ISDA Safe, Efficient Markets

July 23, 2019

Submitted Electronically

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100 F Street N.E.
Washington, D.C. 20549-1090

Re: *Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements* [Release No. 34-85823; File No. S7-07-19]

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to submit these comments on the *Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements* ("**Proposal**") published by the U.S. Securities and Exchange Commission ("**SEC**" or "**Commission**") on May 24, 2019[2] pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**" or "**Title VII**").[3]

ISDA members use security-based swaps ("**SBSs**") and many are currently provisionally registered with the U.S. Commodity Futures Trading Commission ("**CFTC**") as swap dealers ("**SDs**"). Their multiple years of experience in complying with the CFTC's rules under the Dodd-Frank Act—specifically the CFTC's SD registration requirements and the cross-border application of the CFTC's Title VII rules—have informed our comments in response to the Proposal.

We appreciate that the Proposal intends to address market participants' longstanding concerns regarding the Commission's security-based swap dealer ("**SBSD**") registration rules and the application of the Commission's rules to transactions between non-U.S. persons that are arranged, negotiated, or executed by U.S. personnel ("**ANE Transactions**").

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[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 70 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and depositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at http://www.isda.org.

2 SEC Proposed Rule and Interpretation, *Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements*, 84 Fed. Reg. 24206 (May 24, 2019).

[3] Pub. L. No. 111-203 (2010). Unless the context requires otherwise, general references to Title VII shall refer to Subtitle B, which amends the U.S. securities laws.

As discussed herein, ISDA is generally supportive of the Commission's efforts in the Proposal to provide supplemental guidance further clarifying the outer bounds of the agency's cross-border jurisdiction under Title VII and addressing certain practical challenges in implementing the Commission's existing registration requirements and interpretive guidance. However, we remain concerned with several aspects of the Proposal:

1. Adopting a Harmonized U.S. Approach to Cross-Border Regulation: The Commission should coordinate with the CFTC to establish a consistent approach to the cross-border regulation of swaps and SBSs. The agencies must seek consistency in the application of swap and SBS requirements since many dealers will likely be registered as both SDs and SBSDs.

2. ANE Transactions Should Not be Regulated under Title VII: The Commission's focus in further clarifying the cross-border reach of its Title VII rules for the purposes of SBSD registration should be on reducing risk, not on determining the situs of SBS trading activities.

3. Proposed Alternative Exceptions to the Regulation of ANE Transactions Should Be Revised: The Commission should adopt proposed "Alternative 2" and revise or eliminate certain conditions associated with the proposed alternative exceptions because those conditions do not take into account regulations implemented by non-U.S. jurisdictions pursuant to the G-20 reforms.

4. The Certification and Opinion of Counsel Requirement Should Be Eliminated or Otherwise Revised: These requirements create conflicts with privacy laws in foreign jurisdictions and discourage non-U.S. firms from registering with the Commission as SBSDs—leading to reduced access of liquidity for U.S. clients. Moreover, these requirements create an un-level playing field between U.S. firms and non-U.S. firms, and may lead to greater market fragmentation. If these requirements are retained, however, we recommend that the Commission:
    - appropriately narrow the certification/opinion of counsel requirement so that it only covers jurisdictions where the relevant instance of U.S.-related books and records and financial records are located (and does not require negative opinions from the jurisdiction of incorporation or places where business is conducted);
    - allow flexibility in the scope, manner and timeframe in which nonresident SBSDs obtain client-consent.
    - narrow the certification and opinion of counsel requirement for nonresident SBSDs for certain conflicts with non-US laws and regulations with respect to data protected by privacy considerations to facilitate compliance with data protection laws and regulations (*e.g.*, the General Data Protection Regulation (**"GDPR"**)). Specifically, such certification and opinion should either carve out such data altogether, or allow alternative means of providing access to data under a memorandum of understanding (**"MOU"**).

5. The Expectations Regarding Consents in the Context of the Proposed Recordkeeping Rules Should be Revisited: It may not be possible for SBSDs to gather all consents prior to the registration compliance date, and requiring non-U.S. firms to do so would create an un-level playing field. We recommend that the Commission:
    - allow additional time for all SBSDs to obtain consents, beyond the registration date;
    - for counterparty consents gathered up front (as opposed to upon request when the regulatory need arises), align the scope of the independent requirement for nonresident registered-SBSDs to provide the Commission with access to its books and records with the scope of books and records covered under the certification/opinion of counsel requirement;
    - for personal data on employees, should not require SBSDs to obtain such consents given the foreign privacy law concerns the Commission itself acknowledges. Rather, such data should be obtained by the Commission through a memorandum of understanding or similar arrangement allowing for access consistent with foreign privacy law (*e.g.*, GDPR).

6. Substituted Compliance Determinations Should Not be Conditioned on the Certification/Opinion of Counsel or Adequate Assurances, and Provisional Substituted Compliance Should be Available: SBSDs should be allowed to operate under a provisional-substituted compliance regime if the SEC and its international counterparts do not issue substituted compliance findings well ahead of the registration date.

