

July 23, 2019

Submitted via electronic mail

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

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

Dear Secretary Countryman:

Credit Suisse and UBS ("We") welcome the opportunity to comment on the Securities and Exchange Commission (the "SEC" or the "Commission") proposal on the cross-border application of certain security-based swaps ("SBS") requirements¹ (the "Proposal"). In particular, we have specific concerns with the requirements related to certifications and legal opinions from non-resident SBS dealers ("SBSDs") and the Commission's access to books and records and conduct of on-site inspections and examinations.²

We appreciate the efforts of the Commission to address some of the significant regulatory and technical issues facing the SBS markets and acknowledge the difficulty in promulgating rules that are cross-border in nature. However, we write respectfully to raise concerns regarding certain aspects of the books and records provisions and the Proposal's direct tension with existing Swiss law.

We would kindly ask you to consider the following proposals: (1) the Commission should consider repealing the non-U.S. SBS legal opinion and certification requirements in an effort to preserve national treatment principles; and, (2) the Commission should consider revising the substituted compliance framework in part and adopt the proposed clarification regarding arrangements with foreign regulators.

(1) Repeal the non-U.S. SBS legal opinion and certification requirements

As proposed, the Commission's rules would require that any nonresident SBS applying for registration submit the following with its application: (1) a certification that it can, as a matter of law, and will provide the Commission with prompt access to the books and records of such nonresident SBS, and can, as a matter of law, and will submit to onsite inspection and examination by the Commission; and, (2) an opinion of counsel that the nonresident SBS can, as a matter of law, provide the Commission with prompt access to the books and records of such nonresident SBS, and can, as a matter of law, submit to

¹ SEC Release No. 34-85823 (May 10, 2019), 84 Fed. Reg. 24,206 (May 24, 2019).

² While this letter narrowly focuses on the Swiss considerations related to books and records provisions of the Proposal, we encourage the Commission to review comments from the Securities Industry and Financial Markets Association ("SIFMA"), Institute of International Bankers ("IIB"), European Banking Federation ("EBF"), and International Swaps and Derivatives Association ("ISDA"), as they relate to the entire Proposal, including provisions related to books and records, arranging, negotiating, or executing transactions, and background checks for associated persons.

onsite inspection and examination by the Commission (collectively the “non-U.S. SBSB certification and legal opinion requirements”).³

While we understand the Commission’s responsibility for protecting the integrity of the U.S. SBS markets and U.S. investors, we agree with many of our peer trade associations (most notably IIB, SIFMA, ISDA, and EBF) that these proposed requirements are not appropriately tailored for the Commission’s stated purpose. In addition to the aspects highlighted by these trade associations (including inconsistency with well-established CFTC requirements, questionable cost-benefit ratio, and unequal treatment of U.S. and non-U.S. SBSBs subject to the same legal requirements), we would like to raise issues specific to Swiss law.

In principle, Swiss administrative law requires foreign authorities to seek administrative assistance when requesting data provision from Switzerland or on-site inspections in Switzerland. Additionally, Switzerland has a number of laws that are intended to protect the privacy of its customers and employees. These Swiss domestic laws may conflict with the Commission’s Proposal. Most notably, Article 47 of the Swiss Federal Banking Act, to the extent customers have not waived such right, protects customer-related data from disclosure to any third-parties and applies to all banking institutions in Switzerland.

Article 271 of the Swiss Criminal Code also prevents “official acts” from being performed on behalf of a foreign authority on Swiss soil and poses an obstacle to the cross-border transmission of data located in Switzerland, in cases where the transmission of data has not been approved by Swiss authorities or the requirements of Article 42c and Article 42 Paragraph 2 of the Swiss Financial Market Supervision Act (“FINMASA”) or the other administrative assistance requirements are not met. Finally, any on-site inspections performed in Switzerland on FINMA supervised entities by non-Swiss authorities are subject to the requirements of Article 43 FINMASA, and will always require varying degrees of FINMA involvement.⁴

Should the Commission not repeal its certification and opinion of counsel requirements in the context of non-U.S. SBSB registration requirements, these laws will necessitate the inclusion of specified reservations in the respective certifications and opinions of counsel. If these reservations are not acceptable to the SEC, Swiss banks would find themselves in an untenable position, where they would be subject to a U.S. law registration requirement with conditions contrary to Swiss law. Consequently Swiss banks may find themselves unable to register as SBSBs with the Commission.

