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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74187 / February 2, 2015

Admin. Proc. File No. 3-15130

In the Matter of the Application of

MPHASE TECHNOLOGIES, INC.
c/o Frank C. Razzano, Esq.
Pepper Hamilton LLP
600 14th Street, N.W.
Washington, D.C. 20005-2004

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF ASSOCIATION ACTION DENYING REQUEST TO PROCESS CORPORATE ACTION

Registered securities association declined to process documents related to an issuer's proposed reverse stock split in the public interest because the issuer's corporate officers were the subject of a settled regulatory action involving securities laws violations. *Held*, review proceeding is *dismissed.*

APPEARANCES:

Frank Razzano and *Min Choi*, of Pepper Hamilton LLP, for mPhase Technologies, Inc.

Alan Lawhead, *Gary Dernelle*, and *Jante C. Turner*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: December 12, 2012
Last brief received: April 24, 2013

mPhase Technologies, Inc., an issuer of securities formerly quoted on the OTC Bulletin Board ("OTCBB"), appeals from FINRA's denial of mPhase's request that FINRA process and announce mPhase's reverse stock split on the OTCBB. FINRA found that mPhase's request was deficient and that processing the announcement was not in the public interest because mPhase's chief executive and chief operating officers were the subject of a "settled regulatory action related to . . . securities laws violations." mPhase does not dispute that its senior officers settled a Commission action in 2007 but argues that FINRA exceeded its regulatory authority in denying mPhase's request to process and announce its reverse stock split on the OTCBB. Based on an independent review of the record, we find that FINRA properly exercised its discretion in operating the OTCBB, relied on grounds that exist in fact, and denied mPhase's request in accordance with FINRA Rules and the purposes of the Securities Exchange Act of 1934. We accordingly dismiss the appeal.

I. Background

A. FINRA's operation of the OTCBB and processing of Company-Related Actions

FINRA owns and operates the OTCBB, an electronic inter-dealer quotation system that FINRA provides to its members that actively trade securities not listed on NASDAQ or a national securities exchange.[1] The OTCBB displays quotes, last-sale prices, and volume information for eligible equity securities. To be quoted on the OTCBB, an issuer's securities must be sponsored by a FINRA member and meet applicable quotation standards.[2] FINRA rules, including the 6000 Rule Series and Uniform Practice Code, govern the use and operation of FINRA's OTCBB service.[3]

As part of its operation of the OTCBB, FINRA processes requests to announce and publish certain corporate actions from issuers whose securities are quoted on the OTCBB.[4] These actions, generally referred to as "Company-Related Actions,"[5] include any stock

1 *See, e.g., Palmworks, Inc.*, Securities Exchange Act Release No. 43294, 54 SEC 840, 2000 WL 1335343, at *1 (Sept. 15, 2000).

2 *See Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Allow Electronic Communications Networks and Alternative Trading Systems to Participate in the [OTCBB]*, Exchange Act Release 45915, 2002 WL 977530, at *1 (May 10, 2002); *OTCBB Frequently Asked Questions*, http://www.finra.org/Industry/Compliance/MarketTransparency/OTCBB/FAQ/ (all websites last visited on June 26, 2014).

3 *See* FINRA Rule 6000 and 11000 Series.

4 FINRA publishes these announcements on the OTCBB "daily list," available through OTCBB.com. FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *1 (Sept. 27, 2010).

5 FINRA Rule 6490; *Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities*

(continued...)

dividends, stock splits, or rights offerings, as well as "the issuance or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transactions, bankruptcy or liquidation."[6] If FINRA elects to process an issuer's Company-Related Action, it will, in turn, announce the action on OTCBB's "Daily List," which "effectively announces the Company-Related Actions to the [OTC] market."[7]

In 2010, based on a "growing concern that FINRA's Company-Related Action processing services may potentially be used by certain parties to further fraudulent activities," FINRA proposed, and the Commission approved, FINRA Rule 6490 authorizing FINRA to deny an issuer's request that FINRA announce a Company-Related Action on the OTCBB under certain circumstances.[8] The Commission's 2010 Approval Order observed that, although "[h]istorically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial" given its indirect relationship with issuers, Rule 6490 makes clear "the scope of its regulatory authority and . . . codif[ies] procedures that it will apply when reviewing requests to process Company-Related Actions."[9] The Rule authorizes FINRA's Department of Operations (the "Department") to conduct "in-depth reviews" of issuers' requests[10] and to deny a request upon finding that (1) the request is "deficient," based on a five-factor inquiry,[11] and (2) denial is "necessary for the

(...continued)
and to Implement Fees for Such Services, Exchange Act Release No. 62434, 2010 WL 2641653, at *2 (July 1, 2010) (the "2010 Approval Order"); *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *3 (Aug. 27, 2010).

6 FINRA Rule 6490 refers to the first category of Company-Related Actions as "SEA Rule 10b-17 Actions" and the second category as "Other Company-Related Actions." *Id. See* further discussion *infra* note 70 and accompanying text.

7 2010 Approval Order, *supra* note 5, at *1 n.7; *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *1.

8 2010 Approval Order, *supra* note 5, at *2.

9 *Id.*

10 *Id.*

11 FINRA Rule 6490(d)(3). Under FINRA Rule 6490(d)(3), a Company-Related Action is "deficient" if "one or more" of the following factors exists:

(1) FINRA staff reasonably believes the forms and all supporting documentation . . . may not be complete, accurate or with proper authority;

(2) the issuer is not current in its reporting requirements . . . to the SEC or other regulatory authority;

(3) FINRA has actual knowledge that . . . officers [or] directors . . . connected to the issuer or the [Company-Related Action requested] . . . are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations;

(continued...)

protection of investors, the public interest and to maintain fair and orderly markets."[12] An issuer may appeal any denial by the Department to a subcommittee of FINRA's Uniform Practice Code Committee ("UPCC Subcommittee") and that subcommittee's decision becomes FINRA's final decision in the matter.[13]

B. mPhase

1. mPhase's application with FINRA

On July 6, 2012, mPhase, an OTCBB-quoted corporation specializing in microfluidics, micro-electro-mechanical systems, and nanotechnology,[14] filed an application with FINRA requesting that it process a Company-Related Action—specifically, an announcement on the OTCBB that mPhase was issuing a 1-200 reverse stock split.[15] According to mPhase, the reverse stock split sought to increase the share price of its common stock by reducing the number of

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(...continued)

(4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA otherwise has actual knowledge indicating that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected with the issuer or [Company-Related Action] may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors; and/or

(5) there is significant uncertainty in the settlement and clearance process for the security.

12 *Id.*; 2010 Approval Order, *supra* note 5, at *6.

13 FINRA Rule 6490(e).

14 mPhase Tech., Inc., Form 10-K for the year ended June 30, 2012, at 4, *available at* http://www.sec.gov/Archives/edgar/data/825322/000106299312003770/form10k.htm ("mPhase Form 10-K"). We take official notice of the information about mPhase provided in its Commission EDGAR filings and on the website of the Secretary of the State of Connecticut. *See* 17 C.F.R. § 210.323 (permitting official notice of "any material fact which might be judicially noticed by a [U.S.] district court" or "any matter in the public official records of the Commission") and Fed. R. Evid. 201(b) (stating that "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned").

15 mPhase is a New Jersey corporation with its principal place of business in Norwalk, Connecticut. Its common stock is registered with the Commission under Section 12(g) of the Securities Act, and at all times relevant to FINRA's action, was quoted on the OTCBB under the ticker symbol "XDSL." On March 26, 2013, during the pendency of mPhase's appeal, mPhase became ineligible for OTCBB quotation "due to quoting inactivity." *OTCBB Daily List*, http://www.otcbb.com/dailylist/ (search "XDSL"). mPhase's stock is currently quoted on the OTC Pink, operated by OTC Markets Group, Inc. *See OTC Markets Group's Company Directory*, http://www.otcmarkets.com/stock/XDSL/quote.

mPhase's outstanding shares from approximately 4.48 billion to 22.4 million.[16] mPhase explained that it has long refrained "from attempting to increase its stock price through a reverse [stock] split rather than through fundamentals flowing from its operations" but that market conditions and its recent failure to secure financing necessitated the action.

2. mPhase officers Durando and Dotoli and their settlement with the SEC

Since mPhase's incorporation in 1996, Robert Durando has acted as its president and chief executive officer and Gustave Dotoli has acted as its chief operating officer. Durando and Dotoli both are on mPhase's board of directors and own 21.75% and 15.31% of the company's stock, respectively. In addition to their association with mPhase, Durando and Dotoli are officers of PacketPort.com, Inc., a Nevada corporation, of which Durando is the president and Dotoli the vice president. Durando is also majority owner of Microphase Corporation, a Connecticut corporation that is a part-owner of mPhase and provides mPhase with various administrative services. Microphase and Packetport both operate from the same business address as mPhase in Norwalk, Connecticut.[17]

On October 18, 2007, while they were officers of mPhase, Durando and Dotoli settled a Commission administrative proceeding (the "2007 Settlement Order"), in which they consented to findings that they violated several federal securities laws from 1999 to 2002.[18] The findings concerned violations related to their roles at Microphase and Packetport.com.[19] The 2007 Settlement Order stated that in early 1999 Durando and Dotoli acquired control of Linkon Corp., a failing Internet company.[20] In return for a cash infusion and settlement of Linkon's debt,

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16 "A reverse stock split reduces the number of shares and increases the share price proportionately." *Reverse Stock Split*, http://www.sec.gov/answers/reversesplit.htm. mPhase initially requested that FINRA process and announce a 1-100 reverse stock split on the OTCBB but later revised the split ratio to 1-200.

17 *See* mPhase Form 10-K, *supra* note 14, at 72, 116 (noting that mPhase leases office space from Microphase and also compensates Microphase for "use of accounting personnel," "research and development," and "specific projects on a project-by-project basis"). According to the Form 10-K, Durando is a controlling owner of Microphase through his ownership of a related holding company. *Id.* at 72.

18 *PacketPort.com, Inc.*, Order Instituting Cease-and-Desist Proceedings, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Exchange Act Release No. 56672, 2007 WL 3033480, *1-2 (Oct. 18, 2007).

19 At the time, Durando was Packetport.com's chairman, president, and chief executive officer and Microphase's majority owner and chief operating officer. Dotoli was Packetport.com's secretary and a director on its board of directors. *Id.*

20 The 2007 Settlement Order stated that by May 1999 Linkon was in default on $1.9 million in debt notes, subject to an $802,500 civil judgment, and had ceased operations. *Id.* at *3.

Durando and Dotoli received stock in Linkon, which later became stock of PacketPort.com. The 2007 Settlement Order found that, in the course of this acquisition, (1) Durando, Dotoli, PacketPort.com, and Microphase offered or sold shares of PacketPort.com stock without a registration statement in effect in violation of Sections 5(a) and (c) of the Securities Act of 1933;[21] (2) Durando and Dotoli violated Exchange Act Section 16(a) and Rule 16a-3 by failing to timely file Forms 3 to reflect their beneficial ownership of more than ten percent of PacketPort.com's stock;[22] and (3) Durando violated Exchange Act Section 13(d) and Rule 13d-1 by failing to timely file a Schedule 13D after acquiring more than five percent of PacketPort.com's stock.[23]

The 2007 Settlement Order required Durando, Dotoli, Microphase, and Packetport.com to cease and desist from committing or causing future violations of the provisions they were found to have violated and ordered that Durando, Dotoli, and Microphase disgorge $150,000, $100,000, and $700,000, respectively, in ill-gotten gains.[24] The Commission also announced that it was withdrawing a parallel enforcement action pending in federal district court against respondents.[25] mPhase was not a party to the 2007 Settlement Order or the dismissed federal court action.

C. FINRA's denial of mPhase's request

On October 2, 2012, the Department notified mPhase that it had denied the company's request to process the reverse stock split pursuant to FINRA Rule 6490(d)(3) because mPhase's CEO and COO are the subject of a "settled regulatory action . . . related to fraud or securities laws violations" and that this misconduct "raised concerns for FINRA regarding the protection of

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21 15 U.S.C. § 77e(a) (prohibiting the "sale" of any securities, in interstate commerce, unless a registration statement is in effect as to the offer or sale of such securities or there is an applicable exemption from the registration requirements); *id.* § 77e(c) (prohibiting the "offer for sale" of any securities, unless a registration statement has been filed as to such securities or an exemption is available).

22 15 U.S.C. § 78p(a) and 17 C.F.R. § 240.16a-3 (requiring directors and persons owning more than 10% of a registrant's stock to file a Form 4 within two business days of the acquisition or disposition of the security).

23 15 U.S.C. § 78m(d) and 17 C.F.R. § 240.13d-1 (requiring any beneficial owner of more than 5% of any Exchange Act registered securities to disclose the extent of his or her ownership stake).

24 *PacketPort.com*, 2007 WL 3033480, at *5-6.

25 *SEC v. PacketPort.com, Inc.*, Litig. Release No. 20339, 2007 WL 3033485, *1-2 (Oct. 18, 2007); *see also SEC v. PacketPort.com, Inc.*, Civil Action No. 3:05cv1747 (filed Nov.15, 2005); *Packetport.com, Inc.*, Litig. Release No. 19465, 2005 WL 3068110 (Nov. 16, 2005).

investors."[26] The Department stated that, as a result of its findings, it would "cease processing documentation related to [mPhase's] Company-Related Action and would make no announcement on the [OTCBB's] Daily List."

mPhase appealed the Department's decision to the UPCC Subcommittee, arguing that the 2007 Settlement Order against Durando and Dotoli "should not *per se* constitute a 'deficiency' under" Rule 6490. It sought to explain the circumstances surrounding Durando's and Dotoli's prior misconduct by blaming their violations on erroneous legal advice. mPhase described the 2007 Settlement Order as involving only "technical violations" of the securities laws, not antifraud violations, and imposing "only" financial penalties, not bars against Durando and Dotoli. mPhase noted that the 2007 Settlement Order was entered "almost 5 years" ago and claimed that since that time neither officer had been the subject of any regulatory action.

The UPCC Subcommittee affirmed the Department's decision, finding mPhase's request deficient based on the 2007 Settlement Order and that processing the request "present[ed] a threat to the investing public or the maintenance of fair and orderly markets." The Subcommittee stated that it "consider[ed] the substantive allegations" of the 2007 Settlement Order, to which Durando and Dotoli consented, and found that the 2007 Settlement Order involved "several serious violations of the federal securities laws" and disgorgement of significant amounts of ill-gotten gains.

The UPCC Subcommittee also cited concerns related to Durando and Dotoli's current circumstances. It stated that Durando and Dotoli currently occupy "significant roles" at mPhase, presenting them with opportunities for abuse without any meaningful supervisory oversight. It "highlight[ed] [ongoing] connection[s] between mPhase and Microphase . . . and Packetport," finding that the three entities currently share the same business address in Norwalk and a common high-ranking official, Durando.[27] Given these facts, the Subcommittee rejected

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26 On August 22, 2012, before the Department's denial, mPhase disclosed to Department staff that Durando and Dotoli were subject to the 2007 Settlement Order by providing a copy of the Commission's 2007 press release announcing the settlement. *PacketPort.com,* 2007 WL 3033485. The record also shows that the Department conducted its own background investigation of the company and its officers, which is reflected in the record as a series of undated "screen shots" of various database searches. These materials include a screen shot of and the URL to the 2007 Settlement Order, but not the entire document. Pursuant to 17 C.F.R. § 210.323, we take official notice of the entire 2007 Settlement Order, a document that is publicly available on the Commission's website.

27 A "business inquiry" search of "Microphase," "PacketPort.com," and "mPhase Technologies" on the Connecticut Secretary's Secretary of State's website confirms this conclusion. *See* Connecticut Secretary of the State Business Inquiry, http://www.concord-sots.ct.gov/CONCORD/online?sn=PublicInquiry&eid=9740 (searching each entity). FINRA also attached this information, which mPhase does not contest, to its opposition brief for our consideration.

mPhase's claim that the age of the settlement and asserted recent compliance served as any mitigation. This appeal followed.[28]

II. Analysis

Exchange Act Section 19(f) governs our review of a self-regulatory organization's denial of access to services.[29] Here, FINRA denied mPhase's request for FINRA to process and announce a reverse stock split on FINRA's OTCBB. Under Section 19(f), we must dismiss mPhase's appeal of this denial if we find that (i) the specific grounds on which FINRA based its denial exist in fact, (ii) the denial was in accordance with FINRA rules, and (iii) those rules are, and were applied in a manner consistent with the purposes of the Exchange Act.[30] FINRA's denial meets these criteria.

A. The grounds on which FINRA based its denial of mPhase's request exist in fact.

FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis in determining whether to process a Company-Related Action request. First, FINRA must assess whether the issuer's request is deficient. As the Rule states, FINRA's deficiency determination "shall" be based "solely . . . [on] one or more" of the five enumerated factors, including as relevant here, that FINRA has "actual knowledge . . . that officers [or] directors . . . connected to the issuer or [the Company-Related Action] . . . are the subject of a . . . settled regulatory action . . . related to fraud or securities laws violations."[31] Second, in the event that FINRA deems an issuer's request deficient, FINRA then "may determine" not to process the issuer's request if it finds that denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[32]

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28 As part of its appeal, mPhase filed a motion to amend its reply brief filed with the Commission, requesting that the Commission strike two footnotes contained in that brief. mPhase's motion, which FINRA does not oppose, is granted.

29 15 U.S.C. § 78s(f) (authorizing Commission review of SRO action that prohibits or limits "any person with respect to access to services offered by the [SRO]"); *see also Intelispan, Inc.*, Exchange Act Release No. 42738, 2000 WL 511471, at *2 (May 1, 2000), *vacated*, 2000 WL 1424830 (May 30, 2000).

30 *Fog Cutter Capital Grp., Inc. v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007). We previously found that FINRA Rule 6490 "is consistent with the [Exchange] Act and the rules and regulations thereunder applicable to a national securities association." 2010 Approval Order, *supra* note 5, at *5 (explaining that FINRA Rule 6490 is consistent with Exchange Act Sections 15A(b)(5) and (6)). Exchange Act Section 19(f) further requires that we set aside FINRA's action if we find that it imposes an undue burden on competition. 15 U.S.C. § 78s(f). mPhase does not claim, nor does the record suggest, that FINRA's action imposes such a burden.

31 FINRA Rule 6490(d)(3)(3).

32 FINRA Rule 6490(d)(3).

1. mPhase's Company-Related Action was deficient under FINRA Rule 6490(d)(3).

mPhase's request was deficient under FINRA Rule 6490(d)(3) because FINRA had "actual knowledge . . . that officers [or] directors . . . connected to" mPhase "are the subject of a . . . settled regulatory action . . . related to . . . securities laws violations."[33] Durando, mPhase's CEO, and Dotoli, its COO, are both officers and directors of mPhase. And their 2007 Settlement Order involved violations of the federal securities laws, specifically, Securities Act Section 5 and Exchange Act Sections 13 and 16 and Rules 13d-1 and 16a-3. The record also establishes that FINRA had actual knowledge of the 2007 Settlement Order as a result of its background investigation of mPhase's officers and information supplied by mPhase.

2. FINRA found that denying mPhase's request was necessary for the protection of investors, the public interest, and to maintain fair and orderly markets under FINRA Rule 6490(d)(3).

FINRA Rule 6490(d)(3) states that "where [a Company-Related Action] is deemed deficient," FINRA "may determine" not to process the request if doing so is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[34] The Rule's use of the permissive term "may" vests FINRA with discretionary authority in deciding whether to process and announce a deficient Company-Related Action request on the OTCBB.[35] In the similar context of delisting appeals, we have long stated that "[t]o the extent that discretion enters into [FINRA's decision to deny inclusion on its systems] . . . the discretion in question is [FINRA's], not ours,"[36] and as in those cases, we will not substitute our judgment for FINRA's unless its decision is unsupported by the record.[37]

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33 FINRA Rule 6490(d)(3)(3).

34 *Id.*

35 *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (stating that, absent "indications of legislative intent to the contrary," "the word 'may,' when used in a statute, usually implies some degree of discretion"). The 2010 Approval Order lends further support for this reading and included, with approval, the following explanation by FINRA of the operation of Rule 6490: "[W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, . . . it would *have the discretion* not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors." 2010 Approval Order, *supra* note 5, at *6 (emphasis added).

36 *Tassaway, Inc.*, Exchange Act Release No. 11291, 45 SEC 706, 1975 WL 160383, at *2 (Mar. 13, 1975) (discussing oversight of the OTC markets by FINRA, then the NASD).

37 *E.g., Cleantech Innovations, Inc.*, Exchange Act Release No. 69968, 2013 WL 3477086, at *6 & n.43 (July 11, 2013) (stating that "we are not free to substitute our discretion for NASDAQ's" but setting aside decision because "the record does not show that the grounds on which NASDAQ relied in delisting CleanTech exist in fact"); *Eagle Supply Grp., Inc.*, Exchange

(continued...)

Here, we find that the specific grounds on which FINRA based its findings that mPhase's action posed a threat to investors and market integrity exist in fact. Durando's and Dotoli's previous misconduct was serious. Durando and Dotoli consented to an order finding that they violated the registration and disclosure provisions of the federal securities laws, which are fundamental to the securities industry and the protection of investors. Securities Act Sections 5(a) and (c) prohibit the offer and sale of a security without a registration statement, the essential purpose of which is to "'protect investors by promoting full disclosure of information thought necessary to informed investment decisions.'"[38] Exchange Act Section 16(a) and rules thereunder are designed to apprise "investors of security transactions by insiders," so that "abuses resulting from the use of inside information may be averted."[39] The disclosures required by Exchange Act Section 13(d) and its rules "alert[] the marketplace to every large, rapid aggregation or accumulation of securities . . . , which might represent a potential shift in corporate control," as in a corporate takeover.[40] Failure to comply with these core registration and disclosure obligations deprives investors of information necessary to make informed investment decisions, and thus, to protect themselves against potential fraud.[41]

(...continued)
Act Release No. 39800, 1998 WL 133847, at *4 (remanding to NASD for a more definitive statement on its reasoning for denying issuer's inclusion on the NASDAQ SmallCap Market).

38 *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *7 (Jan. 6, 2012) (quoting *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953)), *petition denied*, 739 F.3d 1243 (9th Cir. 2014).

39 *Securities and Exchange Commission Release Notice*, Exchange Act Release No. 2253, 1939 WL 37795, at *1 (Sept. 20, 1939); *see also Interpretive Release on Rules Applicable to Insider Reporting and Trading*, Exchange Act Release No. 18114, 1981 WL 31301, at *1 (Sept. 24, 1981) ("The intent of [Exchange Act Section 16(b)] is to deprive officers, directors and substantial stockholders of the incentive to utilize their positions to trade in the securities of their companies on the basis of inside information.").

40 *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (explaining that a violator of Exchange Act Section 13(d) improperly benefits by purchasing stock at an artificially low price, because disclosure of a "holding in excess of five percent of a company's stock suggests to the rest of the market a likely takeover and therefore may increase the price of the stock").

41 The importance of these provisions undermines mPhase's attempt to characterize their violations as merely "technical" in nature. *E.g.*, *Owen V. Kane*, Exchange Act Release No. 23827, 48 SEC 617, 1986 WL 626043, at *5 (Nov. 20, 1986) (rejecting claim that respondent's violations were mere "technical" violations because "[t]he registration provisions [of Securities Act Section 5] are a keystone of the entire system of securities regulation, and set forth basic requirements for the protection of investors" (internal punctuation and citation omitted)), *aff'd*, 842 F.2d 194 (8th Cir. 1988); *see also SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (stating that "[Exchange Act] Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent 'the only
(continued...)

FINRA concluded that the imposition of $950,000 in disgorgement against Durando, Dotoli, and Microphase further highlighted the gravity of their past misconduct. The conclusion that the misconduct was grave also is supported by the 2007 Settlement Order's entry of cease-and-desist orders against Durando, Dotoli, Microphase, and Packetport.com. A cease-and-desist order cannot be entered unless the "person is violating, has violated, or is about to violate any provision of"[42] the securities laws, rules, or regulations and there is "some risk of future violations."[43]

FINRA also based its denial on its ongoing regulatory concerns about mPhase, Durando, and Dotoli, which mPhase does not contest on appeal. As FINRA found, Durando's and Dotoli's current positions as CEO and COO provide them "with substantial authority, placing them in roles with minimal supervisory oversight and presenting opportunities for abuse."[44] FINRA also found it troubling that mPhase continued to be associated with Packetport and Microphase, both of which are subject to the 2007 Settlement Order and continue to operate from the same business address as mPhase, and in the case of Microphase, remains a part-owner of mPhase. mPhase's briefs on appeal do not contest these findings and conclusions, and we find these uncontested grounds for FINRA's denial exist in fact.[45]

(...continued)
way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings'" (citations omitted)).

42 15 U.S.C. §§ 77h-1(a), 78u-3(a); *see also* S. Rep. 101-337 (1990) (explaining that "a cease-and-desist order is an administrative remedy that directs a person to refrain from engaging in conduct or a practice which violates the laws").