7. Statutory Disqualification Provision and Questionnaire Recordkeeping Requirement Must be Modified: The scope of non-U.S. persons subject to the statutory disqualification provision and questionnaire recordkeeping requirement should be limited to include only non-U.S. front office personnel that engage in transactions with U.S. persons, rather than sweeping in, through the definition of "involved in effecting," a number of back-office functions.

8. The Requirement for the CCO or Delegate to Review and Sign all Employment Questionnaires or Applications Should be Eliminated: There is no comparable requirement under CFTC rules, and the burden is out of proportion to any benefits the Commission seeks to achieve.

Below we further explain our recommendations, which we believe will allow the Commission to finalize the Proposal in such a way that avoids unnecessarily fragmenting markets and reducing liquidity available for U.S. market participants, while still meeting the Commission's regulatory objectives under Title VII.

1. Adopting a Harmonized U.S. Approach to Cross-Border Regulation

ISDA strongly supports the Commission's efforts to implement a balanced approach to the extraterritorial application of its SBS rules and interpretive guidance. We also appreciate that in developing this Proposal, the Commission has consulted with CFTC staff—in accordance with

the consultation mandate of Title VII—in order to minimize differences in regulatory oversight and reduce associated compliance costs and significant operational burdens.[4]

We remain concerned that material differences in the agencies' cross border regimes still exist and will lead to conflicting compliance mandates, notwithstanding there being no differences in the way SBSs and swaps are traded and there being no commensurate benefit to the SEC's regulatory oversight. For market participants that find themselves covered by two regimes for the same activity, differing interpretations of identical terms will require these market participants to build out duplicative and sometimes conflicting compliance systems, creating significant uncertainty when implementing the rules and conducting training for their affected personnel. Ultimately, different cross-border requirements for the same activity will considerably increase market participants' operational costs, decrease the competitiveness of U.S. derivatives markets, and lead to market fragmentation and diminished liquidity for all market participants—not just those that must register with the agencies.

2. ANE Transactions Should Not be Regulated Under Title VII

We appreciate that the Proposal provides additional guidance on which types of activities would constitute "arranging" or "negotiating" for purposes of ANE Transactions and offers alternative compliance mechanisms that would allow a non-U.S. person to exclude ANE Transactions towards its SBSD *de minimis* threshold calculation. We continue to have specific concerns, however, regarding the Proposal's treatment of ANE Transactions. We believe that the Commission should not apply Title VII requirements to ANE Transactions where no further U.S. nexus exists. At a minimum, we believe that the SBS reporting and external business rules should not apply to ANE Transactions since it would result in the imposition of burdensome and costly operational requirements on transactions that do not have a material connection to the United States. Each of these concerns are described in more detail below.

A. ANE Transactions Have No Material Connection to the United States

In the Proposal, the Commission reiterates its view that it has jurisdiction over ANE Transactions even where the transactions have no further U.S. nexus. Specifically, the Proposal provides that a non-U.S. person that "engages in market facing activity using personnel located in the United States would perform activities that fall within the [SBSD] definition."[5] As we have stated previously in comment letters and through our engagement with the Commission and its staff, we continue to believe that such activity, without some further U.S. nexus, should not count towards a non-U.S. person's *de minimis* threshold.[6] Transactions between two non-U.S. persons—where neither is guaranteed by a U.S. person—do not threaten U.S. market stability or U.S. counterparties simply because, during the initial stages leading to the consummation of an

[4] Proposal at 24207.
[5] Proposal at 24208.
[6] We have noted in the past that there are legitimate business reasons for involving U.S. agent affiliate personnel in some SBS transactions. For U.S.-listed products and SBSs based on those products, many non-U.S. dealing entities concentrate that expertise in the United States to better serve client demands. If forced to comply with onerous registration and related U.S. regulatory requirements based on *de minimis* U.S.-based conduct during the initial stages of an SBS transaction, these same dealers may choose to move that expertise outside of the United States.

SBS transaction, personnel located in the United States had minimal levels of involvement. As we have stated in the past,[7] the location of personnel or agents within the United States should not form the sole basis for requiring SBSD registration and compliance with the SEC's other Title VII rules, including external business conduct standards and reporting requirements.

The registration of certain SBS market participants, and the rules applicable to them as a result of such registration, are primarily driven by the policy objective of mitigating risk in the SBS markets. In the absence of any other substantive regulatory concern regarding risk to the U.S. financial system, regulating ANE Transactions and the entities involved solely on the basis of some *de minimis* level of U.S. nexus during the initial stage of the transaction does not advance the Commission's mandate under Title VII to protect U.S. counterparties and the U.S. financial system.

Instead, the Commission's far-reaching proposed approach to oversee ANE Transactions would result in the misapplication of U.S. regulatory requirements to transactions between two non-U.S. entities where no further U.S. nexus is present. This overreach would add further costs and complexity to cross-border trading as non-U.S. entities are already subject to comprehensive regulatory requirements under local laws.[8] When the U.S. regulatory regime is unnecessarily extended, the competitiveness of U.S. institutions and U.S. markets is threatened and may prompt other jurisdictions to take retaliatory action against U.S. entities. To avoid these outcomes, we continue to strongly urge the Commission to reconsider subjecting ANE Transactions to its SBS regulatory regime.

