security-based swap transaction data. The Commission intends to use these reports to inform its specification of the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts; and the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public in order to implement regulatory requirements under Section 13 of the Act (15 U.S.C. 78m). In producing

these reports, the staff shall consider security-based swap data collected by the Commission pursuant to other Title VII rules, as well as any other applicable information as the staff may determine to be appropriate for its analysis.

(a) Report topics. As appropriate, based on the availability of data and information, the reports should address the following topics for each asset class:

(1) Price impact. In connection with the Commission's obligation to specify criteria for determining what constitutes a block trade and the appropriate reporting delay for block trades, the report generally should assess the effect of notional amount and observed reporting delay on price impact of trades in the security-based swap market.

(2) Hedging. In connection with the Commission's obligation to specify criteria for determining what constitutes a block trade and the appropriate reporting delay for block trades, the report generally should consider potential relationships between observed reporting delays and the incidence and cost of hedging large trades in the security-based swap market, and whether these relationships differ for interdealer trades and dealer to customer trades.

(3) Price efficiency. In connection with the Commission's obligation to specify criteria for determining what constitutes a block trade and the appropriate reporting delay for block trades, the report generally should assess the relationship between reporting delays and the speed with which transaction information is impounded into market prices, estimating this relationship for trades of different notional amounts.

(4) Other topics. Any other analysis of security-based swap data and information, such as security-based swap market liquidity and price volatility, that the Commission or the staff deem relevant to the specification of:

(i) The criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts; and

(ii) The appropriate time delay for reporting large notional security-based swap transactions (block trades).

(b) Timing of reports. Each report shall be complete no later than two years following the initiation of public dissemination of security-based swap transaction data by the first registered SDR in that asset class.

(c) Public comment on the report. Following completion of the report, the report shall be published in the Federal Register for public comment.

§ 242.902 – Public dissemination of transaction reports.

(a) General. Except as provided in paragraph (c) of this section, a registered security-based swap data repository shall publicly disseminate a transaction report of a security-based swap, or a life cycle event or adjustment due to a life cycle event, immediately upon receipt of information about the security-based swap, or upon re-opening following a period when the registered security-based swap data repository was closed. The transaction report shall consist of all the information reported pursuant to § 242.901(c), plus any condition flags contemplated by the registered security-based swap data repository's policies and procedures that are required by § 242.907.

(b) [Reserved].

(c) Non-disseminated information. A registered security-based swap data repository shall not disseminate:

- (1) The identity of any counterparty to a security-based swap;
- (2) With respect to a security-based swap that is not cleared at a registered clearing agency and that is reported to the registered security-based swap data repository, any information disclosing the business transactions and market positions of any person;
- (3) Any information regarding a security-based swap reported pursuant to § 242.901(i);
- (4) Any non-mandatory report;
- (5) Any information regarding a security-based swap that is required to be reported pursuant to §§ 242.901 and 242.908(a)(1) but is not required to be publicly disseminated pursuant to § 242.908(a)(2);
- (6) Any information regarding a clearing transaction that arises from the acceptance of a security-based swap for clearing by a registered clearing agency or that results from netting other clearing transactions; or
- (7) Any information regarding the allocation of a security-based swap.

(d) Temporary restriction on other market data sources. No person shall make available to one or more persons (other than a counterparty or a post-trade processor) transaction information relating to a security-based swap before the primary trade

information about the security-based swap is sent to a registered security-based swap data repository.

§ 242.903 – Coded information.

(a) If an internationally recognized standards-setting system that imposes fees and usage restrictions on persons that obtain UICs for their own usage that are fair and reasonable and not unreasonably discriminatory and that meets the criteria of paragraph (b) of this section is recognized by the Commission and has assigned a UIC to a person, unit of a person, or product (or has endorsed a methodology for assigning transaction IDs), the registered security-based swap data repository shall employ that UIC (or methodology for assigning transaction IDs). If no such system has been recognized by the Commission, or a recognized system has not assigned a UIC to a particular person, unit of a person, or product (or has not endorsed a methodology for assigning transaction IDs), the registered security-based swap data repository shall assign a UIC to that person, unit of person, or product using its own methodology (or endorse a methodology for assigning transaction IDs). If the Commission has recognized such a system that assigns UICs to persons, each participant of a registered security-based swap data repository shall obtain a UIC from or through that system for identifying itself, and each participant that acts as a guarantor of a direct counterparty's performance of any obligation under a security-based swap that is subject to § 242.908(a) shall, if the direct counterparty has not already done so, obtain a UIC for identifying the direct counterparty from or through that system, if that system permits third-party registration without a requirement to obtain prior permission of the direct counterparty.