43 *E.g., Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *19 (Dec. 11, 2009) (citing *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *24 (Jan. 19, 2001) ("We believe that there must be some likelihood of future violations whenever we issue a cease-and-desist order."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002)), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

44 *Cf., e.g., Stuart K. Patrick*, Exchange Act Release No. 32314, 51 SEC 419, 1993 WL 172847, at *2 (May 17, 1993) ("Supervision, by its very nature, cannot be performed by the employee himself.").

45 *See* Commission Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring that "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly"); *cf. NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996) (uncontested findings on appeal accepted as true); *NLRB v. Tenn. Packers, Inc.*, 344 F.2d 948, 949 (6th Cir. 1965) ("Since respondent's brief failed to challenge the Board's order on the merits, that issue is considered . . . abandoned . . . ."). Information available on the Secretary of State of Connecticut's website confirms the companies' continued connection. *See supra* note 27 and accompanying text.

3. FINRA properly considered the findings of the 2007 Settlement Order in reaching its decision.

We reject mPhase's contention on appeal that FINRA improperly considered the factual findings set forth in the 2007 Settlement Order as a basis for its denial. mPhase cites to provisions in the 2007 Settlement Order stating that Durando and Dotoli neither "admitt[ed] or den[ied] the findings therein" and that "[t]he findings . . . [were] not binding on any other person or entity . . . [in] any other proceeding" and points out that mPhase was not a party to the 2007 Settlement Order.[46]

We find that FINRA properly considered the underlying factual findings of Durando and Dotoli's 2007 Settlement Order in assessing its interest in protecting investors and market integrity. By including a settled securities-related action as one of the specific grounds for deeming a Company-Related Action deficient in Rule 6490, FINRA made "a basic public interest determination about the seriousness" of such an action.[47] FINRA, as a general matter, has considered prior settlements in weighing the public interest in other contexts, such as in the evaluation of whether a person subject to a statutory disqualification should be permitted to return to the securities industry[48] and in assessing prior disciplinary history as part of its sanction analysis in a disciplinary action.[49] FINRA is required by Rule 6490(d)(3) to determine whether denying the Company-Related Action requested is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets." FINRA must be able to consider

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[46] mPhase did not make this claim before the UPCC Subcommittee; rather it urged the opposite position—that the Subcommittee review the findings of the 2007 Settlement Order and find that the order involved only "technical" violations. It asserted that the "purpose of FINRA Rule 6490 . . . is to enable FINRA to review the activities of parties related to the Company-Related Action that are subject to a prior consent decree." FINRA contends that mPhase has waived its new argument because Rule 6490(e) required it to "set forth with specificity any and all defenses" before the UPCC Subcommittee. We nonetheless consider mPhase's argument, in our discretion, as part of our review of FINRA's action.

[47] *See, e.g., Marshall E. Melton*, Investment Advisers Act Release No. 2151, 56 SEC 760, 2003 WL 21729839, at *7 (July 25, 2003) (stating that, by making an injunction a specific ground for commencing a follow-on proceeding, Congress intended that the allegations underlying a consent injunction be considered in the subsequent proceeding); *see also Michael Batterman*, Advisers Act Release No. 2334, 2004 WL 2785527, at *5 (Dec. 3, 2004) (same).

[48] *See, e.g., Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *7 (Mar. 19, 2013) (sustaining FINRA's consideration of state consent order); *LaJolla Capital Corp.*, Exchange Act Release No. 41755, 1999 WL 624046, at *7 n.31 (Aug. 18, 1999) (same). mPhase attempts to distinguish *Weiss* because the *Weiss* consent order did not provide that the order was "not binding" on any other party but as discussed, *infra* text accompanying note 56, the provisions in the 2007 Settlement Order did not bar FINRA's consideration of it here.

[49] *See, e.g., Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 WL 169138, at *16 (Jan. 20, 2012); *Wendell D. Beldon*, Exchange Act Release No. 47859, 2003 WL 21088079, at *5 (May 14, 2003).

the findings underlying the prior settlement to properly weigh the issuer's interests in having its action processed against those of the investing public.[50] We believe that consideration of the factual predicate for the settlement, rather than the existence of the settlement alone, is a necessary element of this analysis—both with respect to the issuer, which may seek to explain the circumstances of the past action, as mPhase did below, and the public, which may be adversely affected by a decision to deny or approve an announcement on the OTCBB.[51]

We have taken a similar approach in our follow-on administrative proceedings that are based on the entry of a consent injunction.[52] In a follow-on proceeding, we routinely consider the facts of the injunctive action in determining whether it is in the public interest to impose a remedial sanction against an enjoined individual. But, where the injunction is based on consent, often there are no court-ordered findings from which to assess the public interest.[53] We have accordingly "adopted the policy in administrative proceedings based on consent injunctions that the injunctive allegations may be given considerable weight in assessing the public interest."[54] This conclusion is predicated on "our belief that Congress, having made an injunction a [specific] ground for commencing a proceeding, [did not intend] for the parties to conduct the proceeding as if the injunction had never been entered, disregarding the allegations underlying the injunction."[55]

We find no error in FINRA's consideration of the settlement's findings in deciding that it was necessary for the protection of investors and market integrity to deny mPhase's Company-Related Action request. Several courts construing the "neither admit nor deny" provision and the provision stating that the findings are "not binding" on other parties have held that such provisions do not preclude the admissibility of the findings of the settled order in a subsequent

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50 FINRA Rule 6490(d)(3) (requiring that FINRA determine after finding a deficiency factor whether denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets").

51 As noted, mPhase's earlier position urged the Subcommittee to consider the facts of the 2007 Settlement Order. *See supra* note 46.

52 *E.g.*, Advisers Act Sections 203(e)(4) and 203(f), 15 U.S.C. §§ 80b-3(e)(4) and (f), and Exchange Act Sections 15(b)(4)(C) and 15(b)(6)(A)(iii), 15 U.S.C. §§ 78o(b)(4)(C) and (b)(6)(A)(iii).

53 *Melton*, 2003 WL 21729839, at *2.

54 *Id.*; *see also Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *10 (Dec. 12, 2013), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014); *Ralph LeBlanc*, Exchange Act Release No. 48254, 2003 WL 21755845, at *1 (July 30, 2003); *Michael J. Markowski*, Exchange Act Release No. 44086, 55 SEC 21, 2001 WL 267660, at *2 (Mar. 20, 2001), *petition denied*, 2002 WL 1932001 (D.C. Cir. Apr. 25, 2002) (unpublished); *Charles Phillip Elliott*, Exchange Act Release 31202, 50 SEC 1273, 1992 WL 258850, at * 3 (Sept. 17, 1992), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

55 *Melton*, 2003 WL 21729839, at *8.

proceeding, so long as they are not adduced to establish liability against a party.[56] In assessing mPhase's request, FINRA did not invoke the findings of the prior proceeding to establish any liability against mPhase, which was not a party to the 2007 Settlement Order, and FINRA imposed no sanction or penalty against mPhase. Rather, FINRA's denial of mPhase's request is but one of the several collateral consequences created by Durando's and Dotoli's settlement and consent to sanctions.[57]

Nor can it be said that 2007 Settlement Order was "binding" or had "legal force" on the outcome here, as mPhase suggests.[58] FINRA gave mPhase an opportunity to dispute the relevance of the 2007 Settlement Order to the Company-Related Action requested. Although FINRA ultimately found the 2007 Settlement Order, together with its ongoing concerns about mPhase, necessitated denial of its request, the 2007 Settlement Order did not require FINRA to deny the request. Rather, FINRA considered a number of factors in addition to the settlement in

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56 *Cf., e.g., Option Res. Grp. v. Chambers Dev. Co.*, 967 F. Supp. 846, 848-49 (W.D. Pa. 1996) (allowing "findings, including the opinions and conclusions" from Commission administrative settlement into evidence in separate civil suit against non-settling party under Fed. R. Evid. 803(8)(C), even though settlement was "not binding" on any other person or entity); *SEC v. Pentagon Capital Mgmt. PLC*, No. 08 Civ. 3324, 2010 WL 985205, at *3-4 (S.D.N.Y. Mar. 17, 2010) (unreported) (holding that "factual findings" contained in Commission settled orders were admissible in subsequent litigation so long as "offered for a purpose other than to establish liability" (citing *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981))); *see also SEC v. Das*, No. 8:10-CV-102, 2010 WL 4615336, at *7 n.5 (D. Neb. Nov. 4, 2010) (unreported) (permitting use of an unrelated settlement order as precedent because "the SEC's findings in the administrative decision are still soundly reasoned"); *but see Carpenters Health & Wealth Fund v. Coca-Cola Co.*, No. 1:00-CV-2838-WBH, 2008 WL 9358563, at *4-5 (Apr. 23, 2008) (holding that settled order was inadmissible as hearsay under Fed. R. Evid. 408).

57 *See DHB Capital Grp., Inc.*, Exchange Act Release No. 37069, 52 SEC 740, 1996 WL 164315, at *3 (Apr. 5, 1996) ("[FINRA]'s decision to deny inclusion [of DHB on NASDAQ]—based in part on the fact that, upon finding that Brooks committed serious securities law violations, we barred him (with his consent) from the industry—is a collateral consequence of Brooks' misconduct . . . [and] a proper exercise of the [FINRA]'s authority under its Qualification Requirements By-Law.").

For example, although mPhase was not a party to the 2007 Settlement Order, the entry of the settlement had the collateral consequence of requiring mPhase to disclose the settlement for the next ten years in its periodic filings with the Commission—a requirement mPhase asserts in its briefs it has met since the entry of the 2007 Settlement Order. Item 401(f) of Reg. S-K, 17 C.F.R. § 229.401(f) (requiring disclosure of a director's, nominee's, or executive officer's involvement in specific legal proceedings "that are material to an evaluation of the ability or integrity" of such a person).

58 *See P.R. Tel. Co. v. Sprintcom, Inc.*, 662 F.3d 74, 96 (1st Cir. 2011) (defining "the word 'binding' . . . as 'having legal force'" (quoting *Black's Law Dictionary* 190 (9th ed. 2009))).

determining that denial was necessary to protect the investing public or the maintenance of fair and orderly markets.[59]

4. There is no credible evidence that FINRA considered the allegations of the dismissed federal complaint in reaching its decision.

We also reject mPhase's claim that FINRA improperly considered the allegations of the Commission's federal suit against Durando and Dotoli, a case mPhase asserts was dismissed with prejudice in connection with entry of the 2007 Settlement Order.[60] mPhase cites to evidence in the record showing that the dismissed complaint was reviewed by a Department of Operations "examiner" during the background investigation of mPhase. It contends that, because the case was dismissed, FINRA should not be able to use the dismissed complaint as a basis for its denial.

mPhase's claim is meritless. Although the dismissed complaint is part of FINRA's record before us and listed in the examiner's materials, it is the decision of the UPCC Subcommittee—not the Department's examiner—that constitutes the final action of FINRA subject to our review.[61] mPhase cites to no part of the Subcommittee decision evidencing that the Subcommittee considered the dismissed complaint in denying mPhase's Company-Related Action request.[62] Rather, as discussed, the Subcommittee based its denial on the 2007 Settlement Order and its ongoing concerns about mPhase and its continued association with Durando and Dotoli, all of which amply support denial.

For the foregoing reasons, we find that the grounds on which FINRA based its denial to process mPhase's Company-Related Action request existed in fact.

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59 FINRA Rule 6490(d)(3); *see also supra* note 51 and accompanying text.

60 In its briefs, mPhase cites to the district court order dismissing the case for a failure to prosecute, *SEC v. PacketPort.Com, Inc.*, No. 3:05 CV 1747, 2007 WL 911900, at *7 (D. Conn. Mar. 21, 2007), but that order was vacated by the court's later decision on reconsideration. *SEC v. PacketPort.Com, Inc.*, 2007 WL 1521583, at *9 (D. Conn. May 23, 2007). As discussed, the Commission withdrew that federal action in connection with the entry of the 2007 Settlement Order. *PacketPort.com*, 2007 WL 3033485, at *1 (D. Conn. Oct. 18, 2007).

61 FINRA Rule 6490(e); *cf. Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *8 (Nov. 8, 2007) ("'[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review.'" (quoting *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006))), *petition denied*, 316 F. App'x 865 (11th Cir. 2008).

62 Although the dismissed complaint involved some of the same registration and disclosure charges found in the 2007 Settlement Order, it primarily involved allegations that Durando and Dotoli ran a pump-and-dump scheme to fraudulently obtain over $9 million in illicit profits from investors. Complaint, *SEC v. PacketPort.com, Inc.,* Civil Action No. 3:05cv1747 (filed Nov.15, 2005), *available at* http://www.sec.gov/litigation/complaints/comp19465.pdf. None of those fraud charges was a basis for the Subcommittee's denial.

B. FINRA's denial of mPhase's request was in accordance with its rules.

FINRA, a registered national securities association, adopted Rule 6490 pursuant to Exchange Act Section 15A(b).[63] That provision authorizes FINRA to adopt rules that, among other things, are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, [and] processing transactions in securities" and, in general, "to protect investors and the public interest."[64] As we stated in the 2010 Approval Order, FINRA adopted Rule 6490 in furtherance of these statutory principles based on FINRA's growing concern that its OTCBB services could be used for fraudulent practices.[65] We concluded that the Rule was designed to protect "the OTC marketplace and investors in OTC Securities" by permitting FINRA to deny a Company-Related Action request when there are "certain indicators of potential fraud."[66]

The plain language of FINRA Rule 6490(d)(3) makes clear FINRA's authority to deny a Company-Related Action in the circumstances presented here. Among the five deficiency factors that may form the basis for FINRA's denial is whether it has "actual knowledge" of a settled regulatory action against the issuer's officers for securities laws violations. If "one or more" of these factors is present, FINRA has the discretion to deny a request if denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets."[67] As discussed, FINRA's denial satisfied these requirements.[68]

mPhase contends that FINRA exceeded its authority under FINRA Rule 6490. It argues that FINRA's ability to deny a Company-Related Action request under the Rule is proscribed by Section 10(b) of the Exchange Act and Rule 10b-17 thereunder, which mPhase claims are "the enabling statute and SEC Rule" for FINRA Rule 6490, and require that the company only give timely notice of its reverse stock split to FINRA.[69] Thus, according to mPhase, because it gave

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63 2010 Approval Order, *supra* note 5, at *5.

64 15 U.S.C. § 78*o*-3(b)(6); *see also Fog Cutter*, 474 F.3d at 824 (discussing Exchange Act Section 15A(b) and stating that, "[a]s a self-regulatory organization, [FINRA] must maintain rules to protect investors and the public interest").

65 2010 Approval Order, *supra* note 5, at *2 (stating that FINRA proposed Rule 6490 "in furtherance of its authority to adopt rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest").

66 *Id.*

67 *See supra* note 35 and accompanying text (discussing FINRA's discretionary authority).

68 In addition to meeting these substantive requirements, we find, as mPhase does not dispute, that FINRA properly followed the procedures set forth in Rule 6490(d) and (e) in disposing of mPhase's request. *Michael Stegawski*, Exchange Act Release No. 59326, 2009 WL 223618, at *6 (Jan. 30, 2009).

69 17 C.F.R § 240.10b-17. Specifically, Exchange Act Rule 10b-17 requires issuers to give

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sufficient notice of its stock split to FINRA, there is no basis for FINRA to deny processing and announcing its Company-Related Action on the OTCBB.

We disagree. As discussed, the enabling statute for FINRA Rule 6490 is Exchange Act Section 15A(b). Although we recognize that FINRA Rule 6490 cross references Exchange Act Rule 10b-17, we reject the contention that, because of this, FINRA may refuse to process a reverse stock split *only* if a company fails to timely give FINRA notice. Rule 6490 refers to Exchange Act Rule 10b-17 because, under subsection (b) of Rule 6490, issuers requesting to effectuate a Company-Related Action that is enumerated by Exchange Act 10b-17—*e.g.*, a reverse stock split—must provide FINRA with advance notice of the action consistent with the "timelines specified" by Exchange Act Rule 10b-17.[70] FINRA does not contest that such notice was made here. But mPhase's compliance with one part of Rule 6490 (subsection (b)) does not alter the fact that the 2007 Settlement Order triggered one of the five deficiency factors set forth in another part of the Rule (subsection (d)(3)).

mPhase raises additional textual arguments regarding Rule 6490(d)(3) to assert that FINRA possesses only "ministerial" power to process Company-Related Actions, despite statements to the contrary in the 2010 Approval Order.[71] Specifically, mPhase cites subsection (d)(3)(1), which allows FINRA to deem a Company-Related Action deficient if "FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority."[72] mPhase also cites subsection (d)(3)(2), which allows FINRA to deem a Company-Related Action deficient if "the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority."[73] mPhase claims these subsections address only instances where the issuer failed to disclose information to

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FINRA, in a timely fashion, information relating to: (1) a dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering. Under Rule 10b-17, the issuer is required to provide this information to FINRA no later than 10 days before the record date or, in case of a rights subscription or other offering if such 10 days advance notice is not practical, on or before the record date, and in no event later than the effective date of the registration statement to which the offer relates. Pursuant to Rule 10b-17(b)(3), comparable notice given by the issuer of an exchange-listed security in accordance with the procedures of the national securities exchange upon which a security of such issuer is registered satisfies this requirement. *Id.*

70 FINRA Rule 6490(b)(2). As noted, *supra* note 6, Rule 6490 refers to Company-Related Actions enumerated under Exchange Act Rule 10b-17 as "SEA Rule 10b-17 Actions." In contrast, those corporate actions not enumerated by Exchange Act Rule 10b-17 (*i.e.*, "Other Company-Related Actions") must adhere to the timelines set by FINRA. FINRA Rule 6490(b)(3). Aside from this distinction, Rule 6490 treats all Company-Related Actions equally.

71 *See supra* text accompanying notes 9-14.

72 FINRA Rule 6490(d)(3)(1).

73 FINRA Rule 6490(d)(3)(2).

FINRA in its Company-Related Action application, and as a result, subsection (d)(3)(3) only allows FINRA to deny a request if the issuer failed to inform FINRA of the prior settled action.[74]

These arguments fail. Subsection (d)(3)(2) says nothing about nondisclosure of information to FINRA.[75] The fact that subsection (d)(3)(1) addresses an incomplete or inaccurate request has no bearing on subsection (d)(3)(3). It is a widely accepted principle of construction that, where a statute or regulation includes particular language in one section but omits it in another, the disparate inclusion or exclusion was intentional and purposeful.[76] Here, it would make little sense to apply the same basis for a deficiency under subsection (d)(3)(1) to the remaining four deficiency factors provided in the Rule. This is particularly true given that each factor constitutes a separate, independent ground for deeming a request deficient, a point made clear by the express language of Rule 6490(d)(3) stating that a request is deficient if FINRA finds "one or more of the [deficiency] factors" exists.

Equally unavailing is mPhase's contention that Rule 6490(d)(3)(3)'s requirement that FINRA have "actual knowledge" of a settled regulatory action means that FINRA can deny requests only when: (i) the issuer failed to disclose the settled action in its application and (ii) FINRA independently becomes aware of the settled action. mPhase's contention is premised on its argument—rejected above—that Rule 6490(d)(3) is a mere notice provision. Nor do we find that the Rule's use of the term "actual knowledge" compels this interpretation. Although "actual knowledge" is not defined by the Rule, the term has a common legal definition: that the actor has "'[d]irect and clear'" awareness of a particular fact.[77] And we find no expressed

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74 mPhase's brief erroneously cites "subsections (d)(1) and (d)(2)" for this claim when the factors it paraphrases are from (d)(3)(1) and (d)(3)(2) of the Rule.

75 FINRA Rule 6490(d)(3)(2) (defining this factor as when "the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority").

76 *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("'Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v United States*, 464 U.S. 16, 23 (1983))); *In the matter of the claim for award in connection with SEC v. Advanced Tech. Grp. Ltd.*, Exchange Act Release No. 70772, 2013 WL 5819623, at *7 n.21 (Oct. 13, 2013) (discussing the "well-established canon of statutory construction expression *unius est exclusion alterius*, or the expression of one thing implies the exclusion of others" (collecting cases)).

77 *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1080 (D.N.M. 2010) (quoting *Black's Law Dictionary* 250 (9th ed. 2009)); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 948 (W.D. Tex. 2008) (same); *see also United States v. Spinney*, 65 F.3d 231, 236 (1st Cir. 1995) (explaining that "[a]ctual knowledge . . . suggests the presence of particular evidence which, if credited, establishes conclusively that the person in question knew of the existence of the fact in question").

"[L]egal terms used in framing a [regulation] are ordinarily presumed to have been intended to convey their customary legal meaning," unless a "contrary direction" is provided. *United Tech., Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994) (citing

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intention by FINRA to construe "actual knowledge" alternatively, as mPhase asserts. Requiring that FINRA have "actual knowledge" of a settled regulatory action—established here by the information mPhase provided FINRA and FINRA's background investigation—serves the important policy objective of ensuring that FINRA has an adequate, justifiable basis before denying an issuer's Company-Related Action request.[78]

mPhase further asserts that FINRA may not reject its Company-Related Action request because the 2007 Settlement Order did not involve fraud, an element that it contends is necessary. But subsection (d)(3)(3) explicitly uses the disjunctive "or," in providing that the previously settled action be "related to fraud *or* securities laws violations"—thus either basis suffices for deeming a request deficient.[79] As discussed, the 2007 Settlement Order resolving the case against Durando and Dotoli for violations of the registration and disclosure requirements constituted a sufficient basis for FINRA's deficiency determination here.

Accordingly, based on the foregoing reasons, we find that FINRA's denial was in accordance with FINRA Rules.

C. FINRA applied its rules in a manner consistent with the Exchange Act.

FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. FINRA designed the OTCBB in response to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, where Congress directed the creation of "automated quotation systems for penny stocks . . . [t]o add visibility and regulatory and surveillance data to that market."[80] In enacting this legislation, Congress amended the federal securities laws by

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Bradley v. United States, 410 U.S. 605, 609 (1973)); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ."); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987) (same).

78 *Spinney*, 65 F.3d at 236. Similar use of the term by FINRA is found in FINRA Rule 8210(d), requiring FINRA staff to follow certain procedures when they have "actual knowledge" of an out-of-date or inaccurate mailing address in the Central Registration Depository.

79 Emphasis added. *Accord Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *4 (Feb. 13, 2009) ("The statutes use the disjunctive 'or,' meaning that any one basis in the statute is sufficient to establish our authority to proceed."), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

80 Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified in the Exchange Act at 15 U.S.C. § 78q-2); *see also Order Approving and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3 and 4 to Proposed Rule Change Relating to the OTC Bulletin Board Service*, Exchange Act Release No. 38456, 1997 WL 152011, at *1, 4 (Mar. 31, 1997) (the "1997 Approval Order") ("While the potential for trading abuses is greater [on the OTCBB

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"issu[ing] legislative directives with the intention of curbing the pervasive fraud and manipulation of the penny stock market."[81] FINRA Rule 6490 furthers these objectives by authorizing FINRA to deny processing and announcing a Company-Related Action on the OTCBB when it finds deficiencies with respect to an issuer's Company-Related Action, including "indicators of potential fraud," and that denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[82]

Here, FINRA found that Durando's and Dotoli's settlement of federal securities laws violations and consent to sanctions, continued association with entities involved in that settlement, and mPhase's lack of supervisory oversight of Durando and Dotoli made denial of the company's request necessary to protect investors and the market integrity of the OTCBB. As we have stated in the context of FINRA's delisting of securities from its automated systems, investors in OTCBB securities are "entitled to assume that securities [on FINRA's] system meet the system's standards, and that the risk associated with investing in [OTCBB securities] is market risk rather than the risk that the promoter or other persons exercising substantial influence over the issuer is acting in an illegal manner."[83]

mPhase contends that FINRA lacks authority to deny its Company-Related Action request because FINRA has "no direct jurisdiction over issuers." But mPhase's argument ignores

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than on NASDAQ], these abuses can be reduced by according more transparency. . . . [T]he additional transparency from the OTCBB should assist the NASD in its surveillance efforts.").

81 *Report to Accompany the Penny Stock Reform Act of 1990*, H.R. Rep. No.101-617 (1990), reprinted in 1990 U.S.C.C.A.N. 1408, 1990 WL 256465.

82 2010 Approval Order, *supra* note 5, at *2 n.9 (citing, *e.g.*, *Andros Isle, Corp.*, Order of Suspension of Trading, File No. 500-1 (Mar. 13, 2008), *available at* http://www.sec.gov/litigation/suspensions/2008/34-57486-o.pdf (suspending trading in 26 Pink Sheet securities and finding that "[c]ertain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation")).