Should the Commission decide to subject ANE transactions to Title VII requirements, we note that a longer implementation period would be necessary. While the industry has consistently requested an 18-month implementation period, it did not account for the Commission's intent to regulate ANE transactions. If the Commission extends its jurisdiction to ANE Transactions, an 18-month compliance period would not be sufficient as it would require SBSDs to build new systems, conduct extensive client outreach, and implement additional documentation, including new industry protocols.[9]

B. SBS Reporting Rules Should Not Apply to ANE Transactions

We believe that expanding the SBS reporting requirements to SBS transactions between two non-U.S. persons without a further U.S. nexus would provide no or minimal regulatory benefits

[7] ISDA Comment Letter, Re: 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; Proposed Rules (RIN 3235-AL73) (July 13, 2015).

[8] *See* ISDA Cross-Border Harmonization Paper (listing key derivatives requirements from a broad range of jurisdictions).

[9] SBSDs would not be able to rely on the Commission's five-year business conduct safe harbor because existing protocols do not capture the full scale of non-U.S. clients that would be captured under the Commission's arranged, negotiated or executed approach to cross border regulation. *See* SEC Commission Statement, *Commission Statement on Certain Provisions of Business Conduct Standards for SBSDs and Major Security-Based Swap Participants*, 83 Fed. Reg. 55486 (Nov. 6, 2018).

while resulting in significant costs to the non-U.S. counterparties. In addition, if the public dissemination of ANE Transaction data is required, this would (i) either lead to potentially duplicative public reporting or (ii) disclose trade data to the public for transactions which are not subject to public dissemination under the laws of other jurisdictions. Both of these points are discussed further below.

If the Commission decides to apply reporting requirements to these transactions, it should provide relief from the regulatory reporting and public dissemination requirements until the Commission issues a substituted compliance determination, at a minimum, for the G-20 jurisdictions.

i. Expanding reporting requirements to non-U.S. SBS transactions is burdensome and costly

We strongly believe that transactions between two non-U.S. persons should not be required to be reported or publicly disseminated in the United States as these transactions lack the requisite regulatory nexus to U.S. interests. However, the costs to market participants (registered or unregistered) would be high (e.g., to build functionality to identify and capture ANE on each counterparty's side and/potentiality communicate the existence of ANE at, or close, to the time of execution to the other side to determine whether a trade is in scope for reporting and/or public dissemination and, in some cases, to determine the side with the reporting obligation). Additionally, it would impose unnecessary burdens and expense on unregistered entities in monitoring for conduct in the United States for the sole purposes of SBS reporting. Some entities do not have reporting infrastructures in place and may be compelled to engage third-party providers to satisfy this burden—unnecessarily expending capital and resources.

A requirement to report ANE Transactions would impact both sides to an ANE Transaction since each counterparty's reporting obligations may depend upon the existence of ANE on its or its counterparty's side. Counterparties would have to expend significant costs and effort to systematically communicate, capture, and apply the SBS data, including the ANE Transaction status of each counterparty, in order to determine the existence or scope of SBS reporting obligations on a transaction-by-transaction basis—all because of some attenuated connection to the United States.

ii. Public dissemination requirements should not apply to ANE transactions

We believe public dissemination requirements should be left with the non-U.S. reporting rules as they apply to the trade between the non-US persons and requiring reporting of these transactions may implicate and conflict with the privacy laws in some jurisdictions.

In addition, since the timing of the SEC's public dissemination requirement is not aligned with the public dissemination requirements of other jurisdictions,[10] trades may be unnecessarily disseminated to the public more than once and at different times, thus undermining the price discovery value of the reported transactions.

[10] For example, public dissemination requirements apply in the EU under MiFID II, RTS2.

Separately, we note that under EU regulations, only certain products that are determined to be sufficiently liquid are subject to public dissemination. The SEC rules, however, require all SBSs to be subject to public dissemination. This means that non-U.S. counterparties entering into SBSs not subject to pubic dissemination in other jurisdictions may be reluctant to have their (less liquid) trades to be publicly disseminated in the United States. As a result, they may be incentivized to avoid trading with non-U.S. counterparties that use U.S.-based agents to arrange, negotiate, or execute SBS transactions.

C. SBS External Business Conduct Rules Should Not Apply to ANE Transactions

We do not believe that the full scale of external business conduct rules should apply to ANE Transactions.[11] Regulatory authorities of the home jurisdictions of the counterparties to a transaction have a greater interest in ensuring that clients are subject to the appropriate regulatory oversight. Moreover, non-U.S. customers would not expect U.S. customer protections rules to apply to transactions with non-resident SBSDs. Absent substituted compliance determinations, non-resident SBSDs may be subject to complex requirements, involving strict privacy and confidentiality laws of their home jurisdictions, creating the risk of requiring non-resident SBSDs to comply with conflicting obligations. As such, adding another layer of regulatory oversight is without merit. Additionally, certain business conduct requirements would impose documentation burdens on non-U.S. counterparties that may incentivize them not to transact with nonresident SBSDs that utilize U.S. personnel. To the extent the Commission decides to impose external business conduct requirements on non-resident SBSDs, ISDA strongly believes that full substituted compliance should be available before implementing these requirements to avoid potentially irreconcilable regulatory obligations.