(b) A registered security-based swap data repository may permit information to be reported pursuant to § 242.901, and may publicly disseminate that information pursuant to § 242.902, using codes in place of certain data elements, provided that the information necessary to interpret such codes is widely available to users of the information on a non-fee basis.

§ 242.904 – Operating hours of registered security-based swap data repositories.

A registered security-based swap data repository shall have systems in place to continuously receive and disseminate information regarding security-based swaps pursuant to §§ 242.900 through 242.909, subject to the following exceptions:

(a) A registered security-based swap data repository may establish normal closing hours during periods when, in its estimation, the U.S. market and major foreign markets are inactive. A registered security-based swap data repository shall provide reasonable advance notice to participants and to the public of its normal closing hours.

(b) A registered security-based swap data repository may declare, on an ad hoc basis, special closing hours to perform system maintenance that cannot wait until normal closing hours. A registered security-based swap data repository shall, to the extent reasonably possible under the circumstances, avoid scheduling special closing hours during periods when, in its estimation, the U.S. market and major foreign markets are most active; and provide reasonable advance notice of its special closing hours to participants and to the public.

(c) During normal closing hours, and to the extent reasonably practicable during special closing hours, a registered security-based swap data repository shall have the capability to receive and hold in queue information regarding security-based swaps that has been reported pursuant to §§ 242.900 through 242.909.

(d) When a registered security-based swap data repository re-opens following normal closing hours or special closing hours, it shall disseminate transaction reports of security-based swaps held in queue, in accordance with the requirements of § 242.902.

(e) If a registered security-based swap data repository could not receive and hold in queue transaction information that was required to be reported pursuant to §§ 242.900 through 242.909, it must immediately upon re-opening send a message to all participants that it has resumed normal operations. Thereafter, any participant that had an obligation to report information to the registered security-based swap data repository pursuant to §§ 242.900 through 242.909, but could not do so because of the registered security-based swap data repository's inability to receive and hold in queue data, must promptly report the information to the registered security-based swap data repository.

§ 242.905 – Correction of errors in security-based swap information.

(a) Duty to correct. ~~Any counterparty to a security-based swap that discovers an error in information previously reported pursuant to §§ 242.900 through 242.909 shall correct such error in accordance with the following procedures:~~ Any counterparty or other person having a duty to report a security-based swap that discovers an error in information previously reported pursuant to §§ 242.900 through 242.909 shall correct such error in accordance with the following procedures:

~~(1) If a side that was not the reporting side for a security-based swap transaction discovers an error in the information reported with respect to such security-based swap, the counterparty shall promptly notify the reporting side of the error; and~~

(1) If a person that was not the reporting side for a security-based swap transaction discovers an error in the information reported with respect to such security-based swap, that person shall promptly notify the person having the duty to report the security-based swap of the error; and

~~(2) If the reporting side discovers an error in the information reported with respect to a security-based swap, or receives notification from its counterparty of an error, the reporting side shall promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction report. If the reporting side reported the initial transaction to a registered security-based swap data repository, the reporting side shall submit an amended report to the registered security-based swap data repository in a manner consistent with the policies and procedures contemplated by § 242.907(a)(3).~~

(2) If the person having the duty to report a security-based swap transaction discovers an error in the information reported with respect to a security-based swap, or receives notification from a counterparty of an error, such person shall promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction report. If the person having the duty to report reported the initial transaction to a registered security-based swap data repository, such person shall submit an amended report to the registered security-based swap data repository in a manner consistent with the policies and procedures contemplated by § 242.907(a)(3).

(b) Duty of security-based swap data repository to correct. A registered security-based swap data repository shall:

(1) Upon discovery of an error or receipt of a notice of an error, verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information regarding such security-based swap contained in its system; and

(2) If such erroneous information relates to a security-based swap that the registered security-based swap data repository previously disseminated and falls into any of the categories of information enumerated in § 242.901(c), publicly disseminate a corrected transaction report of the security-based swap promptly following verification of the trade by the counterparties to the security-based swap, with an indication that the report relates to a previously disseminated transaction.

§ 242.906 – Other duties of participants.