83 *JJFN Servs., Inc.*, Exchange Act Release No. 39343, 53 SEC 335, 1997 WL 722029, at *3 (Nov. 21, 1997) (internal quotation marks omitted) (declining to list issuer's securities on the SmallCap Market because promoter and "key person" of the issuer was previously convicted of filing a false tax return); *see also Fog Cutter Capital Grp., Inc.*, Exchange Act Release No. 52993, 58 SEC 1049, 2005 WL 3500274, at *5 (Oct. 31, 2005) (denying issuer's listing on NASDAQ after guilty plea by issuer's key executive and largest shareholder), *petition denied*, 474 F.3d 822, 825 (D.C. Cir. 2007); *DHB Capital*, 1996 WL 164315, at *3 (denying issuer's listing on the SmallCap Market based on consent injunction entered against controlling shareholder, officer, and director).

the critical role that FINRA occupies in regulating the OTC market.[84] FINRA is the owner and operator of the OTCBB and as a result has "direct authority for the activities related . . . to the OTCBB."[85] With this comes an obligation to oversee the OTCBB and "protect the integrity of the market it is charged with maintaining."[86]

mPhase further contends that FINRA's denial is time-barred because the 2007 Settlement Order is over five years old and "the five-year [statute of] limitations period " of 28 U.S.C. § 2462 "has clearly passed."[87] The five-year statute of limitations set forth in 28 U.S.C. § 2462 applies only to "an action or proceeding for the enforcement of any civil fine, penalty, or forfeiture."[88] FINRA did not institute this action, it is not a disciplinary action, and FINRA does not seek imposition of a fine, penalty, or forfeiture.[89] Rather, this action arises solely from

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84 As one court has observed, "[t]he joint roles taken by [FINRA] and the SEC in the regulation of OTC securities reflects a congressional intent 'to establish a "cooperative regulation" where securities associations would regulate themselves under the supervision of the SEC.'" *Lang v. French*, 154 F.3d 217, 221 (5th Cir. 1998) (quoting *Jones v. SEC*, 115 F.3d 1173, 1179 (4th Cir. 1997) (quoting 115 S. Rep. No. 75-1455, at 3-4 (1938) and H.R. Rep. No. 75-2307, at 4-5 (1938) (legislation authorizing creation of SROs))).

85 *Notice of Filing of Proposed Rule Change to Align the Reporting Requirements and Dissemination Protocols for OTC Equity Transactions Involving Foreign Securities with All Other OTC Equity Securities*, Exchange Act Release No. 57986, 2008 WL 2971915, at *2 (June 18, 2008) (citing Exchange Act Release No. 52508 (Sept. 26, 2005), 70 F.R. 57,346 (Sept. 30, 2005)).

86 *Air L.A., Inc.*, Exchange Act Release No. 34491, 1994 WL 413098, at *2 (Aug. 3, 1994) (order denying stay of delisting from NASD's SmallCap Market); *see also* 1997 Approval Order, *supra* note 80, at *4 (stating that "the operation of the OTCBB places a concomitant responsibility on [FINRA] to surveil" that facility for abuse).

87 28 U.S.C. § 2462 (providing that "any proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued").

88 *Cf. Weiss*, 2013 WL 1122496, at *10 ("FINRA merely denied [the applicant's] 'relief from a previously existing disqualification'"; it did not impose additional penalty.); *Dennis Milewitz*, Exchange Act Release No. 40254, 53 SEC 701, 1998 WL 409449, at *4 (July 23, 1998) ("NASD's consideration of the applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct." (collecting cases)).

89 *Pac. Stock Exch.'s Options Floor Post X-17*, Exchange Act Release No. 31666, 51 SEC 261, 1992 WL 400646, at *4 (Dec. 29, 1992) ("We . . . have interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an Exchange rule or Commission statute or rule or action 'in which punishment or sanction is sought or intended.'" (quoting *Tague Sec. Corp.*, Exchange Act Release 18510, 47 SEC 743, 1982 WL 32205, at *2 (Feb. 25, 1982))).

mPhase's request that FINRA provide it services on the OTCBB.[90] In any event, we have long held that FINRA, a private organization, is not subject to the requirements of 28 U.S.C. § 2462, applicable to government agencies.[91]

mPhase argues that FINRA's denial was inconsistent with the Exchange Act because it "amount[s] to a *de facto* and improper officer and director bar." mPhase is incorrect. As discussed, FINRA's denial imposed no sanction. FINRA's refusal to announce mPhase's Company-Related Action was a prophylactic measure designed to prevent potential fraud or abuse from occurring through use of the OTCBB, and it had no further reach than announcement on that particular FINRA facility.[92] Although mPhase contends that FINRA's denial effectively bars Durando and Dotoli from acting as officers and directors, we note that both remain officers and directors of mPhase and mPhase's stock continues to trade in the OTC market and is currently quoted on the OTC Pink, an alternative inter-dealer quotation system.[93]

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90 We note that mPhase's current § 2462 claim contradicts its previous statement before FINRA that the 2007 Settlement Order was "almost five years old," which is a more accurate factual statement: The 2007 Settlement Order was entered on October 18, 2007, mPhase filed its application with FINRA on July 6, 2012, and FINRA's Department denied the application on October 2, 2012. Thus, even if we assume *arguendo* that the application or denial somehow served as "commence[ment]" of an action under 28 U.S.C. § 2462, that action would have started within the five-year limitations period. *Cf. Birkelbach v. SEC*, 751 F.3d 472, 479-80 (7th Cir. May 2, 2014) (finding that, even if § 2462 applied to FINRA disciplinary actions, "sufficient violative conduct" took place within the five-year period preceding action).

91 *William D. Hirsch*, Exchange Act Release No. 43691, 54 SEC 1068, 2000 WL 1800614 at *5 (Dec. 8, 2000) ("We have consistently held that no statute of limitations applies to the disciplinary actions of . . . self-regulatory organizations."); *Shamrock Partners, Ltd.*, Exchange Act Release No. 40663, 53 SEC 1008, 1998 WL 786953, at *5 n.15 (Nov. 12, 1998) ("The five-year statute of limitations discussed in *SEC v. Johnson*, 87 F.3d 484 (D.C. Cir. 1996), . . . does not apply to NASD proceedings."); *Henry James Faragalli*, Exchange Act Release No. 37991, 52 SEC 1132, 1996 WL 683707, at *10 & n.36 (Nov. 26, 1996) ("[I]t is well established that no statute of limitations applies to [SRO] actions . . . [because] SROs are not subject to the requirements applicable to a government agency.").

92 *Cf., e.g., United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (describing Exchange Act Rule 14e-3(a) as "[a] prophylactic measure, because its mission is to prevent . . . [and it] encompasses more than the core activity prohibited").

93 *See supra* note 15. *Cf. Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000) (denying stay of OTCBB delisting and stating that "the deletion [from the OTCBB] means only that there will be no prices for those securities quoted on the OTCBB," not that the securities must cease trading); *Cleantech Innovations, Inc.*, Exchange Act Release No. 66064, 2011 WL 6811202, at *3 (Dec. 28, 2011) (same).

For similar reasons, we reject mPhase's related arguments that are based on this contention, including that FINRA's action improperly intrudes on New Jersey corporate law, that the Commission is collaterally estopped from affirming an officer and director bar, and that

(continued...)

Finally, we reject mPhase's argument, made only in its application for review, that FINRA "improperly applied [FINRA Rule 6490] retroactively to punish conduct that occurred prior to the enactment of [Rule 6490]." mPhase has since abandoned this argument in subsequent briefs; in any event, we find it meritless. The United States Supreme Court has observed that "[a] statute 'is not made [impermissibly] retroactive merely because it draws upon antecedent facts for its operation.'"[94] Rather, a statute is impermissibly retroactive "when such application would 'tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past.'"[95] The Court has explained that statutes imposing requirements on previously convicted or sanctioned individuals to "address[] dangers that arise postenactment" are not impermissibly retroactive.[96] Even where application of such statutes could be construed to "unsettle expectations and impose burdens on past conduct," those statutes are not impermissibly retroactive because they "target a present danger."[97]

FINRA's action was not impermissibly retroactive for two independent reasons. First, FINRA considered the 2007 Settlement Order, along with its ongoing concerns about mPhase, to make a present determination of risk to investors and the public generally. Although FINRA drew on information predating Rule 6490's adoption, FINRA did so as part of a process in which it assessed the *present* risks posed by mPhase's request for public announcement on the OTCBB.[98] Under FINRA's process, while the existence of the 2007 Settlement Order caused mPhase's request to be deficient under FINRA Rule 6490(d)(3), FINRA, consistent with its Rule, allowed mPhase an opportunity to explain why the company's request should be processed

(...continued)
imposing a bar denies Durando and Dotoli due process. FINRA's denial of an announcement on the OTCBB and our affirmance of that decision imposes no bar; nor does the denial prevent mPhase from effectuating its corporate action outside of the OTCBB.

94 *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)); *see also Martin v. Hadix*, 527 U.S. 343, 357-58 (1998) ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" (quoting *Landgraf*, 511 U.S. at 270)).

95 *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (quoting *Langraf*, 511 U.S. at 283) (holding that statutes authorizing prospective remedies may consider conduct pre-dating the statute without a genuinely retroactive effect).

96 *Id.* at 1489 n.7; *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *13 (July 12, 2013) (holding that it is proper to consider respondent's conduct predating Dodd-Frank Act in assessing future risk to investing public).

97 *Vartelas*, 132 S. Ct. at 1489 (discussing various examples); *see also United States v. Shoulder*, 738 F.3d 948, 958 (9th Cir. 2012).

98 *Landgraf*, 511 U.S. at 270 n.24.

nonetheless.[99] Yet, after weighing the arguments and materials mPhase submitted against the perceived interests of the public, FINRA concluded that announcement of mPhase's reverse stock split on the OTCBB at this time posed too great a risk for the investing public and market integrity.[100] And as discussed, FINRA's assessment of that risk is supported by the record.

Second, nothing in FINRA's application of Rule 6490 impairs rights mPhase possessed when it acted, increases its liability for past conduct, or imposes new duties with respect "to transactions already completed."[101] mPhase has not asserted, nor do we find, that it had a vested right in having FINRA process and announce its Company-Related Actions.[102] mPhase filed its application more than two years after the adoption of Rule 6490. When mPhase did so, it was clear that its officers' 2007 Settlement Order could be a basis for FINRA to deny the request. FINRA's action therefore did not affect mPhase's reliance interest or settled expectations in having FINRA announce its corporate actions on the OTCBB.

mPhase also did not incur any new liability, duty, or disability from its own conduct predating Rule 6490's adoption because it was neither a party to the 2007 Settlement Order nor was it subject to any of its sanctions.[103] mPhase, in effect, is claiming an impermissible

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99 *See supra* note 51 and accompanying text; *accord Boniface v. Dep't of Homeland Sec.*, 613 F.3d 282, 288 (D.C. Cir. 2010). In *Boniface*, the Court of Appeals for the D.C. Circuit rejected a similar retroactivity challenge, upholding the Transportation Security Administration's ("TSA") application of a new regulation to deny licensing of a hazardous materials endorsement ("HME") to a commercial trucker based on an event predating the regulation, the trucker's thirty-year-old conviction for transporting hazardous materials. The court reasoned that the TSA's denial did not trigger "any of the effects deemed retroactive [by the Supreme Court] in *Landgraf* because it does not bar an applicant with a disqualifying conviction from obtaining an HME but rather creates 'an evidentiary presumption' that an applicant with a disqualifying conviction in his past poses a security threat in the present; the applicant may rebut that presumption through the waiver process." *Id.* The presence of a deficiency factor here operated analogously.

100 *Boniface*, 613 F.3d at 288; *Adm'rs of the Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993) (finding that regulations at issue had no retroactive effect because they "contemplate only the use of past information for subsequent decisionmaking").

101 *Landgraf*, 511 U.S. at 280.

102 *See, e.g.*, *Empresa Cubaexport v. Dept. of Treasury*, 638 F.3d 794, 799 (D.C. Cir. 2011) (holding that company had no vested right to perpetual renewal of its trademark; stating that "[a] law that merely 'upsets expectations based in prior law' . . . does not trigger the presumption against retroactivity" (quoting *Landgraf*, 511 U.S. at 269)); *Goodyear Tire & Rubber Co. v. Dep't. of Energy*, 118 F.3d 1531, 1536-38 (Fed. Cir. 1997) (holding that DOE's application of 1992 product eligibility rule was not retroactive because applicant had no vested right to have the pre-1992 rule applied and no vested right to have its claims approved).

103 *See, e.g.*, *Ohio Head Start Assoc. v. U.S. Dept. of Health and Human Svcs.*, 873 F. Supp. 2d 335, 347-48 (D.D.C. 2012) (discussing U.S. Supreme Court precedent and concluding that the principal focus for determining whether to allow "regulations [to] use antecedent information in

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retroactive effect based on an antecedent event that relates only to the conduct of its officers. We have not found, nor has mPhase cited to, any authority suggesting that a statute or regulation is impermissibly retroactive when it triggers an outcome based on the earlier misconduct of a *different* person or entity. Accordingly, for all these reasons, we find that FINRA's denial was not impermissibly retroactive.

Based on the foregoing, we find that FINRA properly denied mPhase's Company-Related Action request and, accordingly, dismiss mPhase's appeal.

An appropriate order will issue.[104]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN); Commissioners GALLAGHER and PIWOWAR, dissenting.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

(...continued)
making future decisions lies in the notion of imposing a 'liability' versus denying an individual a future 'benefit'" (citations omitted)), *aff'd*, 510 F. App'x 1 (D.C. Cir. 2013) (per curiam).

104 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74187 / February 2, 2015

Admin. Proc. File No. 3-15130

In the Matter of the Application of

MPHASE TECHNOLOGIES, INC.
c/o Frank C. Razzano, Esq.
Pepper Hamilton LLP
600 14th Street, N.W.
Washington, D.C. 20005-2004

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by mPhase Technologies, Inc., is hereby dismissed.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Commissioner Aguilar
Commissioner Stein
Disapproved as to
Scariot

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4014 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16368

In the Matter of Wyoming Investment Management Services, LLC and Craig M. Scariot, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Wyoming Investment Management Services, LLC ("WIMS") and Craig M. Scariot (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds that:

Summary

This proceeding arises out of improper registration and material misstatements made in Forms ADV by WIMS, an investment adviser registered with the Commission. Since February 2013, WIMS misrepresented that its principal office and place of business was in Wyoming, a state that does not regulate investment advisers. This was done at the time new rules went into effect restricting such registration to advisers with more assets under management. Scariot, WIMS' president and sole employee, was responsible for all of WIMS' filings, and aided and abetted and caused all of its violations.

Respondents

1. WIMS, a Wyoming Limited Liability Company, filed its initial Form ADV with the Commission in February 2013 and has approximately $70 million assets under management. From March 1, 2013, the date WIMS became registered as an investment adviser with the Commission, through December 31, 2013 WIMS' principal office and place of business was at the home of WIMS' president in Ft. Collins, Colorado.

2. Scariot, age 37, is currently a resident of Longmont, Colorado and is the president, portfolio manager, chief compliance officer, and sole employee of WIMS.

Background

3. In 2011, the Advisers Act was amended to increase the threshold for an investment adviser's assets under management required for registration with the Commission effective March 2012.[1] Registration with the Commission was still required, however, for advisers not regulated by the states where they maintained their principal offices and places of business. Currently, Wyoming is the only state that does not regulate investment advisers. So any investment adviser with a principal office and place of business in Wyoming, regardless of its assets under management, is required to register with the Commission.

4. Rule 222-1(b) under the Advisers Act states that the principal office and place of business of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

5. In December 2012, Scariot organized WIMS as a Wyoming limited liability company, signed a lease for an office space in Cheyenne, Wyoming, and opened the WIMS' bank

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[1] Previously, Section 203A of the Advisers Act prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption. Effective July 21, 2011, Section 203A increased the minimum amount of assets under management for most advisers to qualify for SEC registration from $25 million to $100 million. *See* Advisers Act Section 203A(a)(2) amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Final Rule; Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011).

account there. On February 15, 2013, WIMS made its initial registration filing with the Commission on Form ADV. In Part 1A, Items 1F and 2A of the Form ADV, WIMS stated its principal office and place of business was in Cheyenne, Wyoming, and based its registration with the Commission on its Wyoming location. WIMS made the same representations about its principal office and place of business and basis for registration in its amendment to Form ADV filed on February 22, 2013, and in an annual amendment on Form ADV filed on February 12, 2014.

6. Scariot did not direct, control, or coordinate the activities of WIMS from Cheyenne, Wyoming from March 2013 through December 2013. During this time, Scariot resided in Ft. Collins, Colorado, and he used his residence there as a primary base of operations for WIMS while completing graduate school and undergoing intensive physical therapy. Scariot did not meet with clients in Wyoming and conducted business in the WIMS office space in Wyoming in 2013 on an infrequent basis. As disclosed in its Form ADV filings, WIMS' books and records were maintained in Santa Fe, New Mexico throughout 2013. Because WIMS did not maintain a principal office or place of business in Wyoming and had no other basis for Commission registration, it was prohibited from registering with the Commission as an investment adviser.

7. Scariot was responsible for preparing, signing, and filing WIMS' filings with the Commission.

Violations

8. As a result of the conduct described above, WIMS willfully[2] violated, and Scariot willfully aided and abetted and caused WIMS' violations of, Section 203A of the Advisers Act by WIMS improperly registering with the Commission based on its misrepresentation that WIMS' principal office and place of business was in Wyoming.

9. As a result of the conduct described above, Respondents willfully violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein." In the relevant Form ADV filings, WIMS and Scariot misstated WIMS' principal office and place of business.

Undertakings

10. Respondents have undertaken to:

Establish WIMS' principal office and place of business in Wyoming by maintaining in Wyoming the executive office of WIMS from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

Certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agree to provide such evidence. The certification and supporting material shall be submitted to Mary S. Brady, Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Sections 203A and 207 of the Advisers Act.

B. Respondents are censured.

C. Respondents shall, within 10 days of the entry of this Order, pay a civil money penalty, jointly and severally, in the amount of $10,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Wyoming Investment Management Services, LLC and Craig Scariot as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas J. Krysa, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294-1961.

D. Respondents shall comply with the undertakings enumerated in paragraph 10 above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4015 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16369

In the Matter of **Arete Ltd.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Arete Ltd. ("Arete" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Arete d/b/a Sky Peak Capital Management, is a Wyoming limited liability company, and filed its initial Form ADV with the Commission in November 2012. Arete's principal office and place of business is in Irvine, California.

B. IMPROPER REGISTRATION AND FALSE FORM ADV FILINGS

1. In 2011, the Advisers Act was amended to increase the threshold for an investment adviser's assets under management required for registration with the Commission effective March 2012.[1] Registration with the Commission was still

[1] Previously, Section 203A of the Advisers Act prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption. Effective July 21, 2011, Section 203A increased the minimum amount of assets under management for most advisers to qualify for SEC registration from $25 million to $100 million. *See* Advisers Act Section 203A(a)(2) amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Final Rule;*

required, however, for advisers not regulated by the states where they maintained their principal offices and places of business. Currently, Wyoming is the only state that does not regulate investment advisers. So any investment adviser with a principal office and place of business in Wyoming, regardless of its assets under management, is required to register with the Commission.

2. Rule 222-1(b) under the Advisers Act states that the principal office and place of business of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

3. In September 2012, the initial owner of Arete formed the company as a for profit corporation in Wyoming. On November 27, 2012, Arete made its initial filing with the Commission on Form ADV. In Part 1A, Items 1F and 2A of the Form ADV, Arete claimed its principal office and place of business was in Cheyenne, Wyoming, and based its registration with the Commission on its Wyoming location. Arete made the same representations about its principal office and place of business and basis for registration in its amendments to Form ADV filed on July 26, 2013, August 2, 2013, and October 2, 2013. Arete stopped conducting business in late 2013 and has not made any filings with the Commission since then.

4. No officer, partner, or manager of Arete directed, controlled, or coordinated the activities of Arete from Wyoming and Arete did not conduct any investment advisory business out of Wyoming. Arete's operations were conducted out of California. Because Arete did not have a principal office or place of business in Wyoming and had no other basis for Commission registration, it was prohibited from registering with the Commission as an investment adviser.

5. On February 28, 2013, the Securities Commissioner for the State of Colorado filed a complaint against the chief compliance officer ("CCO") of Arete, among others, for carrying out a scheme to defraud investors through the use of investments in a so-called "private equity fund." Arete's CCO was charged with violating Section 11-51-301, C.R.S, for the offer or sale of unregistered securities; Section 11-51-401, C.R.S., for acting as an unlicensed sales representative; and Section 11-51-501(1), C.R.S., for securities fraud. On December 9, 2013, Arete's CCO entered into a stipulation, on a neither admit nor deny basis, for an order of permanent injunction and other relief in connection with that case. On December 30, 2013, an order was entered granting the permanent injunction and other relief based on the alleged violations in the complaint.

6. Respondent did not amend its Form ADV to disclose in Part 1A, Item 11 the complaint filed against Arete's CCO, nor did it disclose in Part 2A, Item 9 the December 30, 2013 order entered against Arete's CCO.

Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011).

C. VIOLATIONS

1. As a result of the conduct described above, Arete willfully violated Section 203A of the Advisers Act by improperly registering with the Commission.

2. As a result of the conduct described above, Arete willfully violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein." Respondent misstated Arete's principal office and place of business.

3. As a result of the conduct described above, Arete willfully violated Section 204(a) of the Advisers Act and Rules 204-1(a)(1) and (2) thereunder, which require that investment advisers amend Forms ADV at least annually and more frequently if required by the instructions to Form ADV. The Form ADV instructions require that amendments to the Form ADV be filed promptly if information provided in response to Part 1A, Item 11 or Part 2A become materially inaccurate. Respondent failed to file any amendments to Arete's Forms ADV Part 1A disclosing the complaint filed against Arete's CCO by the Colorado Securities Commissioner, or any amendments to its Form ADV Part 2A disclosing the order entered against Arete's CCO by the Colorado district court.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(e) of the Advisers Act including, but not limited to, a civil penalty pursuant to Section 203 of the Advisers Act; and

C. Whether, pursuant to Section 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 203A, 204(a), and 207 of the Advisers Act and Rules 204-1(a)(1) and (2) thereunder.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an

Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Stein
Disapproved As to Nagler

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4017 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16371

In the Matter of **New Line Capital, LLC and David A. Nagler,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against New Line Capital, LLC ("New Line") and David Nagler (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

Summary

This proceeding arises out of improper registration and material misstatements made in Forms ADV by New Line, an investment adviser registered with the Commission. Since 2012, New Line falsely represented that its principal office and place of business was in Wyoming, a state that does not regulate investment advisers, to maintain the firm's Commission registration after rules went into effect restricting such registration to advisers with more assets under management. New Line also overstated its assets under management in filings with the Commission. In addition, although New Line had registered as an investment adviser with the Commission, it failed to maintain and make available to the Commission's staff, books and records required under the Advisers Act. Nagler, New Line's owner, was responsible for all of New Line's filings and recordkeeping, and aided and abetted and caused all of its violations.

Respondents

1. New Line, is a Wyoming limited liability company and conducts business from offices in New Mexico. New Line filed an initial Form ADV with the Commission in April 2007. New Line's principal office and place of business is in Santa Fe, New Mexico.

2. Nagler, age 52, is a resident of Santa Fe, New Mexico and is the owner, managing member, portfolio manager, and chief compliance officer of New Line.

Background

3. Nagler organized New Line as a New Mexico company in 2007. On April 9, 2007, New Line filed its initial registration with the Commission on Form ADV, basing eligibility to file with the Commission on the fact that it had assets under management of $25 million or more.

4. In July 2011, the Advisers Act was amended to increase the threshold for an investment adviser's assets under management required for registration with the Commission from $25 million to $100 million.[1] Registration with the Commission was still required, however, for advisers not regulated by the states where they maintained their principal offices and places of business. Currently, Wyoming is the only state that does not regulate investment advisers. So any investment adviser with a principal office and place of business in Wyoming, regardless of its assets under management, is required to register with the Commission.

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[1] Previously, Section 203A of the Advisers Act prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption. Effective July 21, 2011, Section 203A increased the minimum amount of assets under management for most advisers to qualify for SEC registration from $25 million to $100 million. *See* Advisers Act Section 203A(a)(2) amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Final Rule; Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011).

5. Rule 222-1(b) under the Advisers Act states that the principal office and place of business of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

6. On March 28, 2012, Nagler reorganized his company as a Wyoming entity. On March 29, 2012, New Line filed an amended Form ADV. In Part1A, Items 1F and 2A of the Form ADV, New Line claimed its principal office and place of business was in Wyoming and that it was eligible to register with the Commission as an investment adviser based on its Wyoming location. New Line made the same representations about its principal place of business and basis for registration in its Forms ADV filed on April 1, 2013, February 4, 2014, and March 25, 2014.

7. Nagler did not direct, control, or coordinate the activities of New Line from Wyoming. During all relevant times, Nagler resided in New Mexico and used his residence there as a base of operations. Nagler never met clients in Wyoming and rarely used the small office space that New Line rented in Wyoming. Nagler has not maintained New Line's books and records in Wyoming since August 2013. Because New Line did not have a principal office or place of business in Wyoming and had no other basis for Commission registration, it was prohibited from registering with the Commission as an investment adviser.

8. New Line also misrepresented its assets under management ("AUM") in Part 1A, Item 5F and Part 2A, Item 4 of the Form ADV in all of its filings since March 29, 2012. New Line filed a Form ADV Part 2A Brochure on March 29, 2012, April 1, 2013, and February 4, 2014. Nagler included in his calculation of New Line's AUM disclosed in the firm's Forms ADV, assets that were not securities portfolios, such as the value of real estate and operating enterprises. Nagler also included in his calculation of New Line's AUM, securities portfolios that he did not provide continuous and regular supervisory or management services, such as retirement accounts. New Line has no discretion over these accounts and is not responsible for "arranging or effecting" purchases or sales in the accounts. Although New Line did not charge advisory fees on these assets, by including these assets, New Line materially misrepresented its AUM.