3. Proposed Alternative Exceptions to the Regulation of ANE Transactions Should be Revised

As noted above, we commend the Commission for taking steps to minimize the impact of the proposed regulation of ANE Transactions by proposing two alternative exceptions from the requirement in Exchange Act Rule 3a71-3(b)(1)(iii)(C) to count ANE Transactions towards the *de minimis* threshold calculation.[12] To this end, we support the Commission adopting the second alternative proposal ("**Alternative 2**"), which would allow for "arranging" or "negotiating" activities to be performed by U.S. agent affiliate personnel under the condition that the U.S. agent affiliate is an affiliated majority-owned registered broker-dealer *or* SBSD.[13] We believe

[11] We understand that requirements related to fair dealings, anti-fraud and anti-manipulation should apply; however, our concerns stem from external business conduct requirements that involve disclosure requirements and documentation implementation.

[12] *See* Proposal at 24299, 24218-24227.

[13] *See* Proposal at 24226-24227. We note that, under Alternative 1, the Commission states that registered SBSDs that engage in ANE Transaction activity would also likely have to register as a broker. *See* Proposal at 24220. We ask the Commission to broadly exempt registered SBSDs from broker registration if the only activity triggering such registration is ANE activity for an affiliate (non-U.S. or U.S.) because the SBSD is already subject to all relevant Title VII requirements. Requiring dual registration for the same activity creates significant burdens on firms (which may create additional documentation requirements in excess of what is required for CFTC Title VII compliance) without commensurate benefit to the Commission's regulatory oversight.

that this flexible approach is important given that certain non-U.S. entities that enter into SBSs with other non-U.S. persons do not intend to register as an SBSD in the United States.

We note, however, both of the Commission's proposed alternative exceptions contain several conditions that would be unnecessarily prescriptive and would not balance the breadth of the Commission's regulatory reach with comity considerations that require the Commission to appropriately respect and defer to the laws and regulations implemented by non-U.S. jurisdictions in accordance with the G-20 derivatives reforms.[14] In this regard, we recommend certain amendments to the conditions to the proposed alternative exceptions, which we believe would allow market participants to more widely utilize either exception. At a minimum, we believe that the Commission should issue substituted compliance determinations for the proposed conditions in advance of the effective date of SBSD registration. These recommendations are discussed in the sections that follow.

A. Certain Conditions Contained in the Alternatives Should be Revised or Eliminated

We believe that the Commission should eliminate a number of conditions where many G-20 jurisdictions have implemented similar requirements, including disclosure and suitability obligations, trade acknowledgement and verification requirements, fair and balanced communication obligations, and portfolio reconciliation requirements (referred to in the Proposal as "**As If Conditions**").[15] Given the remote connection of ANE Transactions to the United States and the fact that many jurisdictions have similar requirements, we believe that the As If Conditions are duplicative and may lead to the imposition of undue costs without commensurate regulatory benefits. For example, the portfolio reconciliation condition is particularly problematic. It would add a two-way documentation burden on the registered broker-dealer or SBSD that would require extensive client-outreach and client responses within a short period of time. And this condition would still apply even in situations where the counterparty ultimately elects to receive, instead of to exchange, portfolio data.

In addition, while we acknowledge the Commission's interest in imposing certain conduct-based requirements on U.S. personnel engaging in ANE Transactions (*i.e.*, anti-fraud and anti-manipulation requirements, fair and balanced communication obligations), we note that U.S. personnel would be subject to these conduct-related requirements by virtue of being associated persons ("**APs**") of SBSDs or employees of registered broker-dealers, subject to the Financial Industry Regulatory Authority's ("**FINRA**") oversight. To the extent that FINRA already imposes similar conduct-based requirements, any additional regulatory obligations would create unnecessary duplication and inefficiencies.

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[14] *See* Proposal at 24218-24227. The other conditions include disclosure of risks, characteristics, incentives and conflicts; suitability of recommendations; fair and balanced communications; trade acknowledgements and verification; and portfolio reconciliation.

[15] We believe the Commission should also not apply these requirements in the context of trades between nonresident SBSDs and non-U.S. counterparties where U.S.-based "arranging" or "negotiating" activity is involved. Applying such requirements to these transactions would also be unnecessary and duplicative of home country regulations.

Further, we believe that the Commission should limit the access to books and records requirement to only books and records of the registered broker-dealer or SBSD. The condition as proposed would grant the Commission access to the non-U.S. entity's books and records. The Commission takes the view that the U.S.-based conduct triggers its jurisdiction over an ANE Transaction. However, to the extent that a non-U.S. entity uses its registered U.S. broker-dealer or SBSD affiliate, we believe that only the U.S. registered agent affiliate engaging in "arranging" or "negotiating" activities—not the non-U.S. entity—should be required to provide access to its books and records. We believe that the Commission's regulatory nexus or interest in the transaction does not go beyond the "arranging" or "negotiating" activities conducted in the United States.