Given the cross-border nature of the SBS markets and the importance of non-U.S. counterparties to those markets,⁵ preventing non-U.S. SBSBs from registering with the Commission would be detrimental to market liquidity and economic growth, both in the U.S. and globally. Thus, the Commission should consider either repealing the non-U.S. SBSB certification and legal opinion requirements or providing a carve-out for competing blocking, privacy, or secrecy laws.⁶

(2) Revise the inconsistencies in the substituted compliance framework and adopt the proposed clarification regarding arrangements with foreign regulators

Under the Proposal, the Commission requires that an application for substituted compliance by parties or groups of parties – other than foreign financial regulatory authorities – be accompanied by a certification and opinion of counsel⁷. In addition to the points raised by the IIB and SIFMA around the lack of need for a certification requirement in association with a substituted compliance application, we would

³ SEC Rule 15 Fb2-4.

⁴ Though we understand from the Proposal (84 Fed. Reg. at 24,111–112) that such a requirement to consult or cooperate with a foreign regulatory authority is not in conflict with the Commission’s requirements.

⁵ As an example, the Commission notes that 88% of North American corporate single-name credit default swaps involve at least one non-U.S. counterparty. 86 Fed. Reg. at 24249.

⁶ E.g. the Commission could take an approach consistent with the Commodity Futures Trading Commission (“CFTC”) and National Futures Association (“NFA”). Under NFA Form 7-R, books and records will be available for inspection by the CFTC, the U.S. Department of Justice and NFA only subject to any applicable foreign blocking, privacy, or secrecy laws.

⁷ Paragraph (c)(2)(ii) of SEC Rule 3a71-6.

further encourage the Commission to take a less prescriptive approach toward substituted compliance in order to offer greater flexibility to firms facing foreign blocking, privacy, or secrecy laws in conflict with the Commission's Proposal.

The Commission already has proposed some flexibility regarding arrangements with foreign authorities. Specifically, the Proposal permits a non-U.S. SBS's certification and legal opinion to take into account whether a relevant foreign authority has: (1) issued an approval, authorization, waiver, or consent; or, (2) entered into a memorandum of understanding or other arrangement with the Commission facilitating direct access to books and records.⁸ We encourage adoption of this provision, as it offers deference to FINMA and other home country regulators as well as encouraging cross-agency discussion between the SEC and home-country regulators, leading to more informed substituted compliance decisions.

We furthermore want to highlight that without either (1) a postponement of the compliance date for registration requirements to 18 months after the date on which the Commission has made all applicable substituted compliance determinations covering the same range of "entity-level" rules and foreign jurisdictions currently covered by the CFTC's corollary determinations, or (2) the adoption of a provisional substituted compliance framework,⁹ there is a significant risk that we will not be able to obtain the required substituted compliance determinations upon the conditional registration or registration of the SBS. In such a case we would be required to fulfil SBS "entity-level" rules eligible for substituted compliance, even though the CFTC has already asserted as part of its substituted compliance determination that the corresponding Swiss rules are comparable to the respective CFTC rules.¹⁰

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Credit Suisse and UBS commend the Commission for its efforts in regulating the cross-border SBS markets, including the proposed amendments and guidance regarding the non-U.S. SBS certification and legal opinion requirements. However, despite the Proposal, we continue to believe, however, that effective regulation must take into account the legal barriers and operational difficulties faced by non-U.S. parties to allow for greater market liquidity in the U.S. and abroad. We would be pleased to provide further information or continue a discussion on these considerations if the Commission would find such conversation helpful.

Respectfully submitted,



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⁸ To that end and subject to certain conditions, relevant supervised institutions may transmit non-public information to foreign authorities and entities without having to obtain official authorization under Article 42c FINMASA.

⁹ E.g. as proposed by IIB and SIFMA.

¹⁰ Commodity Futures Trading Commission 78 Fed. Reg. 78,899 (December 27, 2013).