9. New Line failed to make and keep true, accurate, and current financial and trading records relating to its advisory business, including financial records of the adviser such as cash receipts and disbursements journals, balance sheets, income statements, cash reconciliations or bills relating to the business of the investment adviser, trial balances, and financial statements; and trading records for accounts in which New Line had custody or possession of securities or funds of its clients. By virtue of its ability to deduct fees from its clients' brokerage accounts, New Line had custody of client funds.

10. Nagler was solely responsible for preparing, signing, and filing all of New Line's Forms ADV. Nagler was aware of the location of the firm's principal office or place of business. Accordingly, Nagler knew that representations in New Line's Forms ADV in Item 1F and 2A3 of New Line's Forms ADV were false when filed and that New Line was not eligible for SEC registration. Nagler was solely responsible for calculating New Line's reported assets under management. Nagler was also solely responsible for New Line's book and records and knew that New Line failed to maintain required records.

Violations

11. As a result of the conduct described above, New Line willfully violated, and Nagler willfully aided and abetted and caused New Line's violations of, Section 203A of the Advisers Act, by improperly registering with the Commission.

12. As a result of the conduct described above, Respondents willfully violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein." New Line and Nagler misstated New Line's principal office and place of business and overstated New Line's AUM.

13. As a result of the conduct described above, New Line willfully violated, and Nagler willfully aided and abetted and caused New Line's violations of Section 204(a) of the Advisers Act and Rules 204-2(a) and 204-2(b) thereunder. Section 204(a) of the Advisers Act requires, among other things, that investment advisers "make and keep" certain records as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204-2(a)(1) requires registered advisers to "make and keep true, accurate and current . . . journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger." Rule 204-2(a)(2) requires an investment adviser to "make and keep true, accurate and current . . . general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income, and expense accounts." Rule 204-2(a)(4) requires registered advisers to "make and keep true, accurate and current . . . all check books, bank statements, cancelled checks and cash reconciliations of the investment adviser." Rule 204-2(a)(5) requires that investment advisers "make and keep, true, accurate and current . . . all bills or statements (or copies thereof), paid or unpaid, relating other business of the investment adviser as such." Rule 204-2(a)(6) requires an investment adviser to "make and keep true, accurate and current . . . all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser." Rule 204-2(b) requires advisers to make and keep "(1) a journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and all other debits and credits to such accounts; (2) a separate ledger account for each such client showing all purchases, sales, receipts and deliveries of securities, the date and price of each such purchase and sale, and all debits and credits; (3) copies of confirmations of all transactions effected by or for the account any such client; and (4) a record for each security in which any such client has a position, which record shall show the name of each such client having any interest in each security, the amount or interest of each such client, and the location of each such security."

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Sections 203A, 204(a) and 207 of the Advisers Act and Rules 204-2(a) and 204-2(b) thereunder.

B. Respondents are censured.

C. Respondents shall, within 10 days of the entry of this Order, pay a civil money penalty, jointly and severally, in the amount of $25,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying New Line and Nagler as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas J. Krysa, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294-1961.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Municipal Advisor +
NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4016 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16370

In the Matter of **Brenda L. Ridley,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Brenda L. Ridley ("Ridley" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

This proceeding arises out of improper registration and material misstatements and omissions made in Forms ADV by Arete, Ltd., an investment adviser registered with the Commission. Since November 2012, Arete falsely represented that its principal office and place of business was in Wyoming, a state that does not regulate investment advisers, to ensure the firm's Commission registration in light of new rules that went into effect restricting such registration to advisers with more assets under management. Arete also failed to disclose a disciplinary proceeding concerning its chief compliance officer.

Respondent

1. Brenda L. Ridley, age 51, is a resident of Bakersfield, California, and has been the sole employee and chief compliance officer of Arete Ltd., a registered investment adviser, since November 2012.

Other Relevant Entity

2. Arete Ltd., d/b/a Sky Peak Capital Management ("Arete"), is a Wyoming limited liability company, and filed its initial Form ADV with the Commission in November 2012. Arete's principal office and place of business is in Irvine, California.

Background

3. In 2011, the Advisers Act was amended to increase the threshold for an investment adviser's assets under management required for registration with the Commission effective March 2012.[2] Registration with the Commission was still required, however, for advisers not regulated by the states where they maintained their principal offices and places of business. Currently, Wyoming is the only state that does not regulate investment advisers. So any investment adviser with a principal office and place of business in Wyoming, regardless of its assets under management, is required to register with the Commission.

4. Rule 222-1(b) under the Advisers Act states that the principal office and place of business of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

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[2] Previously, Section 203A of the Advisers Act prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption. Effective July 21, 2011, Section 203A increased the minimum amount of assets under management for most advisers to qualify for SEC registration from $25 million to $100 million. *See* Advisers Act Section 203A(a)(2) amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Final Rule; Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011).

5. In September 2012, the initial owner of Arete formed the company as a for profit corporation in Wyoming. On November 27, 2012, Arete made its initial registration filing with the Commission on Form ADV. In Part 1A, Items 1F and 2A of the Form ADV, Arete claimed its principal office and place of business was in Cheyenne, Wyoming, and based its registration with the Commission on its Wyoming location. Arete made the same representations about its principal office and place of business and basis for registration in its amendments to Form ADV filed on July 26, 2013, August 2, 2013, and October 2, 2013. Arete stopped conducting business in late 2013 and has not made any filings with the Commission since then.

6. No officer, partner, or manager of Arete directed, controlled, or coordinated the activities of Arete from Wyoming and Arete did not conduct any investment advisory business out of Wyoming. Arete's operations were conducted out of California. Because Arete did not have a principal office or place of business in Wyoming and had no other basis for Commission registration, it was prohibited from registering with the Commission as an investment adviser.

7. Ridley prepared, filed, and signed the October 2, 2013, amendment to Arete's Form ADV as chief compliance officer. That filing had the same misstatements as prior filings with the Commission regarding Arete's principal office and principal place of business and its Wyoming location being the basis for Arete's eligibility to register with the Commission.

8. On February 28, 2013, the Securities Commissioner for the State of Colorado filed a complaint against Ridley, among others, for carrying out a scheme to defraud investors through the use of investments in a so-called "private equity fund." Ridley was charged with violating Section 11-51-301, C.R.S, for the offer or sale of unregistered securities; Section 11-51-401, C.R.S., for acting as an unlicensed sales representative; and Section 11-51-501(1), C.R.S., for securities fraud. On December 9, 2013, Ridley entered into a stipulation, on a neither admit nor deny basis, for an order of permanent injunction and other relief in connection with that case. On December 30, 2013, an order was entered granting the permanent injunction and other relief based on the alleged violations in the complaint.

9. Arete did not amend its Form ADV to disclose in Part 1A, Item 11 the complaint filed against Ridley, nor did it disclose in Part 2A, Item 9 the December 30, 2013 order entered against Ridley. Since October 2, 2013 Ridley was responsible for filing Arete's Forms ADV and any necessary amendments thereto.

Violations

10. As a result of the conduct described above, Ridley willfully[3] aided and abetted and caused Arete's violations of Section 203A of the Advisers Act by Arete improperly registering with the Commission based on its false representation that Arete's principal office and place of business was in Wyoming.

[3] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

11. As a result of the conduct described above, Ridley willfully violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein." Ridley filed Arete's October 2013 Form ADV falsely stating that Arete's principal office and place of business was in Wyoming.

12. As a result of the conduct described above, Ridley willfully aided and abetted and caused Arete's violations of Section 204(a) of the Advisers Act and Rules 204-1(a)(1) and (2) thereunder, which requires that investment advisers amend Forms ADV at least annually and more frequently if required by the instructions to Form ADV. The Form ADV instructions require that amendments to the Form ADV be filed promptly if information provided in response to Part 1A, Item 11 or Part 2A become materially inaccurate. Ridley failed to file any amendments to Arete's Forms ADV Part 1A disclosing the complaint filed against her by the Colorado Securities Commissioner, or any amendments to its Form ADV Part 2A disclosing the order entered against her by the Colorado district court.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 203A, 204(a), and 207 of the Advisers Act and Rules 204-1(a)(1) and (2) thereunder.

B. Respondent be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4019 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16373

In the Matter of MICHAEL R. DRILLING, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Michael R. Drilling ("Respondent" or "Drilling").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.1, III.2, and III.3 below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. From January 2010 through February 2014, Drilling, operating as Financial Advisory Partners LLC, was an unregistered investment adviser. Drilling, 47 years old, is presently on supervised release awaiting sentencing by the United District Court for the District of Minnesota.

2. On April 17, 2014, Drilling pled guilty to one count of securities fraud before the United States District Court for the District of Minnesota, in United States of America v. Michael Robert Drilling, (Cause No. 0:14-cr-00100-ADM). He is currently on supervised release awaiting sentencing.

3. The count of the criminal information to which Drilling pled guilty alleged, inter alia, that Drilling, in connection with the offer and sale of securities, by the use of means and instrumentalities of interstate commerce, directly and indirectly, employed a scheme and artifice to defraud, in violation of Sections 17(a) and 24 of the Securities Act of 1933 [15 U.S.C. §§ 77q(a) and 77x]. Specifically, the criminal information filed against Drilling alleged, inter alia, that, from January 2010 through February 2014, Drilling knowingly and intentionally devised and executed a scheme and artifice to defraud and to obtain money and property from investment advisory clients by means of material false and fraudulent pretenses, representations and promises. The criminal information also alleged that Drilling (i) diverted over $5.6 million in investment funds from thirteen investment advisory clients for his own use; (ii) falsely represented to these clients that he was placing their money in a larger pool of funds which he could manage more efficiently; and (iii) provided false information to his clients regarding their investment holdings, balances and performance.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Drilling's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Drilling be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Disapproved

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74202; File No. SR-OCC-2014-813)

February 4, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice, as Modified by Amendment No. 1, Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systemically Important Financial Market Utility

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Payment, Clearing and Settlement Supervision Act" or "Clearing Supervision Act")[1] and Rule 19b-4(n)(1)(i)[2] under the Securities Exchange Act of 1934 ("Act") notice is hereby given that on December 29, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice as described in Items I and II below, which Items have been prepared by OCC.[3] On January 14, 2015, OCC filed Amendment No. 1 to the advance notice.[4] The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

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1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

3 In Items I and II below, OCC states that the purpose of this proposal is in part to facilitate compliance with the SEC Proposed Rules (as defined below) and address Principle 15 of the Principles for Financial Market Infrastructures ("PMFIs"). The Commission notes that the SEC Proposed Rules are pending. The Commission will evaluate the advance notice under the Clearing Supervision Act and the rules currently in force thereunder.

4 According to OCC, Amendment No. 1 to the SR-OCC-2014-813 ("Filing"): (i) updates OCC's plan for raising additional capital ("Capital Plan") in connection with negotiations between OCC and the options exchanges that own equity in OCC ("Stockholder Exchanges" or "stockholders") and that would contribute additional capital under the Capital Plan, (ii) corrects typographical

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is filed by OCC in order to set forth a proposed Capital Plan for raising additional capital that would support OCC's function as a systemically important financial market utility and facilitate OCC's compliance with new regulatory requirements applicable to systemically important financial market utilities that have been proposed by the Commission but have not yet been adopted.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A) and (B) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants or Others

Written comments on the advance notice were not and are not intended to be solicited with respect to the advance notice and none have been received.

(B) Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

The proposed change sets forth the Capital Plan under which the Stockholder Exchanges would make an additional capital contribution and commit to replenishment capital ("Replenishment Capital") in circumstances discussed below, and would receive, among other things, the right to receive dividends from OCC. In addition to the

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errors in the Filing, and (iii) updates the Term Sheet included as an exhibit to the Filing, which summarizes material features of the Capital Plan.

additional capital contribution and Replenishment Capital, the main features of the Capital Plan are: (i) a policy establishing OCC's fees at a level that would be sufficient to cover OCC's estimated operating expenses plus a "Business Risk Buffer" as described below ("Fee Policy"), (ii) the Refund Policy [sic], and (iii) a policy for calculating the amount of dividends to be paid to the options exchanges owning equity in OCC ("Dividend Policy"). The Capital Plan is proposed to be implemented on or about February 27, 2015, subject to all necessary regulatory approvals.[5]

PURPOSE OF THE PROPOSED CHANGE

The purpose of this proposed change is to implement the Capital Plan, which would significantly increase OCC's capital in connection with its increased responsibilities as a systemically important financial market utility, and which OCC believes would facilitate OCC's compliance with new regulatory requirements applicable to such systemically important financial market utilities that have been proposed by the Commission but have not yet been adopted.[6] For purposes of this filing, OCC has used the working assumption that the new requirements contained in the Commission's proposed amendments to Rule 17Ad-22 of the SEC Proposed Rules will be adopted substantially as proposed. The proposed change is intended to ensure OCC's ability to comply with Rule 17Ad-22, specifically paragraph (e)(15) thereof, when the SEC

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5 The material features of the Capital Plan are summarized in the Term Sheet that is included as Exhibit 3. Certain details of the Term Sheet may change as a result of further negotiations or changes in financial figures, but OCC does not anticipate any material changes to the Capital Plan. OCC intends to separately file a proposed rule change seeking approval of changes to its By-Laws, Certificate of Incorporation and relevant agreements, including its Stockholders Agreement, necessary to implement the Capital Plan.

6 *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29507 (May 22, 2014) ("SEC Proposed Rules").

Proposed Rules become effective. In addition, it is intended to address Principle 15 of the Principles for Financial Market Infrastructures published by the Bank for International Settlements and the International Organization of Securities Commissions, which provides, among other things, that a financial market utility should identify, monitor and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue to operate as a going concern. The proposal includes an infusion of substantial additional equity capital by the Stockholder Exchanges to be made prior to February 27, 2015, subject to regulatory approval, that when added to retained earnings accumulated by OCC in 2014 will significantly increase OCC's capital levels as compared to historical levels. Additionally, the proposed change includes the Replenishment Capital commitment, which would provide OCC access to additional equity contributed by the Stockholder Exchanges should OCC's equity fall close to or below the amount that OCC determines to be appropriate to support its business and manage business risk in compliance with Rule 17Ad-22, as discussed more fully below.

Background

OCC is a clearing agency registered with the Commission and is also a derivatives clearing organization ("DCO") regulated in its capacity as such by the Commodity Futures Trading Commission ("CFTC"). OCC is a Delaware business corporation and is owned equally by the Stockholder Exchanges, five national securities exchanges for which OCC provides clearing services.[7] In addition, OCC provides

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[7] The Stockholder Exchanges are: Chicago Board Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ OMX PHLX LLC; NYSE MKT LLC; and NYSE Arca, Inc.

clearing services for seven other national securities exchanges that trade options ("Non-Stockholder Exchanges"). In its capacity as a DCO, OCC also provides clearing services to four futures exchanges.

OCC has been designated systemically important by the Financial Stability Oversight Council pursuant to the Payment, Clearing and Settlement Supervision Act, and the Commission is OCC's "Supervisory Agency" under Section 803(8) of the Payment, Clearing and Settlement Supervision Act. OCC is therefore a "covered clearing agency" ("CCA") as defined in proposed amendments to the Commission's Rule 17Ad-22(a)(7) and would be required to comply with the provisions of proposed Rule 17Ad-22 applicable to CCA's, including paragraph (e)(15) thereof.[8]

Proposed Rule 17Ad-22(e)(15) provides:

> Each covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable: . . . Identify, monitor, and manage the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize, including by:
>
> (i) Determining the amount of liquid net assets funded by equity based upon its general business risk profile and the length of time required to achieve recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken;
>
> (ii) Holding liquid net assets funded by equity equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing

[8] *SEC Proposed Rules* at 32-33, FR 29507, 29515 (May 22, 2014).

agency, as contemplated by the plans established under paragraph (e)(3)(ii) of this section, and which:

(A) shall be in addition to resources held to cover participant defaults or other risks covered under the credit risk standard in paragraph (b)(3) or paragraph (e)(4)(i)-(iii) of this section, as applicable, and the liquidity risk standard in paragraph (e)(7)(i) and (ii) of this section; and

(B) Shall be of high quality and sufficiently liquid to allow the covered clearing agency to meet its current and projected operating expenses under a range of scenarios, including adverse market conditions; and

(iii) Maintaining a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under paragraph (e)(15)(ii) of this section.[9]

Over the last nine months, OCC has devoted substantial efforts to: 1) develop a 5-year forward looking model of expenses; 2) quantify maximum recovery and wind-down costs under OCC's Recovery and Wind-Down Plan; 3) assess and quantify OCC's operational and business risks; 4) model projected capital accumulation taking into account varying assumptions concerning business conditions, fee levels, buffer margin levels and refunds; and 5) develop an effective mechanism that provides OCC access to replenishment capital in the event of losses that could cause OCC to be non-compliant with the SEC Proposed Rules. Incorporating the results of those efforts, the proposed change is intended to provide OCC with the means to increase its stockholder equity and, in particular, to obtain timely compliance with Rule 17Ad-22(e)(15)[10] as proposed by the

9 *SEC Proposed Rules* at 417-418, FR 29507, 29616 (May 22, 2014).

10 *SEC Proposed Rules* at 222-223, FR 29507, 29547-29548 (May 22, 2014).

Commission. A more detailed discussion of the manner in which the proposed change would allow OCC to comply with Rule 17Ad-22(e)(15) appears below.

OCC's Projected Capital Requirement

Using the methods described in detail below, OCC will annually determine a "Target Capital Requirement" consisting of (i) a "Baseline Capital Requirement" equal to the greatest of (x) six months operating expenses for the following year, (y) the maximum cost of the recovery scenario from OCC's Recovery and Wind-Down Plan, and (z) the cost to OCC of winding down operations as set forth in the Recovery and Wind-Down Plan, plus (ii) a "Target Capital Buffer" linked to plausible loss scenarios from operational risk, business risk and pension risk. OCC has determined that its currently appropriate "Target Capital Requirement" is $247 million, reflecting a Baseline Capital Requirement of $117 million, which is equal to six months of projected operating expenses, plus a Target Capital Buffer of $130 million. This Target Capital Buffer would provide a significant capital cushion to offset potential business losses.

As of December 31, 2013, OCC had total shareholders' equity of approximately $25 million,[11] meaning that OCC proposes to add additional capital of $222 million to meet its 2015 Target Capital Requirement. In addition, OCC would be obligated under paragraph (e)(15)(iii)[12] of proposed Rule 17Ad-22 to maintain "a viable plan" for raising additional equity should its equity fall close to or below the amount required under

11 *See* OCC 2013 Annual Report, Financial Statements, Statements of Financial Condition, available on OCC's website, http://optionsclearing.com/components/docs/about/annual-reports/occ_2013_annual_report.pdf.

12 *SEC Proposed Rules* at 418, FR 29507, 29616 (May 22, 2014).

paragraph (e)(15)(ii) of the Rule[13]; i.e., the Baseline Capital Requirement. OCC has determined that its viable plan for Replenishment Capital should provide for a "Replenishment Capital Amount" which would give OCC access to additional capital as needed up to a maximum of the Baseline Capital Requirement, which is currently $117 million.[14] Therefore, OCC's proposed Capital Plan would provide OCC in 2015 with ready access to approximately $364 million in equity capital as follows:

Baseline Capital Requirement	$117,000,000
Target Capital Buffer	$130,000,000
Target Capital Requirement	$247,000,000
Replenishment Capital Amount	$117,000,000
Total OCC Capital Resources	$364,000,000

Procedures Followed in Order to Determine Capital Requirement

Various measures were used in determining the appropriate level of capital necessary to comply with the SEC Proposed Rules. An outside consultant conducted a "bottom-up" analysis of OCC's risks and quantified the appropriate amount of capital to be held against each risk. The analysis was comprehensive across risk types, including credit, market pension, operation, and business risk. Based on internal operational risk scenarios and loss modeling at or above the 99% confidence level, OCC's operational risk was quantified at $226 million and pension risk at $21 million, resulting in the total Target Capital Requirement of $247 million. Business risk was addressed by taking into consideration that OCC has the ability to fully offset potential revenue volatility and

13 *SEC Proposed Rules* at 417, FR 29507, 29616 (May 22, 2014).

14 The obligation to provide Replenishment Capital will be capped at $200 million, which OCC projects will sufficiently account for increases in its capital requirements for the foreseeable future.

manage business risk to zero by adjusting the levels at which fees and refunds are set and by adopting a "Business Risk Buffer" of 25% when setting fees. Other risks, such as counterparty risk and on-balance sheet credit and market risk, were considered to be immaterial for purposes of requiring additional capital based on means available to OCC to address those risks that did not require use of OCC's capital. As discussed in more detail below in the context of OCC's Fee Policy, the Business Risk Buffer of 25% is achieved by setting OCC's fees at a level intended to achieve target annual revenue that will result in a 25% buffer for the year after paying all operating expenses.

An analysis was also performed to identify OCC's risk in terms of the regulatory requirements set forth in proposed Rule 17Ad-22(e)(15)(ii). This analysis estimated that, currently, OCC's maximum recovery costs would be $100 million and projected wind-down costs would be $73 million. OCC's projected expenses for 2015 are $234 million, so that six months projected expenses are $234 million/2 = $117 million. The greater of recovery or wind-down costs and six months of operating expenses is therefore $117 million, and OCC's Baseline Capital Requirement (minimum regulatory requirement) is therefore $117 million. OCC then computed the appropriate amount of a Target Capital Buffer from operational risk, business risk, and pension risk. This resulted in a determination that the current Target Capital Buffer should be $130 million. Thus, the Target Capital Requirement is $117 million + $130 million = $247 million.

Overview of, and Basis for, OCC's Proposal to Acquire Additional Equity Capital

In order to meet its Target Capital Requirement, and after consideration of available alternatives, OCC's Board approved a proposal from OCC's Stockholder

Exchanges under which OCC would meet its Target Capital Requirement of $247 million in early 2015 as follows:

Shareholders' Equity as of 1/1/2014	$ 25,000,000
Shareholders Equity Accumulated Through Retained Earnings[15]	$ 72,000,000
Additional Contribution from Stockholder Exchanges	$150,000,000
Target Capital Requirement	$247,000,000
Replenishment Capital Amount	$117,000,000
Total OCC Capital Resources	$364,000,000

The additional contribution of the Stockholder Exchanges would be made in respect of their Class B Common Stock on a *pro rata* basis. The Stockholder Exchanges will also commit to provide additional equity capital up to the Replenishment Capital Amount, which is currently $117 million, in the event Replenishment Capital is needed. While the Replenishment Capital Amount will increase as the Baseline Capital Requirement increases, it would be capped at a total of $200 million that could be outstanding at any point in time. OCC has estimated that the Baseline Capital Requirement would not exceed this amount before 2022. When the limit is being approached, OCC would revise the Capital Plan as needed to address future needs. In consideration for their capital contributions and replenishment commitments, the Stockholder Exchanges will receive dividends as described in the Dividend Policy discussed below for so long as they remain stockholders and maintain their contributed

15 *See* Proposed Rule Change by The Options Clearing Corporation to Reflect the Elimination of a Discount to the Clearing Fee Schedule, Securities Exchange Act Release No. 71769 (March 21, 2014), 79 FR 17214 (March 27, 2014) (SR-OCC-2014-05) (Filing for immediate effectiveness of a proposed rule change with the Commission to reinstate OCC's permanent clearing fee schedule for securities options and securities futures that became effective May 1, 2007 ("Permanent Schedule Reinstatement Filing")). The $72 million is after giving effect to the approximately $40 million refund referred to below.

capital and commitment to replenish capital up to the Replenishment Capital Amount, subject to the $200 million cap.

Fee, Refund, and Dividend Policies

Upon reaching the Target Capital Requirement, the Capital Plan requires OCC to set its fees at a level that utilizes a Business Risk Buffer of 25%. The purpose of this Business Risk Buffer is to ensure that OCC accumulates sufficient capital to cover unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements. Furthermore, the Capital Plan requires OCC to maintain Fee, Refund, and Dividend Policies, described in more detail below, which are designed to ensure that OCC's shareholders' equity remains well above the Baseline Capital Requirement. The required Business Risk Buffer of 25% is below OCC's 10-year historical pre-refund average buffer of 31%. The target will remain 25% so long as OCC's shareholders' equity remains above the Target Capital Requirement amount. The reduction in buffer margin from OCC's 10-year average of 31% to 25% reflects OCC's commitment to operating as an industry utility and ensuring that market participants benefit as much as possible from OCC's operational efficiencies in the future. This reduction will permit OCC to charge lower fees to market participants rather than maximizing refunds to clearing members and dividend distributions to Stockholder Exchanges. OCC will review its fee schedule on a quarterly basis to manage revenue as closely to this target as possible.[16] For example, if the Business Risk Buffer is materially above 25% after the first quarter of a particular year, OCC may decrease fees for the

16 If OCC's fee schedule needs to be changed in order to achieve the 25% Business Risk Buffer, OCC would file a proposed rule change seeking approval of the revised fee schedule.

remainder of the year, and conversely if the Business Risk Buffer is materially below 25% at this time, OCC may increase fees for the remainder of the year.