Finally, we believe that the Proposal's "contemporaneous" disclosure condition should be eliminated. The Proposal would require registered broker-dealers or SBSDs to "contemporaneously" disclose to counterparties that the non-U.S. person is not registered with the SEC and that certain SEC rules would not apply to the transaction. This proposed condition would require constant monitoring of relevant calls, emails, electronic messaging, and other means of communications to ensure compliance. Should the Commission decide to retain this condition, we recommend that the Commission permit registered broker-dealers or SBSDs to provide such disclosures through client on-boarding documentation or SBS trading relationship documentation provided or executed at the outset of the counterparty relationship rather than on a transaction-by-transaction basis.

B. The Commission Should Issue Substituted Compliance Determinations for the Proposed Conditions

Throughout our many comment letters and engagements with the Commission over the past few years, we have advocated for one consistent theme: if cross-border SBS transactions directly implicate the Commission's regulatory interests, then for these transactions, the Commission should adopt a substituted compliance regime that considers the rules of other jurisdictions in their entirety based on their outcomes, rather than a rule-by-rule analysis of each element of the foreign jurisdiction's regulatory framework. In other words, the Commission should review the rules of foreign jurisdictions with a view towards whether the rules achieve the same policy outcomes.

Major international regulators have laid out the necessary regulatory framework[16] for the Commission to undertake an outcomes-based review of the laws of these jurisdictions since the Commission first proposed to count ANE Transactions towards an SBSD's registration threshold in 2015.[17] As the Commission knows, many G-20 jurisdictions have implemented comparable

[16] We note that these jurisdictions include, but are not limited to, those listed in the Proposal as the "initial set of listed jurisdictions": Australia, Canada, France, Germany, Hong Kong, Japan, Singapore, Switzerland, and the United Kingdom. Proposal at 24226. *See also*, ISDA cross-border white paper (Sept. 2017), https://www.isda.org/a/DGiDE/isda-cross-border-harmonization-final2.pdf (listing certain derivatives reforms implemented by a number of jurisdictions).

[17] SEC Proposed Rule, *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. 27443 (May 13. 2015).

laws and regulations governing derivatives transactions and market participants.[18] These include rules that adhere to the same outcomes as the As If Conditions. Complying with these requirements would subject affected firms to potentially duplicative or inconsistent obligations, would be short-lived and provide negligible regulatory oversight benefits considering that the Commission may later make substituted compliance determinations allowing non-U.S. SBSDs to ultimately comply with their local jurisdiction's regulatory regime.

The Proposal even acknowledges that imposing these requirements on registered broker-dealers or SBSDs may require such entities to undertake "potentially significant additional efforts related to information-gathering and documentation . . . ."[19] Nevertheless, it finds that such burdens may be outweighed by customer protection considerations.[20] The Commission should defer to non-U.S. jurisdictions' regulatory regimes for oversight of their own markets by providing recognition to those non-U.S. regulatory regimes that have implemented similar rules in respect of principles of international comity.

4. The Certification/Opinion of Counsel Requirement Should Be Eliminated or Otherwise Revised

As an initial matter, we note that U.S. dealers operate globally in the same jurisdictions in which non-U.S. dealers operate. Some of these jurisdictions may subject dealers to non-U.S. privacy and secrecy laws that may impact dealers' ability to provide the SEC with unfettered access to books and records and conduct required background checks. Yet, non-U.S. dealers are subject to the SEC requirement to provide a legal opinion and certification as a condition of registration, and as a condition to substituted compliance. Thus, in order to create a level playing field, we ask the Commission to eliminate the certification and opinion of counsel requirement in both instances, and instead, rely solely on the underlying obligations of the registered nonresident SBSD to comply with all applicable regulatory requirements.

As an alternative, we ask the Commission to consider limiting the requirement to the certification of a senior officer of a nonresident SBSD based on reasonable due diligence that it will provide access to its U.S. business-related books and records (including records demonstrating compliance with the SEC's capital and margin rules) to the SEC upon request. In other words, the Commission should allow nonresident SBSDs to rely on their own legal analyses to ensure that they will be able to comply with the Commission's requirement. This is a less prescriptive approach toward implementing the SEC's intended goal of assuring that it will be able to access its foreign registrants' U.S. business-related records upon request.

Should the Commission retain this requirement in the final rulemaking, we believe that our recommendations below are necessary to reduce compliance burdens, while still allowing the Commission to achieve its regulatory oversight objectives.[21]

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[18] *See* n.16 *supra*.
[19] Proposal at 24221.
[20] *See* Proposal at 24221, 24225.
[21] In response to proposed Question 6(c), where the provisionally-registered SBSD has demonstrated best efforts to furnish the certification/opinion of counsel to the Commission but was unable to do so during the 24-month grace period, we request that the Commission allow additional time for compliance based on the facts and circumstances.