(a) Identifying missing UIC information. A registered security-based swap data repository shall identify any security-based swap reported to it for which the registered security-based swap data repository does not have the counterparty ID and (if applicable) the broker ID, branch ID, execution agent ID, trading desk ID, and trader ID of each direct counterparty. Once a day, the registered security-based swap data

repository shall send a report to each participant of the registered security-based swap data repository or, if applicable, an execution agent, identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered security-based swap data repository lacks counterparty ID and (if applicable) broker ID, branch ID, execution agent ID, desk ID, and trader ID. A participant of a registered security-based swap data repository that receives such a report shall provide the missing information with respect to its side of each security-based swap referenced in the report to the registered security-based swap data repository within 24 hours.

(b) Duty to provide ultimate parent and affiliate information. ~~Each participant of a registered security-based swap data repository shall provide to the registered security-based swap data repository information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered security-based swap data repository, using ultimate parent IDs and counterparty IDs. Any such participant shall promptly notify the registered security-based swap data repository of any changes to that information.~~ Each participant of a registered security-based swap data repository that is not a platform, ~~or a registered clearing agency, or a registered broker-dealer (including a registered security-based swap execution facility) that becomes a participant solely as a result of making a report to satisfy an obligation under § 242.901(a)(2)(ii)(E)(4)~~ shall provide to the registered security-based swap data repository information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered security-based swap data repository, using ultimate parent IDs and counterparty IDs. Any such participant shall promptly notify the registered security-based swap data repository of any changes to that information.

(c) ~~Policies and procedures of registered security-based swap dealers and registered major security-based swap participants. Each participant of a registered security-based swap data repository that is a registered security-based swap dealer or registered major security-based swap participant shall establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that it complies with any obligations to report information to a registered security-based swap data repository in a manner consistent with §§ 242.900 through 242.909. Each such participant shall review and update its policies and procedures at least annually.~~ Policies and procedures to support reporting compliance. of security-based swap dealers, major security-based swap participants, registered clearing agencies, and platforms. Each participant of a registered security-based swap data repository that is a security-based swap dealer, major security-based swap participant, registered clearing agency, ~~registered broker-dealer (including a registered security-based swap execution facility) that becomes a participant solely as a result of making a report to satisfy an obligation under § 242.901(a)(2)(ii)(E)(4), or platform~~ shall establish, maintain, and enforce written

policies and procedures that are reasonably designed to ensure that it complies with any obligations to report information to a registered security-based swap data repository in a manner consistent with §§ 242.900 through 242.909. Each such participant shall review and update its policies and procedures at least annually.

§ 242.907 – Policies and procedures of registered security-based swap data repositories.

(a) General policies and procedures. With respect to the receipt, reporting, and dissemination of data pursuant to §§ 242.900 through 242.909, a registered security-based swap data repository shall establish and maintain written policies and procedures:

- (1) That enumerate the specific data elements of a security-based swap that must be reported, which shall include, at a minimum, the data elements specified in § 242.901(c) and (d);
- (2) That specify one or more acceptable data formats (each of which must be an open-source structured data format that is widely used by participants), connectivity requirements, and other protocols for submitting information;
- (3) For specifying procedures for reporting life cycle events and corrections to previously submitted information, making corresponding updates or corrections to transaction records, and applying an appropriate flag to the transaction report to indicate that the report is an error correction required to be disseminated by § 242.905(b)(2), or is a life cycle event, or any adjustment due to a life cycle event, required to be disseminated by § 242.902(a);
- (4) For:
 - (i) Identifying characteristic(s) of a security-based swap, or circumstances associated with the execution or reporting of the security-based swap, that could, in the fair and reasonable estimation of the registered security-based swap data repository, cause a person without knowledge of these characteristic(s) or circumstance(s), to receive a distorted view of the market;
 - (ii) Establishing flags to denote such characteristic(s) or circumstance(s);
 - (iii) Directing participants that report security-based swaps to apply such flags, as appropriate, in their reports to the registered security-based swap data repository; and

(iv) Applying such flags:

(A) To disseminated reports to help to prevent a distorted view of the market; or

(B) In the case of a transaction referenced in § 242.902(c), to suppress the report from public dissemination entirely, as appropriate;

(5) For assigning UICs in a manner consistent with § 242.903; and

(6) ~~For periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any participant(s) with which the participant is affiliated, using ultimate parent IDs and counterparty IDs.~~ For periodically obtaining from each participant other than a platform, ~~or~~ a registered clearing agency, or a registered broker-dealer (including a registered security-based swap execution facility) that becomes a participant solely as a result of making a report to satisfy an obligation under § 242.901(a)(2)(ii)(E)(4) information that identifies the participant's ultimate parent(s) and any participant(s) with which the participant is affiliated, using ultimate parent IDs and counterparty IDs.