The Capital Plan would allow OCC to refund approximately $40 million from 2014 fees to clearing members in 2015 and to reduce fees in an amount to be determined by the Board, effective in the second quarter 2015. OCC will announce new fee levels early in 2015 and will make them effective following notification to clearing members and any necessary approval by the Commission. OCC will endeavor to provide clearing members with no less than 60-day advance notice of the effectiveness of changes to fee levels, particularly those that result in increases to fee levels. No dividends will be declared until December 2015 and no dividends will be paid until 2016.

Changes to the Fee, Refund or Dividend Policies will require the affirmative vote of two-thirds of the directors then in office and approval of the holders of all of OCC's outstanding Class B Common Stock. The formulas for determining the amount of refunds and dividends under the Refund and Dividend Policies, respectively, which are described in more detail below, are based on, among other things, the current tax treatment of refunds as a deductible expense. The Refund and Dividend Policies would each provide that in the event that refunds payable under the Refund Policy are not tax deductible, the policies would be amended to restore the relative economic benefits between the recipients of the refunds and the Stockholder Exchanges.[17]

Fee Policy

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17 This sentence and the previous sentence relate to a provision added to the Refund and Dividend Policies and designed to preserve the original business understanding between OCC and the Stockholder Exchanges even if refunds are no longer deductible.

Under the Fee Policy, in setting fees each year, OCC would calculate an annual revenue target based on a forward twelve months expense forecast divided by the difference between one and the Business Risk Buffer of 25%, *i.e.*, OCC will divide the expense forecast by .75. Establishing a Business Risk Buffer at 25% would allow OCC to manage the risk that fees would generate less revenue than expected due to lower-than-expected trading volume or other factors, or that expenses would be higher than projected. The Fee Policy also will include provisions from existing Article IX, Section 9 of the By-Laws to the effect that the fee schedule may also include additional amounts necessary to (i) maintain such reserves as are deemed reasonably necessary by the Board to provide facilities for the conduct of OCC's business and to conduct development and capital planning activities in connection with OCC's services to the options exchanges, Clearing Members and the general public, and (ii) accumulate such additional surplus as the Board may deem advisable to permit OCC to meet its obligations to Clearing Members and the general public; however, these provisions will be used only in extraordinary circumstances and to the extent that the Board has determined that the required amount of such additional reserves or additional surplus will exceed the full amount that will be accumulated through the Business Risk Buffer (prior to payment of refunds or dividends) so OCC's fees will ordinarily be based on its projected operating expenses and the Business Risk Buffer of 25%.

Under the proposed change, OCC would calculate its annual revenue target as follows:

Annual Revenue Target = Forward 12 Months Expense Forecast/(1-.25).

Because OCC's clearing fee schedules typically reflect different rates for different categories of transactions, fee projections would include projections as to relative volume in each such category. The clearing fee schedule would therefore be set to achieve a blended or average rate per contract sufficient, when multiplied by total projected contract volume, to achieve the Annual Revenue Target. Under extraordinary circumstances, OCC would then add any amount determined to be necessary for additional reserves or surplus and divide the resulting number by the projected contract volume to determine the applicable average fee per cleared contract needed to achieve the additional amounts required. Consistent with past practice, OCC would notify its clearing members of the fees it determines it would apply for any particular period by describing the change in an information memorandum distributed to all clearing members. Consistent with past practice, OCC would also notify regulators of the fees it determines it would apply for any particular period by filing an amendment to its Schedule of Fees as a proposed rule change for immediate effectiveness under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(2) thereunder.[18]

Refund Policy

Under the Refund Policy, except at a time when Replenishment Capital is outstanding as described below, OCC would declare a refund to Clearing Members in December of each year, beginning in 2015, in an amount equal to 50% of the excess, if any, of (i) pre-tax income for the year prior to the refund over (ii) the sum of (x) the

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18 *See, e.g.*, the Permanent Schedule Reinstatement Filing, *supra* n. 14 [sic]; Proposed Rule Change by The Options Clearing Corporation to Reduce the Per Contract Clearing Fee for Routing Trades Executed in Accordance with the Options Order Protection and Locked/Crossed Market Plan to $.01 per Contract, Securities Exchange Act Release No. 68025 (October 12, 2012), 77 FR 63398 (October 16, 2012) (SR-OCC-2012-18).

amount of pre-tax income after the refund necessary to produce after-tax income sufficient to maintain shareholders' equity at the Target Capital Requirement for the following year plus (y) the amount of pre-tax income after the refund necessary to fund any additional reserves or additional surplus not already included in the Target Capital Requirement. Such refund will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and applicable federal laws and regulations. OCC would not be able to pay a refund on a particular date unless dividends were paid on the same date. If Replenishment Capital has been contributed and remains outstanding, OCC would not pay refunds until such time as the Target Capital Requirement is restored through the accumulation of retained earnings. Refunds in accordance with the Refund Policy would resume once the Target Capital Requirement is restored and all Replenishment Capital is repaid in full, provided that the restoration of the Target Capital Requirement and the repayment of Replenishment Capital occurred within 24 months of the issuance date of the Replenishment Capital. If, within 24 months of the issuance date of any Replenishment Capital, such Replenishment Capital has not been repaid in full or shareholders' equity has not been restored to the Target Capital Requirement, OCC would no longer pay refunds to clearing members, even if the Target Capital Requirement is restored and all Replenishment Capital is repaid at a later date.

Dividend Policy

The Dividend Policy would provide that, except at a time when Replenishment Capital is outstanding as described below, OCC would declare a dividend on its Class B

Common Stock in December of each year in an aggregate amount equal to the excess, if any, of (i) after-tax income for the year, after application of the Refund Policy (unless the Refund Policy has been eliminated, in which case the refunds shall be deemed to be $0) over (ii) the sum of (A) the amount required to be retained in order to maintain total shareholders' equity at the Target Capital Requirement for the following year, plus (B) the amount of any additional reserves or additional surplus not already included in the Target Capital Requirement. Such dividend will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and applicable federal laws and regulations. If Replenishment Capital has been contributed and remains outstanding, OCC would not pay dividends until such time as the Target Capital Requirement is restored.

OCC's Status as an Industry Utility

OCC has always been operated on an "industry utility" model. The Stockholder Exchanges have heretofore contributed only minimal capital to OCC.[19] OCC's By-Laws currently require that OCC set its clearing fees at a level that is designed to cover operating expenses and to maintain such reserves and accumulate such additional capital as are deemed reasonably necessary for OCC to meet its obligations to its clearing members and the public. Clearing fees that are collected in excess of these amounts are

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19 OCC's common stock and paid in capital total $2,659,999. See OCC 2013 Annual Report, Financial Statements, Statements of Financial Condition, available on OCC's website, http://optionsclearing.com/components/docs/about/annual-reports/occ_2013_annual_report.pdf.

refunded annually on a *pro rata* basis to the clearing members who paid them. Under this model, OCC has never paid dividends to the Stockholder Exchanges. However, OCC has paid significant refunds to clearing members each year. OCC is aware that a portion -- possibly a significant portion -- of those refunds are not passed through by the clearing members to their end user customers. Accordingly, by adopting an approach that includes paying dividends to the Stockholder Exchanges that have invested a significant amount of additional capital ($150 million) but that also reduces the historical pre-refund average buffer of 31% by adopting a Business Risk Buffer of 25%, OCC believes that the proposed approach maintains, and perhaps better aligns with, an industry utility model.

Given the very large increase in capital that OCC has determined to be appropriate in order to assure compliance with regulatory requirements and meet the increased responsibilities imposed upon it as a systemically important financial market utility, OCC has determined that the best alternative available to it is to obtain a substantial further capital contribution from the Stockholder Exchanges. This cannot be accomplished without modification of the past practice of not providing dividends to stockholders. Accordingly, it would be necessary for OCC to establish the new Fee Policy, Refund Policy, and Dividend Policy. Because of the Business Risk Buffer being set at 25%, the combination of the Fee, Refund and Dividend Policies will effectively cap the dividends to be paid to the Stockholder Exchanges at a level that the Board (with the advice of outside financial experts) has determined results in a reasonable rate of return on contributed capital, particularly in comparison to the implied cost of capital to the clearing members and their customers of instead pursuing an approach which required the accumulation of retained earnings through higher fees and no refunds for several years. OCC will continue to refund a significant percentage of excess clearing fees to clearing members, thereby benefiting both clearing members and their customers. The Capital Plan therefore effectively preserves OCC's industry utility model of providing its services in an efficient manner, but enhances the benefits to the end user customers by charging lower initial fees as a result of the decrease in the buffer margin from OCC's 10-year average of 31% to 25%.

Clearing members and customers will benefit from the proposed Capital Plan because it will allow OCC to continue to provide clearing services at low cost. As noted, OCC expects that this capital infusion from stockholders will enable OCC to provide a significant refund of 2014 fees. OCC further expects that its current clearing fees will be reduced significantly based on the Business Risk Buffer of 25% beginning in 2015 with refunds restored, and that these lower fees will continue for the foreseeable future.

Stockholder Exchanges will benefit from the dividend return they receive and, perhaps more importantly, they will be assured that OCC will be in a position to provide clearing services for their markets on an on-going basis within the same basic structure that has served these markets well since their inception and without the need to radically change the structure to address potential demands of outside equity investors. Non-Stockholder Exchanges will also benefit by continuing to receive OCC's clearing services for their products on the same basis as they presently do.[20]

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20 Non-Stockholder Exchanges contribute capital by purchasing a promissory note in the principal amount of $1,000,000. *See* Section 2 of Article VIIB of OCC's By-Laws. The required Capital Contribution of Non-Stockholder exchanges will not change under the Capital Plan.

OCC also believes that the Capital Plan will better align the interests of Stockholder Exchanges and clearing members with respect to expenses, since changes to the level of operating expenses directly affect the Target Capital Requirement. In sum, OCC believes that the present proposal represents a fair and reasonable balancing of the interests of the Stockholder Exchanges, the other exchanges for which OCC provides clearing services, clearing members, customers, and the general public while providing an immediate infusion of capital and a structure within which OCC can meet its obligations to the public as a systemically important financial market utility, as well as the requirements under the SEC Proposed Rules.

Replenishment Capital Plan

OCC proposes to put in place a Replenishment Capital Plan whereby OCC's Stockholder Exchanges are obligated to provide on a *pro rata* basis a committed amount of Replenishment Capital should OCC's total shareholders' equity fall below the hard trigger (as defined below). The aggregate committed amount for all five Stockholder Exchanges in the form of Replenishment Capital that could be outstanding at any time would be capped at the excess of (i) the lesser of (A) the Baseline Capital Requirement, which is currently $117 million, at the time of the relevant funding or (B) $200 million, over (ii) amounts of outstanding Replenishment Capital ("Cap"). The $200 million figure in the Cap formula takes into account projected growth in the Baseline Capital Requirement for the foreseeable future. The commitment to provide Replenishment Capital would not be limited by time, but only by the Cap. Replenishment Capital could be called in whole or in part after the occurrence of a "hard trigger" event described below, subject to the Cap. If the Baseline Capital Requirement approaches or exceeds

$200 million, the Board can consider, as part of its annual review of the Replenishment Capital Plan that is required by the SEC Proposed Rules, alternative arrangements to obtain replenishment capital in excess of the $200 million committed under the Replenishment Capital Plan. In addition, the Refund Policy and the Dividend Policy will provide that, in the absence of obtaining any such alternative arrangements, the amount of the difference will be subtracted from amounts that would otherwise be available for the payment of refunds and dividends.

Replenishment Capital contributed to OCC under the Replenishment Capital Plan would take the form of a new class of common stock ("Class C Common Stock") of OCC to be issued to the Stockholder Exchanges solely in exchange for Replenishment Capital contributions.

The Replenishment Capital Plan would be part of OCC's overall Capital Plan. In implementing the Replenishment Capital Plan, OCC's management would monitor OCC's levels of shareholders' equity to identify certain triggers, or reduced capital levels, that might require action. OCC has identified two key triggers – a soft trigger and a hard trigger – and proposes that OCC take certain steps upon the occurrence of either as described in more detail below.

The "soft trigger" for re-evaluating OCC's capital would occur if OCC's shareholders' equity falls below the sum of (i) the Baseline Capital Requirement and (ii) 75% of the Target Capital Buffer. The soft trigger would be a warning sign that OCC's capital had fallen to a level that required attention and responsive action to prevent it from falling to unacceptable levels. Upon a breach of the soft trigger, OCC's senior management and the Board would review alternatives to increasing capital, and take appropriate action as necessary, including increasing fees or decreasing expenses, to restore shareholders' equity to the Target Capital Requirement.

The "hard trigger" for making a mandatory Replenishment Capital call would occur if shareholders' equity falls below 125% of the Baseline Capital Requirement ("Hard Trigger Threshold"). The hard trigger would be a sign that corrective action more significant and with a more immediate impact than increasing fees or decreasing expenses should be taken to increase OCC's capital, either as part of a recovery plan or a wind-down plan for OCC's business. OCC's shareholders' equity would have to fall more than $100,000,000 below the fully funded capital amount described above in order for the Hard Trigger Threshold to be breached. As a result, OCC views the breach of the Hard Trigger Threshold as unlikely and occurring only as a result of a significant, unexpected event. Upon a breach of the Hard Trigger Threshold, the Board would have to determine whether to attempt a recovery, a wind-down of OCC's operations or a sale or similar transaction, subject in each case to any necessary stockholder consent.[21] If the Board decides to wind-down OCC's operations, OCC would access the Replenishment Capital in an amount sufficient to fund the wind-down, as such amount would be determined by the Board, and subject to the Cap described above. If the Board decides to attempt a recovery of OCC's capital and business, OCC would access the Replenishment Capital in an amount sufficient to return shareholders' equity to an amount equal to $20 million above the Hard Trigger Threshold, subject to the Cap described above.

21 The requirement for stockholder consent would arise under OCC's Restated Certificate of Incorporation, which would provide that any decision to attempt a recovery would require separate approval by the stockholders, while a decision to wind-down would require separate approval by the stockholders.

While Replenishment Capital is outstanding, no refunds or dividends would be paid and, if any Replenishment Capital remains outstanding for more than 24 months or the Target Capital Requirement is not restored during that period, changes would be made to how OCC calculates refunds and dividends, as described in more detail above under Refund Policy and Dividend Policy. In addition, while Replenishment Capital is outstanding, OCC would first utilize the entire amount of Available Funds to repurchase, on a *pro rata* basis from each Stockholder, to the extent permitted by applicable Delaware and federal law and regulations, outstanding shares of Class C Common Stock as soon as practicable after completion of the financial statements following the end of each calendar quarter at a price equal to the original amount paid for such shares, plus an additional "gross up" amount to compensate the holders of the Class C Common Stock for taxes on dividend income (if any) that they may have to recognize as a result of such repurchase.[22] For this purpose, "Available Funds" would equal, as of the end of any calendar quarter, the excess, if any, of (x) shareholders' equity over (y) the Minimum Replenishment Level. The "Minimum Replenishment Level" would mean $20 million above the Hard Trigger Threshold, so that OCC's shareholders' equity would remain at or above the Minimum Replenishment Level after giving effect to the repurchase.

Compliance with Rule 17Ad-22(e)(15)

The capital base described above will permit OCC to hold at all times cash and other assets of high quality and sufficiently liquid to allow OCC to meet its current and projected operating expenses under a range of scenarios, including adverse market

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22 Based on current federal rates, if the full amount of the payment is classified as a dividend and the recipient is entitled to a dividends received deduction, this gross up is estimated to be approximately 12% of the payment.

conditions. In compliance with proposed Rule 17Ad-22(e)(15),[23] OCC proposes at all times to hold liquid net assets funded by equity sufficient to cover potential general business losses so that OCC can continue operations and services as a going concern if those losses materialize, which assets will always be greater than either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the Board to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the plans established under paragraph (e)(3)(ii)[24] of the proposed Rule. These assets will be held in addition to resources held to cover participant defaults or other risks covered under the credit risk standard in paragraph (b)(3) or paragraph (e)(4)(i)-(iii)[25] of proposed Rule 17Ad-22, as applicable, and the liquidity risk standard in paragraph (e)(7)(i) and (ii)[26] of that proposed rule.

OCC believes that the Replenishment Capital Plan described above together with OCC's ability to set fees and retain earnings as described above will assure OCC's ability to remain at all times in compliance with the requirements of proposed Rule 17Ad-22(e)(15),[27] including providing the basis for maintaining a viable capital plan for replenishment capital in compliance with subparagraph (e)(15)(iii)[28] of the rule.

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23 *SEC Proposed Rules* at 417, FR 29507, 29616 (May 22, 2014).

24 *SEC Proposed Rules* at 408, FR 29507, 29613 (May 22, 2014).

25 *SEC Proposed Rules* at 408-409, FR 29507, 29614 (May 22, 2014).

26 *SEC Proposed Rules* at 412-413, FR 29507, 29615 (May 22, 2014).

27 *SEC Proposed Rules* at 417-418, FR 29507, 29616 (May 22, 2014).

28 *SEC Proposed Rules* at 418, FR 29507, 29616 (May 22, 2014).

STATUTORY BASIS FOR THE ADVANCE NOTICE

OCC believes that the proposed change is consistent with Section 805(b) of the Clearing Supervision Act[29] because the proposed change will reduce systemic risk.[30] OCC believes that implementation of the Capital Plan will provide OCC with an immediate injection of capital and future committed capital to help ensure that it can continue to provide its clearing services if it suffers business losses as a result of a decline in revenues or otherwise. OCC believes that the proposed change, as described above, is necessary for it to meet the capital requirements under the proposed amendments[31] to Rule 17Ad-22. For these same reasons, the proposed change will reduce systemic risk because it will promote confidence that OCC will be able continue operating even if it suffers business losses.

ANTICIPATED EFFECT ON AND MANAGEMENT OF RISK

OCC believes that the proposed change will reduce OCC's overall level of risk because it will help ensure that OCC will be able to continue to provide its clearing services even if it suffers significant business losses. As described above, the proposed change includes a significant infusion of permanent capital. In addition, each feature of the Capital Plan would help ensure that OCC's capital is sufficient on an ongoing basis to allow it to withstand business losses, whether resulting from a decline in revenue or otherwise. The Fee Policy would provide for the Business Risk Buffer, which is designed to ensure that fees will be sufficient to cover projected operating expenses. The

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29 12 U.S.C. 5464(b).

30 12 U.S.C. 5464(b)(3).

31 *See generally* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29507 (May 22, 2014).

Refund Policy and Dividend Policy both would allow for refunds of fees or payment of dividends, respectively, only to the extent that they would allow OCC to maintain shareholders' equity at the Target Capital Requirement. They would also prohibit refunds and dividends when Class C Common Stock is outstanding under the Replenishment Capital Plan and OCC was in the process of rebuilding its capital base. In addition, the Replenishment Capital Plan would establish a mandatory mechanism for the contribution of additional capital by OCC's stockholder exchanges in the event capital fell below desired levels. Together these features of the Capital Plan help ensure that OCC maintains levels of capital sufficient to allow it to absorb substantial business losses and meet its increased responsibilities imposed upon it as a systemically important financial market utility, which in turn helps reduce OCC's overall level of risk.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The designated clearing agency may implement this change if it has not received an objection to the proposed change within 60 days of the later of (i) the date that the Commission receives the notice of proposed change, or (ii) the date the Commission receives any further information it requests for consideration of the notice. The designated clearing agency shall not implement this change if the Commission has an objection.

The Commission may, during the 60-day review period, extend the review period for an additional 60 days for proposed changes that raise novel or complex issues, subject to the Commission providing the designated clearing agency with prompt written notice of the extension. The designated clearing agency may implement a change in less than 60 days from the date of receipt of the notice of proposed change by the Commission, or the date the Commission receives any further information it requested, if the Commission notifies the designated clearing agency in writing that it does not object to the proposed change and authorizes the designated clearing agency to implement the change on an earlier date, subject to any conditions imposed by the Commission.

The designated clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[32]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2014-813 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-OCC-2014-813. This file number should be included on the subject line if e-mail is used. To help the Commission process

32 *See* note 5, *supra*.

and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's website http://www.optionsclearing.com/about/publications/bylaws.jsp. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2014-813 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

By the Commission.

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9721 / February 4, 2015

Securities Exchange Act of 1934
Release No. 74203 / February 4, 2015

ORDER APPROVING PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD BUDGET AND ANNUAL ACCOUNTING SUPPORT FEE FOR CALENDAR YEAR 2015

The Sarbanes-Oxley Act of 2002, as amended (the "Sarbanes-Oxley Act"),[1] established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. The PCAOB is subject to the comprehensive oversight of the Securities and Exchange Commission (the "Commission").

Section 109 of the Sarbanes-Oxley Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Under Section 109(f) of the Sarbanes-Oxley Act, the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. The PCAOB's annual budget and accounting support fee are subject to approval by the Commission.

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[1] 15 U.S.C. 7201 et seq.

Section 982 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[2] amended the Sarbanes-Oxley Act to provide the PCAOB with explicit authority to oversee auditors of broker-dealers registered with the Commission. In addition, the PCAOB must allocate the annual accounting support fee among issuers and among brokers and dealers.

Section 109(b) of the Sarbanes-Oxley Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Commission. Rule 190 of Regulation P facilitates the Commission's review and approval of PCAOB budgets and annual accounting support fees.[3] This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, and a list of definitions that apply to the rule and to general discussions of PCAOB budget matters.

In accordance with the budget rule, in March 2014 the PCAOB provided the Commission with a narrative description of its program issues and outlook for the 2015 budget year. In response, the Commission provided the PCAOB with economic assumptions and budgetary guidance for the 2015 budget year. The PCAOB subsequently delivered a preliminary budget and budget justification to the Commission. Staff from the Commission's Offices of the Chief

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2 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3 17 CFR 202.190.

Accountant and Financial Management dedicated a substantial amount of time to the review and analysis of the PCAOB's programs, projects and budget estimates; reviewed the PCAOB's estimates of 2014 actual spending; and attended several meetings with management and staff of the PCAOB to further develop its understanding of the PCAOB's budget and operations. During the course of this review, Commission staff relied upon representations and supporting documentation from the PCAOB. Based on this review, the Commission issued a "pass back" letter to the PCAOB. On November 25, 2014, the PCAOB approved its 2015 budget during an open meeting, and subsequently submitted that budget to the Commission for approval.

After considering the above, the Commission did not identify any proposed disbursements in the 2015 budget adopted by the PCAOB that are not properly recoverable through the annual accounting support fee, and the Commission believes that the aggregate proposed 2015 annual accounting support fee does not exceed the PCAOB's aggregate recoverable budget expenses for 2015. The Commission also acknowledges the PCAOB's updated strategic plan and encourages the PCAOB to continue keeping the Commission and its staff apprised of developments throughout the PCAOB's implementation of its near-term priority projects. The Commission looks forward to providing views to the PCAOB as future updates are made to the plan.

The Commission is aware that some of the projects on the PCAOB's standard setting agenda to update auditing and quality control standards have been slow to advance. The Commission also understands that the Board intends to undertake a review of performance and management of the standard setting agenda. The Commission directs the PCAOB during 2015 to provide timely updates to the Commission's staff on the Board's evaluation of all aspects of its standard setting process including performance and management of the process and the potential actions being considered by the Board for process improvements. The Commission also directs the PCAOB, upon its finalization of a process improvement plan for the standard setting agenda, to include in its quarterly reports to the Commission updates on the Board's assessment of the improvements in the performance and management of the standard setting agenda.

Similarly, as part of its review of the 2015 budget, the Commission notes that the Center for Economic Analysis ("Center"), established in 2014, requires continued Board oversight to align its activities with the PCAOB's mission. The Commission directs the PCAOB during 2015 to provide timely updates to the Commission's staff on the activities of the Center, including with respect to defining its role and aligning its activities with the Board's mission. The Commission also directs the PCAOB to include in its quarterly reports to the Commission, updates on the Board's assessment of the performance of the Center.

The Commission understands that in recent years the PCAOB has taken significant and productive steps to improve its information technology ("IT") program. These steps include IT staffing changes, implementing stronger IT governance structures, and strengthening Board oversight of its IT program. Based upon updates provided by the PCAOB, the Commission also understands that these efforts are ongoing; and directs the Board to continue to provide in its quarterly reports to the Commission detailed information about the state of the PCAOB's IT program, including planned, estimated, and actual costs for IT projects, and the level of involvement of consultants. These reports also should continue to include: (a) a discussion of the Board's assessment of the progress and implementation of the Board actions mentioned above; and (b) the quarterly IT report that is prepared by PCAOB staff and submitted to the Board.

The Commission also directs the PCAOB during 2015 to continue to include in its quarterly reports to the Commission information about the PCAOB's inspections program. Such information is to include: (a) statistics relative to the numbers and types of firms budgeted and expected to be inspected in 2015, including by location and by year the inspections are required to be conducted in accordance with the Sarbanes-Oxley Act and PCAOB rules; (b) information about the timing of the issuance of inspections reports for domestic and non-U.S. inspections; and (c) updates on the PCAOB's efforts to establish cooperative arrangements with respective non-U.S. authorities for inspections required in those countries.