A. The Commission Should Further Clarify the Scope of Foreign Laws Covered by the Certification and Opinion of Counsel Requirement

We appreciate the Commission's efforts to amend the certification and opinion of counsel requirement in Exchange Act Rule 14Fb2-4. Specifically, we are pleased that the Proposal appropriately seeks to limit the scope of foreign laws in a nonresident SBSD's certification and opinion of counsel to include only the laws of the jurisdiction(s) in which the nonresident SBSD maintains books and records related to its U.S. business and financial records necessary to assess compliance with capital and margin requirements. The Proposal further provides that "the certification and opinion of counsel would not need to cover other jurisdictions where . . . the nonresident SBS[D] may have additional offices or conduct business."[22]

We are concerned, however, that the proposed guidance as written would still require a nonresident SBSD's certification and opinion of counsel to cover any *jurisdiction in which it is doing business* by requiring the opinion of counsel to determine that those jurisdictions do not stand in the way of the Commission's direct access to the U.S. business-related books and records, or the nonresident SBSD is not prevented from promptly furnishing them to the Commission (*e.g.*, through an on-site inspection or examination).[23] We believe that the proposed guidance could be interpreted to require a nonresident SBSD's certification and opinion of counsel contain a negative opinion to cover all jurisdictions in which the nonresident SBSD does business—not just where its U.S. business-related books/records and financial records relating to capital and margin requirements are located.

Also, if an SBSD maintains copies of the same covered books and records in multiple jurisdictions, then the SBSD should be permitted to limit the opinion and certification for that record to one of those jurisdictions. We note that due to the electronic nature in which records are kept today, it is difficult to determine, from a compliance perspective, where records are truly "located." In other words, by virtue of being stored on a server or multiple servers, the same records could be "located" in a number of different jurisdictions—leading to additional compliance challenges not contemplated by the Proposal. Therefore, at a minimum, a nonresident SBSD should be allowed to designate a single records location for purposes of the

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In response to proposed Question 6(d), there should be no requirement to disclose to counterparties the risk of the Commission instituting proceedings to deny registration. We believe that such a requirement should not be applicable to non-U.S. clients who are not subject to the SEC's regulatory regime.

[22] *Id*. ("Under this proposed guidance, the certification and opinion of counsel would not need to cover other jurisdictions where customers or counterparties of the nonresident SBS Entity may be located or where the nonresident SBS Entity may have additional offices or conduct business.").

[23] Our concerns stem from the following language in the Proposal's preamble: "If the nonresident SBS Entity maintains its [U.S. business-related] books and records in a jurisdiction or jurisdictions other than where it is incorporated or has its principal place of business (*e.g.*, in a jurisdiction where it maintains a foreign branch office that conducts its security-based swap activities), the certification and opinion of counsel should address such jurisdiction or jurisdictions, provided that the laws of the jurisdiction where the firm is incorporated or *jurisdictions in which it is doing business* would not prevent the Commission from having direct access to the [U.S. business-related] books and records, nor prevent the nonresident SBS Entity from promptly furnishing them to the Commission or opening them up to the Commission for an on-site inspection or examination." Proposal at 24234 (emphasis added).

certification and opinion, even if the record is also stored elsewhere (*e.g.*, during transit or as duplicate record). For example, if copies of the same record are stored in London and Singapore, the opinion and certification need not cover the copy in Singapore.

In addition, if an SBSD's U.S. broker-dealer affiliate maintains copies of some or all of an SBSD's covered books and records, the opinion and certification should be permitted to exclude those books and records (for the same reason that U.S. SBSDs are not subject to the opinion or certification requirement).

Unless the Commission provides further clarity around the scope of covered foreign jurisdictions, this guidance, if adopted as final, will significantly undermine its utility and the Commission's stated intent to limit the scope of the certification and opinion of counsel requirement for the nonresident SBSD's U.S. business. We also note that the proposed guidance would create an arbitrary regulatory distinction based merely on where the nonresident SBSD has decided to keep its U.S. business-related books and records. We believe that this distinction unfairly penalizes nonresident SBSDs that have chosen to keep their books and records in a jurisdiction other than where it is incorporated or has its principal place of business.

B. The Certification and Opinion of Counsel Requirement Raises GDPR Issues and If Retained, Additional Alternatives Must be Permitted Where Conflicts of Law Prevent Such Access

Nonresident SBSDs operating in an EU Member State would likely be subject to GDPR. Among other things, GDPR imposes restrictions on the processing and transferring of personal data. In particular, it prohibits firms subject to GDPR from transferring the personal data of its employees to entities or governments outside of the EU, unless such transfer is effected through a national regulator exercising its authority over such firm.

Given that the certification and opinion of counsel are required to speak to the Commission having *direct access* to all of a nonresident SBSD's books and records, we are concerned that GDPR may prevent a nonresident SBSDs from complying with the certification and opinion requirement in the context of personal employee data.

Accordingly, for nonresident SBSDs that are subject to GDPR, we recommend that the Commission narrow the scope of the certification and opinion of counsel requirement to exclude personal data subject to GDPR (*i.e.*, personal employee data), or at least allow for the certification and opinion to speak to indirect access via an MOU in this regard. We note that the SEC may still obtain personal data through MOUs and other similar tools, which are permitted under GDPR.