(b) [Reserved].

(c) Public availability of policies and procedures. A registered security-based swap data repository shall make the policies and procedures required by §§ 242.900 through 242.909 publicly available on its website.

(d) Updating of policies and procedures. A registered security-based swap data repository shall review, and update as necessary, the policies and procedures required by §§ 242.900 through 242.909 at least annually. Such policies and procedures shall indicate the date on which they were last reviewed.

(e) A registered security-based swap data repository shall provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to §§ 242.900 through 242.909 and the registered security-based swap data repository's policies and procedures thereunder.

§ 242.908 – Cross-border matters.

(a) Application of Regulation SBSR to cross-border transactions.

(1) A security-based swap shall be subject to regulatory reporting and public dissemination if:

(i) There is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction; or

(ii) The security-based swap is accepted for clearing by a clearing agency having its principal place of business in the United States.

(iii) The security-based swap is executed on a platform having its principal place of business in the United States;

(iv) The security-based swap is effected by or through a registered broker-dealer (including a registered security-based swap execution facility); or

(v) The transaction is connected with a non-U.S. person's security-based swap dealing activity and is arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office.

(2) A security-based swap that is not included within paragraph (a)(1) of this section shall be subject to regulatory reporting but not public dissemination if there is a direct or indirect counterparty on either or both sides of the transaction that is a registered security-based swap dealer or a registered major security-based swap participant.

(b) Limitation on obligations. Notwithstanding any other provision of §§ 242.900 through 242.909, a person shall not incur any obligation under §§ 242.900 through 242.909 unless it is:

(1) A U.S. person; ~~or~~

(2) A registered security-based swap dealer or registered major security-based swap participant; ~~;~~

(3) A platform; or

(4) A registered clearing agency.

(5) A non-U.S. person that, in connection with such person's security-based swap dealing activity, arranged, negotiated, or executed the security-based swap using its personnel located in a U.S. branch or office, or using personnel of an agent located in a U.S. branch or office.

(c) Substituted compliance—

(1) General. Compliance with the regulatory reporting and public dissemination requirements in sections 13(m) and 13A of the Act (15 U.S.C. 78m(m) and 78m-1), and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a Commission order described in paragraph (c)(2) of this section, provided that at least one of the direct counterparties to the security-based swap is either a non-U.S. person or a foreign branch.

(2) Procedure.

(i) The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting and public dissemination of security-based swaps with respect to a foreign jurisdiction if that jurisdiction's requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements. The Commission may, conditionally or unconditionally, by order, make a substituted compliance determination regarding regulatory reporting of security-based swaps that are subject to § 242.908(a)(2) with respect to a foreign jurisdiction if that jurisdiction's requirements for the regulatory reporting of security-based swaps are comparable to otherwise applicable requirements.

(ii) A party that potentially would comply with requirements under §§ 242.900 through 242.909 pursuant to a substituted compliance order or any foreign financial regulatory authority or authorities supervising such a person's security-based swap activities may file an application, pursuant to the procedures set forth in § 240.0-13 of this chapter, requesting that the Commission make a substituted compliance determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction the rules of which also would require reporting and public dissemination of those security-based swaps.

(iii) In making such a substituted compliance determination, the Commission shall take into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority to support oversight of its regulatory reporting and public dissemination system for security-based swaps. The Commission shall not make such a substituted compliance determination unless it finds that:

(A) The data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to § 242.901;

(B) The rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by §§ 242.900 through 242.909 (or, in the case of transactions that are subject to § 242.908(a)(2) but not to § 242.908(a)(1), the rules of the foreign jurisdiction require the security-based swap to be reported in a manner and a timeframe comparable to those required by §§ 242.900 through 242.909);

(C) The Commission has direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and

(D) Any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, integrity, resiliency, availability, and security; and recordkeeping that are comparable to the requirements imposed on security-based swap data repositories by the Commission's rules and regulations.

(iv) Before issuing a substituted compliance order pursuant to this section, the Commission shall have entered into memoranda of understanding and/or other arrangements with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.

(v) The Commission may, on its own initiative, modify or withdraw such order at any time, after appropriate notice and opportunity for comment.

§ 242.909 – Registration of security-based swap data repository as a securities information processor.

A registered security-based swap data repository shall also register with the Commission as a securities information processor on Form SDR (§ 249.1500 of this chapter).

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