The Commission understands that the Office of Management and Budget ("OMB") has determined the 2015 budget of the PCAOB to be sequestrable under the Budget Control Act of 2011.[4] Unless legislation occurs that avoids sequestration, we expect the PCAOB will have approximately $1 million in excess funds available from the 2014 sequestration for spending in 2015. As such, the PCAOB has reduced its accounting support fee for 2015 by approximately $1 million.

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[4] See "OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2015", Appendix page 17 of 17 at: http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/sequestration_order_report_march2014.pdf

The Commission has determined that the PCAOB's 2015 budget and annual accounting support fee are consistent with Section 109 of the Sarbanes-Oxley Act. Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Sarbanes-Oxley Act, that the PCAOB budget and annual accounting support fee for calendar year 2015 are approved.

By the Commission.

Brent J. Fields
Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74206 / February 4, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4018 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16372

In the Matter of **Douglas E. Hampton,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Douglas E. Hampton ("Hampton" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.1., III.2., III.3., III.4. and III.5. below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Hampton was a registered representative and investment adviser representative associated with First Allied Securities, Inc. and First Allied Advisory Services, Inc. First Allied Securities, Inc. is registered with the Commission as a broker-dealer and investment adviser, and is headquartered in San Diego, California. First Allied Advisory Services, Inc. is an investment adviser registered with the Commission, and is headquartered in Chesterfield, Missouri. Hampton is 40 years old and a resident of Canton, Ohio.

2. On August 13, 2013, Hampton pled guilty to conspiracy to commit federal program bribery, honest services wire fraud, and money laundering, in violation of Title 18 United States Code, Sections 371 before the United States District Court for the Southern District of Ohio, in United States v. Douglas E. Hampton, Case No. 2:13-CR-180.

3. The count of the criminal information to which Hampton pled guilty alleged, inter alia, that Hampton willfully became a member of a conspiracy to, among other things: solicit benefits or accept things of value, and gave things of value, with the intent to influence and be influenced in connection with securities transactions; knowingly participated in a scheme to defraud the public, through material misrepresentations, false statements, false pretenses, or concealment of fact, of its right to the honest services of a public official through bribery or kickbacks transmitted by means of wire communication in interstate commerce; and engaged in monetary transactions involving property from unlawful activity which he knew to be criminally derived.

4. On June 30, 2014, Hampton submitted, and the Financial Industry Regulatory Authority ("FINRA") accepted, a Letter of Acceptance, Waiver and Consent ("Consent") entitled In Re: Douglas Eric Hampton, CRD No. 2797816. The FINRA Consent barred Hampton, in all capacities, from associating with any FINRA member.

5. The FINRA Consent found that Hampton, in 2009 and 2010, paid approximately $520,000 to the Chief Financial Officer and Deputy Treasurer in the Office of the Treasurer of the State of Ohio, and two other persons, as a kickback for state brokerage business that the State directed to Hampton. The FINRA Consent also found that Hampton received over $3 million in commissions as a result of executing 360 securities trades on behalf of accounts belonging to the Office of the Treasurer of the State of Ohio. In connection with the FINRA Consent, Hampton consented to a finding, without admitting or denying the finding, that he willfully violated Section 10(b) of the Securities Exchange Act of 1934.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Hampton's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act, and Section 203(f) of the Advisers Act, that Respondent Hampton be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Hampton be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74207 / February 4, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4020 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16374

In the Matter of

DAVID R. WULF,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David R. Wulf ("Respondent" or "Wulf").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Wulf is 62 years old. From September 1999 through August 2013, Wulf was a registered representative with Moloney Securities Company, Inc. ("Moloney"), a broker-dealer and an investment adviser registered with the Commission. From February 1986 through August 2013, Wulf was also the Chief Executive Officer and an advisory representative of Wulf Bates & Murphy, Inc. ("Wulf Bates"), which was an investment adviser formerly registered with the Commission and the state of Missouri. Between June 1988 and August 1999, Wulf was a registered representative with Birchtree Financial Services, Inc., which was a broker-dealer previously registered with the Commission. Between February 1986 through June 1988, Wulf was a registered representative with American Capital Equities, Inc., which was a broker-dealer previously registered with the Commission. From December 1982 through February 1986, Wulf was a registered representative with Shearson Lehman Brothers Inc., which was a broker-dealer and investment adviser registered with the Commission. From April 1979 through December 1982, Wulf was a registered representative with Merrill Lynch, Pierce, Fenner & Smith Incorporated, which was a broker-dealer and investment adviser registered with the Commission. Finally, from January 1978 through November 1978, Wulf was a registered representative with Cigna Securities Inc., which was a broker-dealer registered with the Commission.

Thus, Wulf was associated with broker-dealers from June 1978 through August 2013. Likewise, Wulf was associated with investment advisers from February 1986 through August 2013. During the relevant time period, Wulf was a Missouri resident. On February 4, 2014, Wulf was committed to the custody of the US Bureau of Prisons in Terre Haute, Indiana.

B. RESPONDENT'S CRIMINAL CONVICTION

1. On August 22, 2013, a federal jury found Wulf guilty of eighteen counts of mail fraud, wire fraud, conspiracy to commit mail fraud affecting a financial institution, and conspiracy to commit wire fraud affecting a financial institution in violation of 18 U.S.C. §§ 1343, 1344, and 1349 before the United States District Court for the Eastern District of Missouri in U.S. v. Sutton et al., Case No. 4:09-cr-00509-JCH-6.

2. Wulf's conviction arose from his role as an investment adviser for National Prearranged Services, Inc. ("National Prearranged") through Wulf Bates. National Prearranged was in the business of selling contracts for prearranged funeral services. As National Prearranged's designated investment adviser, Wulf established trusts for these prearranged funeral services and maintained certain authority over the assets maintained in these trusts. The trustees were financial institutions and/or insurance companies.

3. The indictment against Wulf alleged, inter alia, that from approximately some time before 1992 and continuing until on or about May 14, 2008, Wulf conspired with his co-defendants and others regarding a scheme to defraud purchasers and trustees of National Prearranged's contracts and trusts. Moreover, Wulf was Chief Executive Officer of a registered investment adviser and associated with a dually registered broker-dealer and investment adviser

during the period of his misconduct. The underlying conduct that gave rise to Wulf's conviction includes, but is not limited to: (i) Wulf's failure to serve as an independent investment adviser for National Prearranged as mandated under state law and a binding consent decree; and (ii) Wulf enabling National Prearranged, and related entities and individuals, to assume the full power to administer, manage, control, remove, and/or use the assets in the preneed funeral trusts established by National Prearranged for their own benefit. Consequently, Wulf knowingly allowed nearly $600,000,000 of the money invested by purchasers to be misdirected for the use by National Prearranged, and related entities and individuals, for their own benefit. The indictment further alleged that Wulf and his co-defendants committed various federal offenses incidental to the misconduct described above including, but not limited to, conspiracy, mail fraud and wire fraud.

4. On November 18, 2013, the Court entered the judgment against Wulf based on the jury verdict. The Court sentenced Wulf to a prison term of 120 months followed by five years of supervised release. The Court further ordered Wulf to make restitution in the amount of $435,515,234.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act; and

D. Whether, pursuant to Section 15(b) of the Exchange Act, it is appropriate and in the public interest to bar Wulf from participating in any offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock; or inducing or attempting to induce the purchase or sale of any penny stock.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74208 / February 4, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3626 / February 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16375

In the Matter of **STEVEN NEIL, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Steven Neil ("Respondent" or "Neil") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any . . . accountant . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Neil, age 62, is and has been a certified public accountant licensed to practice in the State of California. He served as Chief Financial and Administrative Officer of Diamond Foods, Inc. ("Diamond"), from 2008 until he was placed on administrative leave in February 2012 and terminated from his position in November 2012. Neil's California license is currently inactive.

2. Diamond was, at all relevant times, a Delaware corporation with its principal place of business in San Francisco, California. Diamond was engaged in the business of producing and selling packaged foods, including walnuts. At all relevant times, Diamond's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ National Market.

3. On January 9, 2014, the Commission filed a complaint against Neil in SEC v. Steven Neil (N.D. Cal. Civil Action No. 14-cv-122). On February 2, 2015, the court entered an order permanently enjoining Neil, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1, 13b2-2, and 13a-14 thereunder, and Section 17(a) of the Securities Act of 1933. Neil was also ordered to pay a $125,000.00 civil money penalty, and prohibited for five years from serving as an officer or director of any entity having a class of securities registered with the Commission pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

4. According to the Commission's complaint, Neil directed an effort to fraudulently underreport money paid to walnut growers by delaying the recording of payments into later fiscal periods. By manipulating walnut costs, Diamond correspondingly reported higher net income and inflated earnings to exceed analysts' estimates for fiscal quarters in 2010 and 2011. After Diamond restated its financial results in November 2012 to reflect the true costs of acquiring walnuts, the company's stock price slid to just $17 per share from a high of $90 per share in 2011.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Neil's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Neil is suspended from appearing or practicing before the Commission as an accountant.

B. After five years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74216 / February 5, 2015

Admin. Proc. File No. 3-15837

In the Matter of the Application of

POSITRON CORPORATION

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF ASSOCIATION ACTION DENYING REQUEST TO PROCESS CORPORATE ACTIONS

Registered securities association found that it was in the public interest to decline to process documents related to an issuer's proposed reverse stock split and change of corporate domicile because the issuer's then chief executive officer and chairman was the subject of a settled regulatory action involving securities laws violations and a Commission administrative proceeding. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Peter Campitiello, of Kane Kessler, P.C., for Positron Corporation

Alan Lawhead, *Gary Dernelle*, and *Jante C. Turner*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: April 11, 2014
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Positron Corporation, an issuer of securities that are quoted on OTC Pink ("OTC Pink"), which is one of the tiers of OTC Market Group, Inc.'s OTC Link, appeals from FINRA's denial of Positron's request that FINRA process and announce Positron's reverse stock split and change of corporate domicile on FINRA's website.[1] FINRA found that Positron's request was deficient and that processing the announcement was not in the public interest because Patrick G. Rooney, who was then Positron's chief executive officer ("CEO") and chairman, had consented in federal district court to an injunction against future violations of the antifraud and disclosure provisions of the federal securities laws and was the subject of a then-pending Commission administrative proceeding to determine whether a securities industry suspension or bar against him was warranted.[2] Positron does not dispute Rooney's involvement in one settled and another then-pending regulatory action that alleged fraud and securities law violations, but argues that FINRA's determination was not in the public interest because, among other reasons, Positron's proposed reverse stock split and change in domicile would benefit its shareholders and Rooney's regulatory proceedings were unrelated to his role at Positron. Based on an independent review of the record, we find that FINRA properly exercised its discretion, relied on grounds that exist in fact, and denied Positron's request in accordance with FINRA Rules and the purposes of the Securities Exchange Act of 1934. We accordingly dismiss the appeal.

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1 OTC Link is an alternative trading system that allows broker-dealers to post and disseminate their quotations (prices) to the marketplace and to negotiate trades at agreed-upon prices. *See* http://www.otcmarkets.com/learn/market-structure. OTC Link also is an interdealer quotation system, as defined in Rule 15c2-11 under the Exchange Act. *See* 17 C.F.R. § 240.15c2-11. OTC Pink is one of three "tiered marketplaces" within OTC Link. OTC Pink "offers trading in a wide spectrum of equity securities through any broker. [OTC Pink] is for all types of companies that are there by reasons of default, distress or design." Within OTC Pink, issuers are "further sub-categorized by the levels of information that they provide." *See* http://www.otcmarkets.com/learn/otc-market-tiers. At the time it filed this appeal, Positron was sub-categorized as "caveat emptor," indicating that "there [was] a public interest concern associated with the company, security, or control person which may include but is not limited to a spam campaign, questionable stock promotion, investigation of fraudulent or other criminal activity, regulatory suspensions, or disruptive corporate actions." Positron is now sub-categorized as "current," which is "based on the level of disclosure and is not a designation of quality or investment risk. This category includes shell or development stage companies with little or no operations as well as companies without audited financial statements and as such should be considered extremely speculative by investors." *Id.* (all websites last visited on January 5, 2015).

2 FINRA also noted that the district court had retained jurisdiction to determine the appropriate sanctions for Rooney's violations.

I. Background

A. FINRA's processing of Company-Related Actions

FINRA processes requests to announce and publish certain corporate actions by issuers whose securities are traded on the over-the-counter markets ("OTC Securities"). FINRA publishes these announcements on its website in a document known as the "Daily List."[3] These actions, generally referred to as "Company-Related Actions,"[4] include any stock dividends, stock splits, or rights offerings, as well as "the issuance or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transactions, bankruptcy or liquidation."[5] If FINRA elects to process an issuer's Company-Related Action, it will, in turn, announce the action on the "Daily List," which "effectively announces the Company-Related Actions to the [OTC] market."[6]

In 2010, based on a "growing concern that FINRA's Company-Related Action processing services may potentially be used by certain parties to further fraudulent activities," FINRA proposed, and the Commission approved, FINRA Rule 6490, which authorizes FINRA to deny an issuer's request that FINRA announce a Company-Related Action on the Daily List under certain circumstances.[7] The Commission's 2010 Approval Order observed that, although "[h]istorically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial" given its indirect relationship with issuers, Rule 6490 makes clear "the scope of its regulatory authority and . . . codif[ies] procedures that it will apply when reviewing requests to process Company-Related Actions."[8] The Rule authorizes FINRA's Department of Operations

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3 *FINRA Regulatory Notice 10-38*, 2010 WL 3393960, at *1 (Aug. 27, 2010).

4 FINRA Rule 6490; *Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and to Implement Fees for Such Services*, Exchange Act Release No. 62434, 2010 WL 2641653, at *2 (July 1, 2010) (the "2010 Approval Order"); *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *3.

5 FINRA Rule 6490 refers to the first category of Company-Related Actions as "SEA Rule 10b-17 Actions" and the second category as "Other Company-Related Actions." Positron's proposed reverse stock split is an SEA Rule 10b-17 Action, and the proposed change of domicile from Texas to Delaware is an Other Company-Related Action. As FINRA explains, this is because, "when an issuer initiates a change in domicile, it typically does so by merging with a shell company formed in the new state of incorporation. As a result of the merger with the shell company, the issuer recalls the current stock certificates to reissue the certificates in accordance with the securities laws, rules, and regulations of the new state of incorporation."

6 2010 Approval Order, *supra* note 4, at *1 n.7; *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *1.

7 2010 Approval Order, *supra* note 4, at *2.

8 *Id.*

(the "Department") to conduct "in-depth reviews" of issuers' requests[9] and to deny a request upon finding that (1) the request is "deficient," based on a five-factor inquiry,[10] and (2) denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[11] An issuer may appeal any denial by the Department to a subcommittee of FINRA's Uniform Practice Code Committee ("UPCC Subcommittee") and that subcommittee's decision becomes FINRA's final decision in the matter.[12]

B. Positron's then-CEO Rooney and the regulatory actions against him.

1. Positron

Positron is a "nuclear medicine healthcare company specializing in the field of cardiac Positron Emission Tomography imaging," and manufactures and sells medical imaging devices and radiopharmaceuticals.[13] Until September 5, 2014, Rooney was Positron's CEO and

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9 *Id.*

10 FINRA Rule 6490(d)(3). Under FINRA Rule 6490(d)(3), a Company-Related Action is "deficient" if "one or more" of the following factors exists:

(1) FINRA staff reasonably believes the forms and all supporting documentation . . . may not be complete, accurate or with proper authority;

(2) the issuer is not current in its reporting requirements . . . to the SEC or other regulatory authority;

(3) FINRA has actual knowledge that . . . officers [or] directors . . . connected to the issuer or the [Company-Related Action requested] . . . are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations;

(4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA otherwise has actual knowledge indicating that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected with the issuer or [Company-Related Action] may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors; and/or

(5) there is significant uncertainty in the settlement and clearance process for the security.

11 *Id.*; 2010 Approval Order, *supra* note 4, at *6.

12 FINRA Rule 6490(e).

13 Positron Corporation, Form 10-K for the year ended December 31, 2013, at 2 ("Positron Form 10-K"). Positron is a Texas corporation with offices in Illinois, Indiana, Texas, and New York. Its common stock is registered with the Commission under Section 12(g) of the Securities Act, and at all times relevant to FINRA's action, was quoted on OTC Pink under the ticker

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Chairman of its Board of Directors.[14] At the time of FINRA's March 27, 2014 determination that is the subject of this appeal, Rooney received a salary from Positron, and he owned common stock and securities convertible into common stock equal to seven percent of Positron's outstanding common stock. Rooney is also the founder, sole owner, and managing partner of Solaris Management, a Delaware limited liability company with its principal place of business in Illinois. Solaris Management is the general partner and investment adviser to Solaris Opportunity Fund, LP ("Solaris Opportunity Fund"), a hedge fund based in Delaware, which at the time of FINRA's determination owned 40.9 percent of Positron's outstanding common stock.[15] Through his personal ownership and the interest held by Solaris Opportunity Fund, Rooney controlled 47.9 percent of Positron's outstanding common stock.

2. The District Court Proceeding

On November 18, 2011, the Commission filed a Complaint in federal district court against Rooney and Solaris Management.[16] The Commission alleged that Rooney and Solaris Management "used [Solaris Opportunity Fund] as Positron's piggy bank." According to the

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symbol "POSC." *See OTC Markets Group's Company Directory*, http://www.otcmarkets.com/stock/POSC/quote.

[14] On September 8, 2014, Positron filed a Form 8-K, which stated, "On September 5, 2014, Patrick G. Rooney tendered his resignation as our Chairman and Chief Executive Officer, effective immediately. Mr. Rooney will continue to pursue current and future strategic collaborations and expansion opportunities on behalf of the Company." On December 22, 2014, Positron filed another Form 8-K announcing that Yuri Perevalov had been appointed to the Company's Board of Directors. The December 22, 2014 Form 8-K states, "With the addition of Dr. Perevalov, the Company returns to a five member Board of Directors, filling the vacancy created by the resignation of Patrick Rooney on September 5, 2014. Dr. Perevalov's addition completes the transition of Mr. Rooney's exit. Accordingly, and as a result of the transfer of his ownership of the majority of his holdings of the Company's securities, Mr. Rooney has concluded his role with the Company as a control person, employee, consultant, or affiliate and the Company's [sic] presently has no plans to rehire Mr. Rooney in the future." We take official notice of the information about Positron provided in its Commission EDGAR filings. *See* 17 C.F.R. § 210.323 (permitting official notice of "any material fact which might be judicially noticed by a [U.S.] district court" or "any matter in the public official records of the Commission") and Fed. R. Evid. 201(b) (stating that "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned").

[15] Rooney formed Solaris Opportunity Fund in mid-2003. As of December 2008, which is the last time that the hedge fund issued financial statements, Solaris Opportunity Fund had thirty investors and reported assets of nearly $16.3 million. Solaris Opportunity Fund promotes the use of "long, short, and neutral positions to hedge risk, generate income, and maintain equity growth over the long term." Solaris Opportunity Fund trades in equities, options, and futures.

[16] *SEC v. Rooney*, No. 1-11-cv-08264 (N.D. Ill. Nov. 18, 2011).

Complaint, Rooney and Solaris Management used undocumented private transactions and no-interest loans totaling over $3.6 million to cause Solaris Opportunity Fund to be invested wholly in Positron without informing Solaris Opportunity Fund's investors. The Complaint alleged that this investment of the entire fund in Positron was in contradiction of the fund's offering documents, which stated that its strategy was to "trade and establish long, short, and neutral positions in equities and indices." The Commission alleged that Rooney and Solaris Management did not disclose these investments or Rooney's ties to Positron to Solaris Opportunity Fund's investors for over four years and that when Rooney finally made the required disclosures, he misrepresented that he became the Chairman of Positron only to protect Solaris Opportunity Fund's investment. While Rooney failed to disclose the investment, the Commission also asserted that, "[i]n 2008, the year in which the Solaris Fund made its largest investments in Positron, six investors put in over $5.7 million into the Fund." The Complaint alleged that Rooney's and Solaris Management's conduct left Solaris Opportunity Fund with "a concentrated, undiversified, and illiquid position in a cash-poor company with a history of net losses [Positron]."[17] The Complaint further alleged that Rooney's misconduct benefited Positron, charging that Rooney "caused [Solaris Opportunity Fund] to finance Positron when it had no other sources of funding." It also noted that Rooney "approved these transactions on behalf of Positron" and "selected an interest rate of 0% because it was best for Positron." Based on Rooney's dual roles with Positron and Solaris Opportunity Fund, the Commission alleged that Rooney "had a conflict of interest" and had "engaged in self-dealing in violation of [his] fiduciary obligations to the Solaris Fund."

On December 19, 2013, Rooney and Solaris Management consented to the entry of permanent injunctions against future violations of the antifraud and disclosure provisions of the federal securities laws (the "District Court Injunction").[18] The district court retained jurisdiction to adjudicate penalties, disgorgement, and a possible officer-and-director bar for Rooney. On July 14, 2014, the district court issued a Memorandum Opinion in which it ordered Rooney and Solaris Management to pay, jointly and severally, disgorgement of $715,700, plus prejudgment

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[17] The Complaint also alleged that Rooney, as the sole owner and managing partner of Solaris Management, had received more than $1.4 million in fees from Solaris Opportunity Fund.

[18] *SEC v. Rooney*, No. 11-cv-8264 (N.D. Ill. Dec. 19, 2013). Without admitting or denying the Commission's allegations, Rooney and Solaris Management consented to permanent injunctions against violating the following antifraud provisions of the federal securities laws: Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1), (2), and (4), and Rules 206(4)-8(a)(1) and (a)(2) thereunder, 17 C.F.R. § 206(4)-8(a)(1) and (a)(2); Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (all prohibiting fraud in the offer and sale of securities). Rooney and Solaris Management also agreed to permanent injunctions against violating the disclosure provisions of the federal securities laws in Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1), and Rule 13d-1 thereunder, 17 C.F.R. § 240.13d-1 (requiring any beneficial owner of more than five percent of any Exchange Act registered securities to disclose the extent of his or her ownership stake).

interest of $166,476; imposed a civil money penalty of $715,700 against Rooney; and imposed a conditional officer-and-director bar against Rooney, prohibiting him from "operating another private fund and barr[ing him] from serving as an officer or director of any other public company except Positron."[19] The district court found that "Rooney acted with a high level of scienter and his conduct of funneling over $3 million of [Solaris Opportunity Fund's] assets into Positron while he served the important role as investment adviser was quite egregious." The district court concluded that a full officer and director bar was not necessary because "the likelihood of recidivism is low," based largely on Rooney's having consented to permanent injunctions against future violations of the antifraud provisions.[20]

3. The Administrative Follow-On Proceeding

On January 8, 2014, we instituted administrative follow-on proceedings to determine whether, as a result of the District Court Injunction, remedial action against Rooney was appropriate in the public interest (the "Commission Follow-On Proceeding").[21] On July 22, 2014, an administrative law judge issued an initial decision barring Rooney from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.[22] The law judge found that Rooney's violations were recurrent, egregious, and evidenced scienter.[23] The law judge further determined that Rooney's previous occupations indicated a likelihood that he would have

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19 *SEC v. Rooney*, No. 1-11-cv-08264 (N.D. Ill. July 14, 2014).

20 The district court also stated, "based on Rooney's status as the father of three dependent sons and the caretaker of his ailing domestic partner, this Court finds that Rooney should be able to continue to support his family with the salary he earns at Positron while simultaneously satisfying disgorgement plus prejudgment interest and the civil penalty ordered by this Court."

On July 31, 2014, FINRA requested that the Commission accept a Supplemental Brief in Opposition to Positron Corporation's Application for Review, which FINRA filed after the conclusion of briefing in this appeal to address arguments regarding the July 14 Memorandum Opinion that Positron raised for the first time in its reply brief. Because the Memorandum Opinion was issued after FINRA filed its opposition brief, FINRA had no opportunity to address it earlier in this appeal. Positron did not oppose FINRA's request. Although the briefing order in this proceeding and our Rules of Practice do not specifically authorize the filing of such supplementary briefs, we have determined to grant FINRA's request.

21 *Patrick G. Rooney*, Investment Advisers Act Release No. 3751, 2014 WL 68369, at *1 (Jan. 8, 2014).

22 *Patrick G. Rooney*, Init. Dec. Release No. 638, 2014 WL 3588060, at *5 (July 22, 2014).

23 *See, e.g., Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 & n.18 (Apr. 20, 2012) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (setting forth the factors the Commission considers in assessing whether sanctions are in the public interest)).

opportunities to commit future violations in the absence of a full industry bar. Rooney did not appeal the initial decision, which has now become final.[24]

C. FINRA's Denial of Positron's Request

On January 24, 2014, Positron filed an application with FINRA requesting that it process two Company-Related Actions—specifically, announcements on the Daily List that Positron was issuing a 1-for-100 reverse stock split and was changing its domicile from Texas to Delaware. Positron explained that it sought the reverse stock split in an effort to increase the share price of its common stock.[25] The application stated that Positron would be "forced to increase the number of its authorized shares by two-fold to account for full dilution of [Positron's] securities and future investor participation." The company stated that such an increase in authorized shares would "bring [Positron's] total to six billion authorized shares, a number that is clearly extraordinary and not respectable of a growing nuclear medicine healthcare company." Positron further claimed that a low share price would undermine its credibility with investors, joint venture partners, and potential employees.[26]

On February 19, 2014, the Department issued a deficiency notice, informing Positron that, pursuant to FINRA Rule 6490(d)(3), it had denied the company's request to process the reverse stock split and the change in domicile because Rooney was the subject of a "settled regulatory action . . . related to fraud or securities laws violations," specifically the District Court Injunction. The Department found that this misconduct "raised concerns for FINRA regarding the protection of investors."[27] The Department stated that, as a result of its findings, it would "cease processing documentation related to [Positron's] Company-Related Action and would make no announcement on the Daily List."