5. The Expectations Regarding Consents in the Context of the Commission's Proposed Recordkeeping Rules Should be Revisited

The Commission's proposed, but not yet finalized, recordkeeping rules require registered SBSDs to provide the Commission with access to its books and records upon request (the **"Access**

Requirement").[24] In the Proposal, the Commission notes that its proposed limitation on the scope of books and records subject to the certification and opinion of counsel requirement would not reduce or otherwise eliminate the Access Requirement because it is "independent of, and in addition to" the certification and opinion of counsel requirement.[25]

In addition, the Commission notes that *nonresident* SBSDs that intend to rely on consent "should obtain such consents prior to registering as an SBSD so that it will be able to [comply with the Access Requirement] while it is conditionally registered."[26] The expectation that non-U.S. firms should gather all consents prior to registering goes beyond what is reasonably achievable ahead of the registration compliance date, and unfairly singles out non-U.S. firms.

A. The Commission Should Allow Flexibility in the Scope, Manner and Timeframe in Which All SBSDs are Required to Obtain Consents from Counterparties

The interpretation of the Access Requirement is overly broad and could capture all clients and employees of a non-resident SBSD, while the guidance would be silent on parallel requirements for U.S. SBSDs.

The Access Requirement can be interpreted to mean that a nonresident SBSD would need to obtain consent from all of its clients and employees in virtually all of the jurisdictions in which it operates prior to registration. This interpretation of the Access Requirement would be out of proportion to the Commission's supervisory interest and contrary to the Commission's stated objective in the Proposal of reducing regulatory burdens. In addition, such interpretation of the Access Requirement would significantly increase compliance and operational burdens for nonresident SBSDs in advance of registration. This problem is exacerbated in the context of employee consents because, as noted above, GDPR may prevent nonresident SBSDs from obtaining such consents.

Accordingly, we believe the Commission should (1) allow for additional time for all SBSDs to obtain consents, beyond the registration date; (2) in the context of nonresident registered-SBSDs obtaining client consents up front (as opposed to upon request when the regulatory need arises), narrow the Access Requirement to include only those books and records in the jurisdictions that are covered by the certification and opinion of counsel requirement (*i.e.*, U.S. business-related books and records and financial records relating to capital and margin requirements); and (3) exempt EU-based registrants from obtaining employee consents.

The Proposal further asks whether nonresident SBSDs should be required to obtain consent every time they enter into a new transaction with a counterparty or through a master agreement.[27] ISDA urges the Commission not to impose requirements regarding the method and frequency in which consent must be obtained. In our view, obtaining consent on a one-time basis through a protocol or disclosure-based regime is more appropriate and would reduce compliance burdens,

[24] *See* Proposed Exchange Act Rule 18a-6(g).
[25] Proposal at 24234-35 (*citing* Proposed Exchange Act Rules 18a-6(g)).
[26] Proposal at 24235.
[27] *See* Proposal at 24237.

while still ensuring that the Commission has access to the nonresident SBSD's books and records. Otherwise, requiring that consent be obtained on a transaction-by-transaction basis would prevent market participants from utilizing any efficient mechanism for compliance, including through client on-boarding, or other standard SBS trading documentation.

B. The Access Requirement Raises GDPR Issues and If Retained, Additional Alternatives Must be Permitted Where Conflicts of Law Prevent Such Access

As noted above, nonresident SBSDs operating in an EU Member State would likely be subject to GDPR, which imposes restrictions on the processing and transferring of personal data.

Given that the Access Requirement provides that the Commission must have *direct access* to all of a nonresident SBSD's books and records, we are concerned that GDPR may prevent a nonresident SBSDs from complying with the Access Requirement in the context of personal employee data. Accordingly, similar to the above, for nonresident SBSDs that are subject to GDPR, we recommend that the Commission narrow the scope of the Access Requirement to exclude personal data subject to GDPR (*i.e.*, personal employee data). We note that the SEC may still obtain personal data through MOUs and other similar tools, which are permitted under GDPR.

6. Substituted Compliance Determinations Should Not be Conditioned on the Certification/Opinion of Counsel or Adequate Assurances; Provisional Substituted Compliance Should be Made Available

Substituted compliance determinations are a key planning component for prospective registrants. To our knowledge, most non-U.S. swap dealers have benefitted from substituted compliance made available by the CFTC, and non-U.S. SBSD registrants are similarly expected to avail themselves broadly of that option. Achieving substituted compliance determinations well ahead of the registration compliance date is critical to focus conformance projects on those areas of the SBSD regime for which no such determination will be forthcoming.

In the context of the certification and opinion of counsel required for non-U.S. registrants, the Commission has acknowledged that the "nonresident SBS Entity may be unable to provide the certification or opinion of counsel required under Rule 15Fb2-4(c)(1) by the time the entity will be required to register because efforts to address legal barriers to the Commission's direct access to books and records are still ongoing."[28] The Commission has also stated that it will accept substituted compliance applications not accompanied by the up-front opinion of counsel or adequate assurance under Rule 3a71-6(c)(2)(ii).[29] Yet, the Proposal states that this clarification "does not mean that the Commission would grant any application for substituted compliance […] until the required certification and opinion of counsel are filed."[30]

[28] Proposal at 24236.
[29] Proposal at 24233-34.
[30] Proposal at 24212.

It may be unlikely that the very same issues that would warrant delaying the certification and opinion of counsel by up to 24 months after the registration compliance date, would be resolved in time to grant timely substituted compliance findings. For the same reasons, the adequate assurances required of foreign financial regulatory authorities that submit a substituted compliance application may also not be submitted in time. We also note that the Commission initially created a linkage between substituted compliance determinations and the certification/opinion of counsel requirement so that it would not need to consider a substituted compliance request from a jurisdiction that imposes blocking, privacy, or secrecy laws. However, since the Commission has acknowledged that such conflicts may need to be worked out even well after the date registrants are required to register, more time may be needed to accommodate both processes.

Indeed, retaining the certification requirement could render the 24-month conditional registration period unworkable. In addition, retaining the opinion of counsel requirement, in the context of substituted compliance determinations, would mean that firms that decide to address the registration concern by establishing records in a "privacy-friendly" jurisdiction may have substituted compliance determinations delayed if the adequate assurances cannot be given for their home jurisdiction. For these reasons, the requirement could unduly slow down substituted compliance determinations and create additional costs for registrants. The requirement should therefore be eliminated even if the Commission decides to retain certification and opinion of counsel as conditions for registration.

In addition, if the Commission and its international counterparts do not issue substituted compliance determinations well ahead of the registration compliance date, we ask that the Commission allow provisional substituted compliance, similar to the CFTC's substituted compliance determinations and related no action relief.[31]

Provisional-substituted compliance would allow firms to use the recently finalized 18 months conformance period (in the Commission's final capital, margin and segregation rules) [32] to address those requirements they know will apply to them, rather than expending significant resources building towards redundant requirements for which substituted compliance would likely become available, but for which industry depends on international regulatory dialogue.

We also urge the Commission to conduct substituted compliance determinations in the same manner as the CFTC—using an outcomes-based approach that does not require any additional submissions or certifications on behalf of other jurisdictions as to how rules will be supervised and enforced. For example, we do not think it is necessary for each EU member state to make

[31] CFTC NAL 13-45, No-action Relief for Registered Swap Dealers and Major Swap Participants from certain requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR (July 11, 2013), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/13-45.pdf.

[32] *See* SEC Final Rule, *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers*, Release No. 34-86175, File No. S7-08-12, adopted June 21, 2019, available at: https://www.sec.gov/rules/final/2019/34-86175.pdf.

substituted compliance requests. Rather, the Commission should evaluate the EU regulatory framework for outcomes and grant substituted compliance as appropriate.

7. Statutory Disqualification Provision and Questionnaire Recordkeeping Requirement Must be Modified

We strongly support the Commission's proposed exclusion from the statutory disqualification provision in Commission Rule of Practice 194 for non-U.S. APs that interact only with non-U.S. persons,[33] and appreciate the Commission's efforts to align its rules with the CFTC's in order to reduce compliance burdens.[34] We remain concerned, however, that despite the Proposal's modifications, the scope of non-U.S. APs subject to the Commission's statutory disqualification prohibition and questionnaire recordkeeping requirement in Exchange Act Rule 15fb2-1 is still overly broad.

The scope of non-U.S. persons subject to this requirement should be narrowed to include only non-U.S. front-office personnel that interact with U.S. persons—and not any non-U.S. personnel that are "involved in effecting" SBS transactions with U.S. persons. In this regard, we recommend that the Commission revise its exclusion to more closely align with the CFTC's definition of APs,[35] and exclude from the statutory disqualification prohibition and questionnaire recordkeeping requirement non-U.S. persons that are not involved in the solicitation or acceptance of SBS transactions with U.S. counterparties.

8. The Requirement for the CCO or Delegate to Review and Sign all Employment Questionnaires or Applications Should be Eliminated

The Commission's current Chief Compliance Officer (**"CCO"**) rules require that CCOs or their designees review and sign each employment questionnaire or application.[36] We ask the Commission to eliminate this requirement as such a signoff requirement would provide significant additional compliance burdens without commensurate policy benefit given the standalone obligation for background checks for APs. We also note that there is no comparable requirement under CFTC rules. Eliminating this requirement would therefore further harmonize the Commission's approach to the oversight of SDs.

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We support the Commission's efforts to amend the SBSD registration rules and its Title VII cross border rules and interpretive guidance. We also appreciate the Commission's intention to address longstanding concerns regarding its registration requirements and the application of SEC rules to ANE Transactions. Our members are strongly committed to maintaining the safety and efficiency of global derivatives markets and hope that the Commission will consider our

[33] *See* Proposal at 24241.
[34] *See* Proposal at 24242.
[35] *See* 17 C.F.R. 1.3 (definition of Associated Person).
[36] 12 C.F.R. § 240.15Fb6-2(b).

recommendations, as they reflect the extensive knowledge and experience of market professionals within our membership. We recognize that fully implementing the SBS regime would require a coordinated effort on behalf of both the SEC and market participants. ISDA stands ready to assist the Commission in this important effort.

Please feel free reach out to me or Bella Rozenberg, Senior Counsel and Head of Regulatory and Legal Practice Group, [redacted], if you have questions.

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Scott O'Malia
Chief Executive Officer
International Swaps and Derivatives Association, Inc. (ISDA)