Positron appealed the Department's decision to the UPCC Subcommittee, arguing that FINRA's determination was "detrimental to the interests of Positron's shareholders and the investing public." Positron claimed that it had already taken the necessary corporate actions and votes and had filed documents in Texas and Delaware to effectuate the Company-Related Actions. According to Positron, it "would have to make an entirely new set of filings with the Secretaries of State of Texas and Delaware to unwind the corporate actions, leading to additional wasted fees and expenses to Positron and its shareholders." Positron also argued for reversal of the Department's deficiency notice because the underlying actions against Rooney did not name Positron and did not (according to Positron) relate to Rooney's role as its CEO or Chairman.

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24 *Patrick G. Rooney*, Advisers Act Release No. 3916, 2014 WL 4467878 (Sept. 11, 2014).

25 "A reverse stock split reduces the number of shares and increases the share price proportionately." *Reverse Stock Split*, http://www.sec.gov/answers/reversesplit.htm.

26 Positron did not address the reasons for its change of domicile from Texas to Delaware before the Department or the UPCC Subcommittee.

27 The Department did not mention the then-pending Commission Follow-On Proceeding.

On March 27, 2014, the UPCC Subcommittee affirmed the Department's decision, finding Positron's request deficient based on both the District Court Injunction and the Commission Follow-On Proceeding.[28] The UPCC Subcommittee found that the Department's denial of Positron's request was necessary "for the protection of investors and the public interest." The Subcommittee stated that "Rooney's beneficial ownership of Positron Corporation, and the corporate positions that he holds, provide Rooney with substantial authority and control [over Positron]." And although the Subcommittee acknowledged that Positron had offered potentially valid business reasons for the Company-Related Actions, it stated that it "place[s] primary importance on [FINRA's] responsibility to protect investors when an issuer's officers or directors are defendants and respondents in pending actions that allege fraud and securities law violations." The UPCC Subcommittee further found that, under Rule 6490, it need not find that Positron itself was involved in the underlying fraud, because Rooney's significant involvement with Positron provided a sufficient basis to support the deficiency determination. Nevertheless, the UPCC Subcommittee noted that Positron "received over $3.6 million from Solaris Opportunity Fund" in the transactions underlying the District Court Injunction. This appeal followed.

II. Analysis

Exchange Act Section 19(f) governs our review of a self-regulatory organization's denial of access to services.[29] Here, FINRA denied Positron's request for FINRA to process and announce a reverse stock split and a change in domicile on FINRA's Daily List. Under Section 19(f), we must dismiss Positron's appeal of this denial if we find that (i) the specific grounds on which FINRA based its denial exist in fact; (ii) the denial was in accordance with FINRA rules; and (iii) those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[30] FINRA's denial meets these criteria.

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28 The UPCC Subcommittee requested that both parties file briefs "to address what effect, if any, should be given" to the then-pending Commission Follow-On Proceeding. Positron argued that the Commission Follow-On Proceeding "should have no effect on Positron's appeal" of the Department's deficiency notice because the two proceedings were based on the same facts and stated that its arguments regarding the District Court Injunction "remain unchanged by the recent issuance of the [Commission Follow-On] order." FINRA argued that it was appropriate for the UPCC Subcommittee to consider the Commission Follow-On Proceeding, noting that it alone "would have served as a sufficient basis for a determination of deficiency" and, accordingly, "raise[d] substantial concerns for FINRA regarding investor protection and transparency to the marketplace as it relates to Positron's Requested Corporate Action."

29 15 U.S.C. § 78s(f) (authorizing Commission review of SRO action that prohibits or limits "any person with respect to access to services offered by the [SRO]"); *see Intelispan, Inc.*, Exchange Act Release No. 42738, 54 SEC 629, 2000 WL 511471, at *2 (May 1, 2000).

30 *Fog Cutter Capital Grp., Inc. v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007). We have found that FINRA Rule 6490 "is consistent with the [Exchange] Act and the rules and regulations thereunder applicable to a national securities association." 2010 Approval Order, *supra* note 4, at *5 (explaining that FINRA Rule 6490 is consistent with Exchange Act Sections 15A(b)(5) and (6)). Exchange Act Section 19(f) further requires that we set aside FINRA's

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A. The grounds on which FINRA based its denial of Positron's request exist in fact.

FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis in determining whether to process a Company-Related Action request. First, FINRA must assess whether the issuer's request is deficient, based "solely . . . [on] one or more" of the five enumerated factors.[31] Second, in the event that FINRA deems an issuer's request deficient, FINRA then "may determine" not to process the issuer's request if it finds that denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[32]

1. Positron's Company-Related Action was deficient under FINRA Rule 6490(d)(3).

Positron's request was deficient under FINRA Rule 6490(d)(3) because FINRA had "actual knowledge . . . that officers [or] directors . . . connected to" Positron "are the subject of a[n] . . . adjudicated or settled regulatory action . . . related to . . . fraud or securities laws violations."[33] Rooney was Positron's CEO and Chairman of its Board of Directors at the time of the request in January 2014. And the District Court Injunction entered against him on December 19, 2013 involved violations of the antifraud and disclosure provisions of the federal securities laws, specifically, Advisers Act Sections 206(1), (2), and (4) and Rules 206(4)-8(a)(1) and (a)(2) thereunder, Securities Act Section 17, and Exchange Act Sections 10(b) and 13(d) and Rules 10b-5 and 13d-1 thereunder. Rooney was also the subject of a then-pending Commission Follow-On Proceeding relating to the same securities law violations, in which the Commission sought to bar Rooney from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.[34] The record further establishes that FINRA had actual knowledge of both the District Court Injunction and the Commission Follow-On Proceeding.

2. FINRA found that denying Positron's request was necessary for the protection of investors, the public interest, and to maintain fair and orderly markets under FINRA Rule 6490(d)(3).

FINRA Rule 6490(d)(3) states that "where [a Company-Related Action] is deemed deficient," FINRA "may determine" not to process the request if doing so is "necessary for the

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action if we find that it imposes an undue burden on competition. 15 U.S.C. § 78s(f). Positron does not claim, nor does the record suggest, that FINRA's action imposes such a burden.

31 FINRA Rule 6490(d)(3). *See supra* note 10 (listing factors).

32 *Id.*

33 FINRA Rule 6490(d)(3)(3).

34 *See id.* (stating the FINRA may determine to deny a Company-Related Action where it has actual knowledge that an issuer's officers or directors are the subject of a "pending . . . regulatory action").

protection of investors, the public interest and to maintain fair and orderly markets."[35] The Rule's use of the permissive term "may" vests FINRA with discretionary authority in deciding whether to process and announce a Company-Related Action request on the Daily List.[36] In the similar context of appeals from a delisting determination, we have long stated that "[t]o the extent that discretion enters into [FINRA's decision to deny inclusion on its systems] . . . the discretion in question is [FINRA's], not ours,"[37] and as in those cases, we will not substitute our judgment for FINRA's unless its decision is unsupported by the record.[38]

Here, we find that the specific grounds on which FINRA based its findings that Positron's action posed a threat to investors and market integrity exist in fact. Rooney's previous misconduct was serious. The Commission's complaint alleged that, over nearly four years, Rooney repeatedly caused Solaris Opportunity Fund to make undocumented and no-interest loans to Positron, while misleading the fund's investors "into believing that they were invested in a diversified hedge fund" and hiding Rooney's role with Positron. The Commission alleged that, in doing so, Rooney "saddled the Fund with a concentrated, undiversified, and illiquid position in a cash poor company with a lengthy track record of losses." The Commission charged Rooney with violating the antifraud and disclosure provisions of the federal securities laws, which are fundamental to the securities industry and the protection of investors. We have repeatedly held that "conduct that violates the antifraud provisions of the securities laws is especially

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35 *Id.*

36 *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (stating that, absent "indications of legislative intent to the contrary," "the word 'may,' when used in a statute, usually implies some degree of discretion"). The 2010 Approval Order lends further support for this reading and included, with approval, the following explanation by FINRA of the operation of Rule 6490: "[W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, . . . it would *have the discretion* not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors." 2010 Approval Order, *supra* note 4, at *6 (emphasis added).

37 *Tassaway, Inc.*, Exchange Act Release No. 11291, 45 SEC 706, 1975 WL 160383, at *2 (Mar. 13, 1975) (discussing oversight of the OTC markets by FINRA, then the NASD).

38 *See, e.g., Cleantech Innovations, Inc.*, Exchange Act Release No. 69968, 2013 WL 3477086, at *6 (July 11, 2013) (stating that "we are not free to substitute our discretion for NASDAQ's" but setting aside decision because "the record does not show that the grounds on which NASDAQ relied in delisting CleanTech exist in fact"); *Eagle Supply Grp., Inc.*, Exchange Act Release No. 39800, 53 SEC 480, 1998 WL 133847, at *4 (Mar. 25, 1998) (remanding to NASD for a more definitive statement on its reasoning for denying issuer's inclusion on the NASDAQ SmallCap Market).

serious . . ."[39] and that antifraud injunctions, such as those to which Rooney consented here, "have especially serious implications for the public interest."[40]

Further, the disclosures required by Exchange Act Section 13(d) and its rules, which the Commission also charged Rooney with violating, "alert[] the marketplace to every large, rapid aggregation or accumulation of securities . . . , which might represent a potential shift in corporate control," as in a corporate takeover.[41] Failure to comply with these core disclosure obligations deprives investors of information necessary to make informed investment decisions.[42] It is also troubling, as the UPCC Subcommittee found, that all of the regulatory actions against Rooney were relatively recent.

FINRA also based its denial on its concerns regarding Rooney's ongoing role at Positron. As FINRA found, Rooney's positions as CEO and Chairman of the Board at the time, as well as the substantial percentage of Positron's stock held by Solaris Opportunity Fund and Rooney, provided Rooney "with substantial authority and control [of Positron]." We also agree with FINRA's finding that Positron benefited from Rooney's misconduct, receiving over $3.6 million in investments at a time when the Commission's Complaint alleged that no other sources of funding for the company existed. Although such a finding is not required to support FINRA's determination, this significant benefit to Positron from Rooney's misconduct undermines Positron's claim that the District Court Injunction had nothing to do with Rooney's role at the company.

3. FINRA properly considered Rooney's District Court Injunction in reaching its decision.

Positron contends on appeal that FINRA should not have considered the District Court Injunction in denying Positron's request because Positron was not a named defendant in the underlying Commission action. Positron further claims that the District Court Injunction had

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39 *See, e.g., Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012) (quoting *Steadman*, 603 F.2d at 1140 (5th Cir. 1979)).

40 *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 (Dec. 12, 2013) (citing *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *7 (Feb. 4, 2008)).

41 *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (explaining that a violator of Exchange Act Section 13(d) improperly benefits by purchasing stock at an artificially low price, because disclosure of a holding in excess of five percent of a company's stock suggests to the rest of the market a likely takeover and therefore may increase the price of the stock).

42 *See SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (stating that "Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent the only way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings" (citations omitted)).

nothing to do with Rooney's work at Positron. Based on these arguments, Positron contends that FINRA's deficiency determination was arbitrary and capricious.

We find that FINRA properly considered the allegations in the Commission's complaint against Rooney in assessing its interest in protecting investors. In our order approving Rule 6490, we specifically highlighted the value of FINRA's authority under the Rule to "conduct in-depth reviews of requests to process Company-Related Actions and to provide FINRA staff the discretion not to process . . . requests for which there are certain indicators of potential fraud."[43] In assessing Positron's request, FINRA did not invoke the allegations in the Commission's complaint against Rooney to establish any liability against Positron, which was not a party to the District Court Injunction. FINRA imposed no sanction or penalty against Positron, Rooney, or any other Positron shareholder. FINRA's denial of Positron's requests is but one of the several collateral consequences of Rooney's consent to the District Court Injunction and Positron's decision to have Rooney as its CEO and Chairman.[44] Further, Positron's argument would defeat the purpose of Rule 6490, under which FINRA looks to the conduct of an issuer's officers and directors, and other persons related to the issuer, when determining whether to process a Company-Related Action.

For the foregoing reasons, we find that the grounds on which FINRA based its denial to process Positron's Company-Related Action request existed in fact.

B. FINRA's denial of Positron's request was in accordance with its rules.

FINRA, a registered national securities association, adopted Rule 6490 pursuant to Exchange Act Section 15A(b).[45] That provision authorizes FINRA to adopt rules that, among other things, are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, [and] processing transactions in securities" and, in

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43 *See* 2010 Approval Order, *supra* note 4, at *2.

44 *See DHB Capital Grp., Inc.*, Exchange Act Release No. 37069, 52 SEC 740, 1996 WL 164315, at *3 (Apr. 5, 1996) ("[FINRA]'s decision to deny inclusion [of DHB on NASDAQ]—based in part on the fact that, upon finding that Brooks committed serious securities law violations, we barred him (with his consent) from the industry—is a collateral consequence of Brooks's misconduct . . . [and] a proper exercise of the [FINRA]'s authority under its Qualification Requirements By-Law.").

For example, although Positron was not a party to the District Court Injunction, the entry of the settlement had the collateral consequence of requiring Positron (as long as Rooney remained the CEO and Chairman) to disclose the settlement for the next ten years in its periodic filings with the Commission—a requirement Positron met. Item 401(f) of Reg. S-K, 17 C.F.R. § 229.401(f) (requiring disclosure of a director's, nominee's, or executive officer's involvement in specific legal proceedings "that are material to an evaluation of the ability or integrity" of such a person).

45 2010 Approval Order, *supra* note 4, at *5.

general, "to protect investors and the public interest."[46] As we stated in the 2010 Approval Order, FINRA adopted Rule 6490 in furtherance of these statutory principles based on FINRA's growing concern that its Daily List services could be used for fraudulent practices.[47] We concluded that the rule was designed to protect "the OTC marketplace and investors in OTC Securities" by permitting FINRA to deny a Company-Related Action request when there are "certain indicators of potential fraud."[48]

The plain language of FINRA Rule 6490(d)(3) makes clear FINRA's authority to find a Company-Related Action deficient in the circumstances presented here. Among the five deficiency factors that may form the basis for FINRA's denial is whether it has "actual knowledge" of an adjudicated, settled, or pending regulatory action alleging securities law violations against the issuer's officers or directors. If "one or more" of these factors is present, FINRA has the discretion to deny a request if denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets."[49] As discussed, FINRA's denial satisfied these requirements.[50]

Positron, citing language from the 2010 Approval Order in which we expressed concern regarding individuals who "usurped the identity of a defunct or inactive publicly traded company . . . based on the apparently false representation that they were duly authorized officers,"[51] claims that "fraud in connection with the [Company-Related Action] was clearly the type of fraud the Commission was concerned with in approving Rule 6490." Because Rooney's fraudulent conduct here was not related to the Company-Related Actions, and because "there has never been even an inference that Positron is not the company that it represents to be," Positron characterizes FINRA's determination at issue as a "fishing expedition," which it claims is inconsistent with the purposes of Rule 6490. But FINRA's discretion under Rule 6490 is not limited in the way Positron suggests. The text of the Rule provides FINRA with discretion to exercise judgment about whether approval of a Company-Related Action is appropriate in the

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46 15 U.S.C. § 78*o*-3(b)(6); *see also Fog Cutter*, 474 F.3d at 824 (discussing Exchange Act Section 15A(b) and stating that, "[a]s a self-regulatory organization, [FINRA] must maintain rules to protect investors and the public interest").

47 2010 Approval Order, *supra* note 4, at *2 (stating that FINRA proposed Rule 6490 "in furtherance of its authority to adopt rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest").

48 *Id.*

49 *See supra* notes 35-38 and accompanying text (discussing FINRA's discretionary authority).

50 In addition to meeting these substantive requirements, we find, as Positron does not dispute, that FINRA properly followed the procedures set forth in Rule 6490(d) and (e) in disposing of Positron's request. *Michael Stegawski*, Exchange Act Release No. 59326, 2009 WL 223618, at *6 (Jan. 30, 2009).

51 2010 Approval Order, *supra* note 4, at *2 & n. 9.

public interest. As FINRA argues, Positron's proffered interpretation of Rule 6490 would "render the rule meaningless" because there is no question FINRA would deny a Company-Related Action request if it was aware of ongoing fraudulent conduct in connection with the Company-Related Action; the Rule addresses the risk of *future* harm by providing FINRA with discretion to consider whether the proposed Company-Related Action raises indicators of potential fraud such that it poses a threat to investors and the integrity of the markets.

Accordingly, based on the foregoing reasons, we find that FINRA's denial was in accordance with its rules.

C. FINRA applied its rules in a manner consistent with the Exchange Act.

FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. In the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Congress directed the formation of "automated quotation systems for penny stocks . . . [t]o add visibility and regulatory and surveillance data to that market."[52] In enacting this legislation, Congress amended the federal securities laws by "issu[ing] legislative directives with the intention of curbing the pervasive fraud and manipulation of the penny stock market."[53] FINRA Rule 6490 furthers these objectives by authorizing FINRA to deny processing and announcing a Company-Related Action on the Daily List when it finds deficiencies with respect to an issuer's Company-Related Action, including "indicators of potential fraud," and that denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[54]

Here, FINRA found that Rooney's consent to the District Court Injunction against violations of the antifraud and disclosure provisions of the federal securities laws, the recent nature of the regulatory actions against Rooney, and Rooney's "substantial authority and control" over Positron at the time made denial of the company's request necessary to protect investors.[55] Positron contends that FINRA lacks authority to deny its Company-Related Action request because FINRA has no direct jurisdiction over issuers. But this argument ignores the critical role

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52 Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified in the Exchange Act at 15 U.S.C. § 78q-2).

53 *Report to Accompany the Penny Stock Reform Act of 1990*, H.R. Rep. No. 617, 101st Cong., 2d Sess. (July 23, 1990) (reporting H.R. 4497), at 7.

54 2010 Approval Order, *supra* note 4, at *2-3.

55 The UPCC Subcommittee noted, in support of its determination, the recent nature of the regulatory actions against Rooney, and the fact that they remained unresolved at the time. Those proceedings have now been fully resolved, but the ultimate findings of the district court and the administrative law judge, which confirmed Rooney's fraudulent misconduct, only serve to add further support to FINRA's deficiency determination and its concerns that processing the Company-Related Actions would not have served the public interest or the protection of investors.

that FINRA occupies in regulating the OTC market.[56] FINRA has "direct authority for the activities related to OTC trading."[57] With this comes an obligation to oversee the market in OTC Securities and "protect the integrity of the market it is charged with maintaining."[58] Investors in OTC Securities are entitled to assume that "the risk associated with investing in [a market over which FINRA has such authority] is market risk rather than the risk that the promoter or other persons exercising substantial influence over the issuer is acting in an illegal manner."[59]

Positron claims that Rule 6490 is inconsistent with the Exchange Act, claiming that it impermissibly gives FINRA *de facto* "oversight over the regulation of officers and directors." But FINRA correctly notes that its determination not to process the requested Company-Related Actions does not "prohibit Rooney from serving as an officer or director of *any* company."[60] FINRA's refusal to announce Positron's Company-Related Action was a prophylactic measure designed to prevent potential fraud or abuse from occurring through use of the Daily List, and it had no further reach than announcement on that particular FINRA facility.[61] Although Positron contends that FINRA's denial effectively bars Rooney from acting as an officer or director, we note that he remained the CEO and Chairman of the Board of Positron at the time Positron filed

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56 As one court has observed, "[t]he joint roles taken by [FINRA] and the SEC in the regulation of OTC securities reflects a congressional intent 'to establish a "cooperative regulation" where securities associations would regulate themselves under the supervision of the SEC.'" *Lang v. French*, 154 F.3d 217, 221 (5th Cir. 1998) (quoting *Jones v. SEC*, 115 F.3d 1173, 1179 (4th Cir. 1997) (quoting 115 S. Rep. No. 75-1455, at 3-4 (1938) and H.R. Rep. No. 75-2307, at 4-5 (1938) (legislation authorizing creation of SROs))).

57 *Order Granting Approval to Proposed Rule Change and Amendment No.1 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendments Nos. 2, 3, and 4 Thereto, Relating to NASD's Direct Authority for the Activities Related to or in Support of Trading in Over-the-Counter Equity Securities*, Exchange Act Release No. 52508 (Sept. 26, 2005), 2005 WL 3734491, at *1, 70 F.R. 57,346 (Sept. 30, 2005).

58 *Air L.A., Inc.*, Exchange Act Release No. 34491, 1994 WL 413098, at *2 (Aug. 3, 1994) (order denying stay of delisting from NASD's SmallCap Market).

59 *JJFN Servs., Inc.*, Exchange Act Release No. 39343, 53 SEC 335, 1997 WL 722029, at *3 (Nov. 21, 1997) (internal quotation marks omitted) (declining to list issuer's securities on the SmallCap Market because promoter and "key person" of the issuer was previously convicted of filing a false tax return); *see also Fog Cutter Capital Grp., Inc.*, Exchange Act Release No. 52993, 58 SEC 1049, 2005 WL 3500274, at *5 (Oct. 31, 2005) (denying issuer's listing on NASDAQ after guilty plea by issuer's key executive and largest shareholder), *petition denied*, 474 F.3d 822 (D.C. Cir. 2007); *DHB Capital*, 1996 WL 164315, at *4 & n.20 (denying issuer's listing on the SmallCap Market based on consent injunction entered against controlling shareholder, officer, and director).

60 Emphasis in FINRA's brief.

61 *Cf., e.g., United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (describing Exchange Act Rule 14e-3(a) as "[a] prophylactic measure, because its mission is to prevent . . . [and] encompasses more than the core activity prohibited").

this appeal. Further, Positron's stock continues to trade in the OTC market and is currently quoted on the OTC Pink.[62] FINRA merely exercised the authority granted under Rule 6490 to determine whether it was in the public interest to process the Company-Related Actions given Rooney's role at Positron at the time.[63]

Positron further contends that, because Rooney is not the controlling shareholder of Positron, "this is not a situation where Rooney is 'calling the shots,' . . . and he must answer to a Board of Directors which approved the Company-Related Action after a vote." Positron points to the required approval of the Company-Related Actions by the vote of two-thirds of Positron's shareholders as evidence that the Company-Related Actions were not "being sought at the sole directive of Rooney." But Positron does not deny that Rooney exercised significant control over the company at the time of the Company-Related Actions, and the fact that Positron has taken the necessary corporate votes to approve the Company-Related Actions does not outweigh FINRA's concerns about the risk of future harm in light of the regulatory actions taken against Rooney. FINRA's discretionary authority under Rule 6490 is significant. Our 2010 Approval Order made clear that the Rule would alter FINRA's approval of Company-Related Actions, which had historically been considered to be "ministerial." If, as Positron suggests, FINRA was expected to approve every Company-Related Action where an issuer had taken the necessary shareholder votes under applicable state laws to approve the action, such a reading would be inconsistent with the language and intent of the Rule.

Positron also claims that FINRA's denial of the Company-Related Actions "is not only unnecessary to protect shareholders and the investing public, but is detrimental to those interests." Positron claims that the reverse stock split would help the company and its shareholders because it would result in a higher stock price, which it claims "would increase Positron's credibility in dealing with the governmental authorities, institutions, and facilities involved in the nuclear medicine industry." It also claims that potential and existing shareholders, brokers, and analysts would think more favorably about Positron if its share price were higher. Positron argues that the change in domicile from Texas to Delaware also would benefit the company and its shareholders because, among other things, Delaware provides "an

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62 *See supra* note 1. *Cf. Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000) (denying stay of OTCBB delisting and stating that "the deletion [from the OTCBB] means only that there will be no prices for those securities on the OTCBB," not that the securities must cease trading); *Cleantech Innovations, Inc.*, Exchange Act Release No. 66064, 2011 WL 6811202, at *3 (Dec. 28, 2011) (same).

FINRA's denial of an announcement on the Daily List and our affirmance of that decision imposes no bar; nor does the denial prevent Positron from effectuating these Company-Related Actions outside of FINRA's services.

63 *Cf. Eagle Supply*, 1998 WL 133847, at *3 & n.12 ("Eagle argues that the NASD has effectively established a rule . . . that prevents an entity's securities from being listed if an officer or director engaged in prior criminal or civil violations of the federal securities laws. We disagree. As noted, the NASD has broad discretion in these matters. This discretion necessarily involves a fact-specific inquiry in determining whether to list particular securities.").

extensive and well-developed corporate jurisprudence that creates predictability and expediency in adjudication" and "Delaware statutes and regulations are favorable to corporations and their shareholders and provide sophisticated and regularly applied rules and structure to meet the evolving needs of businesses and their investors."[64]

FINRA considered Positron's business reasons before reaching its deficiency determination, but it found that they did not provide a compelling basis to outweigh FINRA's concerns based on the regulatory actions against Rooney relating to fraudulent misconduct. FINRA's mandate under Rule 6490 is "aimed not only at facilitating trading and settlement, but also promoting investor protection and market integrity."[65] In light of this mandate, and given FINRA's thorough consideration of Positron's business reasons for its request, we find that FINRA's determination is in the public interest and is consistent with the purposes of the Exchange Act.

Based on the foregoing, we find that FINRA properly denied Positron's Company-Related Action requests and, accordingly, dismiss Positron's appeal.

An appropriate order will issue.[66]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

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64 Positron did not specify these or any other reasons for its change in domicile before the Department or the UPCC Subcommittee.

65 2010 Approval Order, *supra* note 4, at *1.

66 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74216 / February 5, 2015

Admin. Proc. File No. 3-15837

In the Matter of the Application of

POSITRON CORPORATION

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Positron Corporation is hereby dismissed.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissent to the provisions
regarding the preclusion
of federal Court Review.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74217 / February 6, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3627 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of

BDO China Dahua CPA Co., Ltd.;
Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;
Ernst & Young Hua Ming LLP;
KPMG Huazhen (Special General Partnership);
PricewaterhouseCoopers Zhong Tian CPAs Limited

Respondents.

ORDER ON THE BASIS OF OFFERS OF SETTLEMENT OF CERTAIN RESPONDENTS IMPLEMENTING SETTLEMENT

I.

The Securities and Exchange Commission ("SEC" or "Commission") instituted public administrative proceedings pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice against Deloitte Touche Tohmatsu Certified Public Accountants Ltd. ("DTTC") on May 9, 2012.[1]

[1] Rule 102(e)(1)(iii) provides, in pertinent part, that: "The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person

The Commission also instituted public administrative proceedings pursuant to Rule 102(e)(1)(iii) against BDO China Dahua CPA Co., Ltd. ("Dahua"); DTTC; Ernst & Young Hua Ming LLP ("EYHM"); KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"); and PricewaterhouseCoopers Zhong Tian CPAs Limited Company ("PwC Shanghai") on December 3, 2012. The two proceedings were consolidated on December 20, 2012, pursuant to Commission Rule 201(a), and constitute the current proceeding ("Current Proceeding"). On May 9, 2014, we granted the respective petitions for review of four of the five respondents, DTTC, EYHM, KPMG Huazhen, and PwC Shanghai (collectively the "Settling Respondents"), and the Division of Enforcement ("Division") of the initial decision of the Administrative Law Judge ("ALJ") issued on January 22, 2014 ("Initial Decision").[2]

II.

The Settling Respondents have submitted Offers of Settlement (the "Offers"), which the Commission has determined to accept. The Settling Respondents admit only the facts set forth in Annex A attached hereto; and admit the Commission's jurisdiction over them in, and over the subject matter of, the Current Proceeding, any proceeding to enforce or that seeks to challenge this Order, and any proceeding contemplated by Section III.J.3 or III.J.4 of this Order. In addition, without admitting or denying the findings herein the Settling Respondents consent to the entry of this Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement ("Order") containing the following findings, undertakings to make payments as part of the Offers, procedures and undertakings as to future requests and possible additional proceedings and remedies, as set forth below, and a stay of the Current Proceeding as to the Settling Respondents (defined herein).

III.

On the basis of this Order and the Settling Respondents' Offers, and the facts contained in Annex A, the Commission finds[3] that:

A. SUMMARY

1. The Settling Respondents are foreign public accounting firms, as defined by Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act"), 15 U.S.C. § 7216(b), all based in the People's Republic of China ("China" or "PRC"). They registered with the Public Company Accounting Oversight Board ("PCAOB" or "Board") in 2004. Each Settling Respondent performed audit work for one or more clients identified in these proceedings with the

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who is found . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(1)(iii).

[2] The remaining respondent, Dahua, did not file a petition for review.

[3] The findings herein are made pursuant to the Settling Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

letter designations DTTC Client A and Client B through I. The Division opened accounting fraud investigations related to each of these nine clients.

2. Pursuant to Section 106 of Sarbanes-Oxley, as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") ("Section 106"), the Division served requests for audit workpapers and related documents pertaining to the nine clients on the Settling Respondents, through their designated agents, at various times between March 11, 2011, and April 26, 2012. The Settling Respondents responded to these requests, stating that PRC laws prevented them from producing responsive documents directly to the Division. The Settling Respondents have not produced any responsive audit workpapers and related documents directly to the Division, nor did the Division receive any of the requested workpapers and related documents through any other channel before commencement of the Current Proceeding. Because of the lack of direct production, the Commission issued the above-referenced orders instituting proceedings under Commission Rule of Practice 102(e) against the Settling Respondents based on willful violations of Section 106 (the "OIPs"). The Administrative Law Judge issued the Initial Decision in the Current Proceeding finding that DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each willfully violated Sarbanes-Oxley Section 106 by willfully refusing to comply with at least one SEC request under that provision.

3. As set forth below, this Order (i) finds, for purposes of this Order, that the Settling Respondents willfully violated Section 106, (ii) censures the Settling Respondents, and (iii) memorializes certain undertakings by them, including a payment by each of them in the amount of $500,000 to the United States Treasury. This Order also stays the Current Proceeding as to the Settling Respondents for a period of four years. During this time, the Settling Respondents will perform specified undertakings in response to any future requests for documents covered by Section 106 of Sarbanes-Oxley. Moreover, this Order provides at least three additional forms of relief in the event the Division is unsatisfied by the productions of documents that it receives in response to future requests.

- First, if a Settling Respondent fails to attest that it has produced documents as required by the undertakings, that Settling Respondent is subject to automatic issuance of a Commission order that partially denies that Settling Respondent the privilege of appearing or practicing before it for a period of six months (an "Automatic Bar").

- Second, if the Division believes that a production from a Settling Respondent is deficient in certain ways as set forth in the undertakings, the Commission, on the basis of the Division's allegations, may institute a separate, expedited administrative proceeding against that Settling Respondent (a "Summary Proceeding").

- Third, if two or more productions from the Settling Respondents are substantially delayed, are deficient in certain ways, or lack substantial volumes of requested documents (or portions of documents) in violation of, or without justification under, U.S. law, including, but not limited to, Section 106 of Sarbanes-Oxley, the Division may request that the Commission terminate the stay and resume the Current Proceeding ("Restart").

Under the Restart scenario, the Commission may resolve all issues as to liability and remedies raised by the OIPs, including all defenses previously raised by the Settling Respondents, consistent with the Commission's May 9, 2014 order granting the parties' petitions for review in the Current Proceeding.[4] Absent a Restart within the four-year undertaking period, this Current Proceeding will be deemed dismissed. However, such dismissal will not affect any admissions, findings, or remedies ordered in this Order, which are, and will be, deemed final upon the dismissal of the Current Proceeding.

B. SETTLING RESPONDENTS

4. DTTC (or "Deloitte") is a special general partnership providing audit and professional services in the PRC. DTTC is located in Shanghai, China, and is a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

5. EYHM (or "Ernst") is a special general partnership providing audit and professional services in the PRC. EYHM is headquartered in Beijing, China, and is a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

6. KPMG Huazhen (or "KPMG") is a special general partnership providing audit and professional services in the PRC. KPMG Huazhen is located in Beijing, China, and is a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

7. PwC Shanghai (or "Pricewaterhouse") is a special general partnership providing audit and professional services in the PRC. PwC Shanghai is headquartered in Shanghai, China, and is a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

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[4] In the event of a Restart, as set forth more fully in Section III.I of this Order, this Order and the findings herein shall be without prejudice to any claims, arguments, or defenses that a Settling Respondent or the Division may assert in connection with the petitions for review or in any other proceeding that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order, except that the facts set forth in Annex A shall remain admitted by the Settling Respondents for all purposes. In the event of a Restart, the findings in Sections III.F and III.G of this Order shall be vacated as to any Settling Respondent for whom the Current Proceeding is restarted. In no event, however, may any Settling Respondent recover any payment made under Section III.H of this Order.

C. OTHER RELEVANT ENTITIES

8. DTTC Client A ("DTTC Client A") is a public company the securities of which are registered with the SEC under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on NASDAQ. DTTC Client A is incorporated in the Province of Ontario, Canada and has its principal operations and principal place of business in the PRC. DTTC Client A designs and manufactures solar products.

9. EYHM Client B ("Client B") is a Delaware corporation with its principal operations and principal place of business in the PRC. Client B's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client B purports to be a leading developer, manufacturer and distributor of organic compound fertilizers in China.

10. EYHM Client C ("Client C") is a Cayman Islands corporation with its primary operations in Beijing, PRC. Client C's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client C purports to provide enhanced recovery services for oil and gas exploration.

11. KPMG Huazhen Client D ("Client D") is a Delaware corporation with its primary operations in Xi'an, PRC. Client D's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client D purports to engage in the wholesale distribution of finished oil and heavy oil products, the production and sale of biodiesel, and the operation of retail gas stations.

12. KPMG Huazhen Client E ("Client E") is a Nevada corporation with its primary operations in Ningbo, PRC. Client E's securities are registered with the SEC pursuant to Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client E purports to manufacture and supply various petrochemical products in China.

13. KPMG Huazhen Client F ("Client F") is a Nevada corporation, with its primary operations in Shanghai, PRC. Client F's securities were previously registered with the SEC pursuant to Section 12(b) of the Exchange Act and listed on NASDAQ. Client F purports to manufacture chemical additives used in the production of consumer and industrial products.

14. DTTC Client G ("Client G") is a Wyoming corporation with its primary operations in Beijing, PRC. Client G's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NYSE. Client G purports to design, manufacture, and sell offset printing equipment.

15. PwC Shanghai Client H ("Client H") is a Cayman Islands corporation with its principal operations in the PRC. Client H's securities are registered with the SEC under Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client H purports to own and operate a commercial vehicle financing and service centers network.

16. PwC Shanghai Client I ("Client I") is a Nevada corporation with its primary operations in Beijing, PRC. Client I's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client I purports to manufacture automotive electrical parts in China.

D. FACTS CONCERNING COMMMISSION REQUESTS TO THE SETTLING RESPONDENTS UNDER SARBANES-OXLEY

1. Regulatory Background

17. Section 106 of the Sarbanes-Oxley Act of 2002, before it was amended by Dodd-Frank in 2010, stated, in relevant part, that "If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented . . . to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report . . . ." Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204 § 106(b).

18. In 2004, the Board posted Frequently Asked Questions to its website which stated, in part: "A registered firm's failure to cooperate with Board requests [for production of documents under Sarbanes-Oxley Section 106] may subject the firm to disciplinary sanctions, including substantial civil money penalties and revocation of the firm's registration. In the staff's view, if a firm fails to cooperate with the Board, the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate."

19. Section 106(b)(1) of Sarbanes-Oxley, as amended by Dodd-Frank, states that: "[i]f a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall . . . produce the audit workpapers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board . . . ."

2. Requests To DTTC

20. On or around April 16, 2004, DTTC[5] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed DTTC's registration as a foreign public accounting firm in a letter dated June 4, 2004. DTTC has remained registered with the Board since that time.

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[5] On January 1, 2013, Deloitte Touche Tohmatsu Certified Public Accountants LLP filed with the PCAOB a notification on Form 4 that Deloitte Touche Tohmatsu Certified Public Accountants LLP had succeeded to the registration status of its predecessor, Deloitte Touche Tohmatsu CPA Ltd.

21. DTTC knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

22. DTTC knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. DTTC described possible conflicts of law in its April 16, 2004 PCAOB registration filing that included a legal opinion.

23. The Board's June 4, 2004 letter confirming DTTC's registration stated that, although DTTC had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Deloitte's registration . . . does not relieve Deloitte of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Deloitte associated persons. If Deloitte prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Deloitte despite the absence of a consent."

24. In June 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, DTTC designated Deloitte & Touche LLP ("DTT US"), the United States member firm of DTT Global, as its agent for receiving service of document requests under Section 106. In so doing, DTTC confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

25. DTTC knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. DTTC also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained power to deny DTTC the privilege of appearing or practicing before the Commission to the extent DTTC willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

26. In the PCAOB reporting years 2010, 2011, 2012, and 2013, DTTC issued audit reports for thirty-two (32), forty-five (45), forty-five (45), and thirty-nine (39) U.S. issuers, respectively.

27. DTTC audited DTTC Client A's financial statements for the fiscal years ended December 31, 2008, 2009, and 2010. DTTC Client A remained DTTC's client as of April 2013.

28. Before April 9, 2010, the Division commenced an investigation into potential accounting fraud involving DTTC Client A, which Client A disclosed in a Form 6-K and accompanying press release filed with the Commission on June 1, 2010. In the press release, DTTC Client A announced that it was postponing the release of its full financial results for the quarter ended March 31, 2010 and its quarterly conference call, scheduled for June 2, as a result of the commencement of an investigation by the Audit Committee of DTTC Client A's Board of Directors. DTTC Client A disclosed that "the investigation was launched after the Company received a subpoena from the [Commission] requesting documents from [DTTC Client A] relating to, among other things, certain sales transactions in 2009."

29. On March 11, 2011, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [DTTC Client A] for the fiscal year ending December 31, 2009" (the "Client A Request").

30. By letter dated April 29, 2011, DTTC, through its U.S. counsel, responded to the Client A Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

31. In July 2011, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client A Request.

32. DTTC was engaged to audit the financial statements of Client G for the fiscal year ended June 30, 2010. In the course of this engagement, DTTC performed audit work on behalf of Client G related to the fiscal year ended June 30, 2010. DTTC did not issue any audit report with respect to Client G.

33. In 2010, Division staff opened an investigation involving Client G, which related to matters reported in a Form 8-K filed by Client G on September 13, 2010. Specifically, Client G reported that:

a. Client G had terminated DTTC's engagement as independent auditor effective September 6, 2010;

b. During the course of DTTC's audit of Client G for the fiscal year ended June 30, 2010, Client G had denied DTTC's request for permission to access original bank statements to verify the identity of certain individuals and entities;

c. Several "reportable events," as defined in Item 304(a)(1)(v) of Regulation S-K, occurred during DTTC's audit of Client G; and

d. Between September 6 and September 8, 2010, Client G's CEO, CFO, and several directors, including the Chair of its Audit Committee, all resigned their positions.

34. On February 14, 2012, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client G] for the fiscal year ended June 30, 2010" (the "Client G Request").

35. By letter dated April 17, 2012, DTTC, through its U.S. counsel, responded to the Client G Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited

the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

36. In April 2012, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client G Request.

37. On May 9, 2012 and December 3, 2012, the Commission instituted these proceedings against DTTC under Rule 102(e) based on DTTC's conduct with respect to the Client A Request and the Client G Request, respectively. DTTC did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

38. In 2013, DTTC provided documents related to DTTC Client A to the China Securities Regulatory Commission ("CSRC"), in response to a request that DTTC had received from the CSRC. In November 2013, DTTC audit workpapers concerning DTTC Client A were provided by the CSRC to the SEC.

39. In 2013, DTTC provided documents related to Client G to the CSRC, in response to a request that DTTC had received from the CSRC. In October 2013, DTTC audit workpapers and related documents concerning Client G were provided by the CSRC to the SEC.

3. Requests To EYHM

40. On or around May 25, 2004, EYHM[6] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed EYHM's registration as a foreign public accounting firm in a letter dated July 8, 2004. EYHM has remained registered with the PCAOB since that time.

41. EYHM knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

42. EYHM knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. EYHM described possible conflicts of law in its May 25, 2004 PCAOB registration filing that included a legal opinion.

43. The Board's July 8, 2004 letter confirming EYHM's registration stated that, although EYHM had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Ernst's registration . . . does not relieve Ernst of the obligation to cooperate in and comply with Board demands (including for

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[6] On September 3, 2012, Ernst & Young Hua Ming LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Ernst & Young Hua Ming LLP had succeeded to the registration status of its predecessor, Ernst & Young Hua Ming Certified Public Accountants.

documents or testimony) and to enforce such cooperation and compliance by Ernst's associated persons. If Ernst prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Ernst despite the absence of a consent."

44. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, EYHM designated Ernst & Young LLP ("EY US"), the United States member firm of EY Global, as its agent for receiving service of document requests under Section 106. In so doing, EYHM confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

45. EYHM knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. EYHM also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that that the Commission retained the power to deny EYHM the privilege of appearing or practicing before the Commission to the extent EYHM willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

46. In the PCAOB reporting years 2010, 2011, 2012, and 2013, EYHM issued audit reports for eleven (11), twenty-four (24), twenty-one (21), and twenty (20) U.S. issuers, respectively.

47. EYHM was engaged to audit the financial statements of Client B for the fiscal year ended December 31, 2010. In the course of this engagement, EYHM performed audit work on behalf of Client B related to the fiscal year ended December 31, 2010. EYHM did not issue an audit report on Client B's financial statements for the fiscal year ended December 31, 2010.

48. In March 2011, the Division opened an investigation into Client B. The investigation related to, among other things, public allegations of potential accounting fraud and misleading disclosures by Client B, including overstated revenues, falsified assets and customer relationships, and failure to disclose certain related party transactions.

49. On April 26, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client B] for the fiscal year ending December 31, 2010" (the "Client B Request").

50. By letter dated May 25, 2012, EYHM, through its U.S. counsel, responded to the Client B Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

51. In June 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client B Request.

52. EYHM audited Client C's financial statements for the fiscal year ended September 30, 2010.

53. By September 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client C. The investigation stemmed from a short seller report regarding Client C, and from a letter that EYHM submitted to the Commission, pursuant to Section 10A of the Exchange Act, upon its resignation as Client C's auditor in September 2011. The two primary subjects of the investigation were possible accounting fraud related to asset valuation, and embezzlement by Client C's chairman.

54. On February 2, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client C] for the fiscal year ending September 30, 2010 and subsequent periods" (the "Client C Request").

55. By letter dated April 4, 2012, EYHM, through its U.S. counsel, responded to the Client C Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

56. In April 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client C Request.

57. On December 3, 2012, the Commission instituted these proceedings against EYHM under Rule 102(e) based on EYHM's conduct with respect to the Client B Request and the Client C Request. EYHM did not produce any documents responsive to either request to the Commission before the December 3, 2012 OIP.

58. In November 2013, EYHM audit workpapers and related documents concerning Client C were received by the Commission from the CSRC. In March 2014, EYHM audit workpapers and related documents concerning Client B were provided to the Commission by the CSRC.

4. Requests To KPMG Huazhen

59. On or around April 26, 2004, KPMG Huazhen[7] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed KPMG Huazhen's registration as a foreign public accounting firm in a letter dated July 13, 2004. KPMG Huazhen has remained registered with the Board since that time.

60. KPMG Huazhen knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

61. KPMG Huazhen knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. KPMG Huazhen described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

62. The Board's July 13, 2004 letter confirming KPMG Huazhen's registration stated that, although KPMG Huazhen had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of KPMG's registration . . . does not relieve KPMG of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by KPMG's associated persons. If KPMG prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to KPMG despite the absence of a consent."

63. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, KPMG Huazhen designated KPMG LLP ("KPMG US"), the United States member firm of KPMG International, as its agent for receiving service of document requests under Section 106. In so doing, KPMG Huazhen confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

64. KPMG Huazhen knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. KPMG Huazhen also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny KPMG Huazhen the privilege of appearing or practicing before the Commission to the extent KPMG Huazhen willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

65. In the PCAOB reporting years 2010, 2011, 2012, and 2013, KPMG Huazhen played a substantial role in the preparation or furnishing of audit reports filed with the SEC (as

[7] On August 14, 2012, KPMG Huazhen (Special General Partnership) filed with the Public Company Accounting Oversight Board a notification on Form 4 that KPMG Huazhen (Special General Partnership) had succeeded to the registration status of its predecessor, KPMG Huazhen.

defined by PCAOB Rule 1001(p)(ii))[8] for twenty-four (24), twenty-three (23), twenty-five (25), and twenty-one (21) U.S. issuers, respectively.

66. KPMG Huazhen was engaged as a component auditor for Client D for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client D related to the fiscal year ended December 31, 2010.

67. By April 2011, the Division opened an investigation into potential accounting fraud at Client D. The investigation concerned allegations made in two short seller reports issued in March 2011, which claimed that Client D's financial statements reported false cash balances, overstated revenues, and failed to disclose a material related party transaction.

68. On February 6, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client D] for the fiscal year ending December 31, 2010" (the "Client D Request").

69. KPMG Huazhen was engaged as a component auditor for Client E for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client E related to the fiscal year ended December 31, 2010, but did not complete the engagement.

70. By April 2011, Division staff opened an investigation into potential financial and accounting fraud at Client E. The investigation concerned issues raised in a Form 8-K that Client E filed in April 2011, which stated that Client E would be unable to file its Form 10-K on time because Client E's principal auditor had identified "unexplained issues regarding certain cash transactions and recorded sales."

71. On February 9, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client E] for the fiscal year ending December 31, 2010" (the "Client E Request").

72. KPMG Huazhen was engaged as a component auditor for Client F for the fiscal years ended December 31, 2008, and December 31, 2009. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit reports Client F filed with the Commission related to the fiscal years ended December 31, 2008 and 2009.

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[8] PCAOB Rule 1001(p)(ii) defines "Play a Substantial Role in the Preparation or Furnishing of an Audit Report" to mean: "(1) to perform material services that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, or (2) to perform the majority of the audit procedures with respect to a subsidiary or component of any issuer the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer necessary for the principal accountant to issue an audit report on the issuer."

73. Before February 2012, Division staff opened an investigation involving potential financial and accounting fraud at Client F. The investigation related to issues raised in a pair of disclosures made by Client F in early 2011:

a. In March 2011, Client F disclosed that it was conducting an internal investigation into "potentially serious discrepancies" in its financial statements for the year ended December 31, 2010, and

b. In May 2011, Client F disclosed that its principal auditor had resigned after identifying what they considered "potentially serious discrepancies and/or unexplained issues relating to [Client F]'s financial records," in response to which Client F failed to take adequate remedial action.

74. On February 3, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit reports issued, audit work performed, or interim reviews conducted for [Client F] from January 1, 2008 to the present" (the "Client F Request").

75. By letter dated March 27, 2012, KPMG Huazhen, through its U.S. counsel, responded to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with any of the requested audit workpapers and related documents. KPMG Huazhen did not include any of the requested audit workpapers or related documents with its March 27 response.

76. In May 2012, the Division issued to KPMG Huazhen a Wells notice that the Division intended to recommend institution of proceedings against KPMG Huazhen because, in the Division's view, KPMG Huazhen had willfully refused to comply with the Client D Request, the Client E Request, and the Client F Request.

77. On December 3, 2012, the Commission instituted these proceedings against KPMG Huazhen under Rule 102(e) based on KPMG Huazhen's conduct with respect to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen did not produce audit workpapers or related documents responsive to any of the requests to the Commission before the December 3, 2012 OIP.

5. Requests To PwC Shanghai

78. On or around April 26, 2004, PwC Shanghai[9] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed PwC

[9] On July 8, 2013, PricewaterhouseCoopers Zhong Tian LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that PricewaterhouseCoopers Zhong Tian LLP had succeeded to the registration status of its predecessor, PricewaterhouseCoopers Zhong Tian CPAs Limited Company.

Shanghai's registration as a foreign public accounting firm in a letter dated July 13, 2004. PwC Shanghai has remained registered with the Board since that time.

79. PwC Shanghai knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

80. PwC Shanghai knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. PwC Shanghai described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

81. The Board's July 13, 2004 letter confirming PwC Shanghai's registration stated that, although PwC Shanghai had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Pricewaterhouse's registration . . . does not relieve Pricewaterhouse of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Pricewaterhouse's associated persons. If Pricewaterhouse prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Pricewaterhouse despite the absence of a consent."

82. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, PwC Shanghai designated PricewaterhouseCoopers LLP ("PwC US"), the United States member firm of PwCIL, as its agent for receiving service of document requests under Section 106. In so doing, PwC Shanghai confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

83. PwC Shanghai knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. PwC Shanghai also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny PwC Shanghai the privilege of appearing or practicing before the Commission to the extent PwC Shanghai willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

84. In the PCAOB reporting years 2010, 2011, 2012, and 2013, PwC Shanghai issued audit reports for seventeen (17), twenty-seven (27), thirty-one (31), and twenty-three (23) U.S. issuers, respectively.

85. PwC Shanghai was engaged to audit the financial statements of Client H for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client H related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client H.

86. By March 2011, the Division opened an investigation into potential accounting fraud at Client H. The investigation concerned public allegations of accounting fraud and market

manipulation at Client H. Certain internet reports alleged, among other things, that Client H overstated revenue and earnings by accounting for lease revenues upfront instead of recognizing this revenue over the duration of the leases, and that there were discrepancies between Client H's cash flow and reported net income.

87. On February 8, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client H] for the fiscal year ending December 31, 2010" (the "Client H Request").

88. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client H Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

89. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client H Request.

90. PwC Shanghai was engaged to audit the financial statements of Client I for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client I related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client I.

91. By March 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client I. The investigation focused on potential accounting irregularities, undisclosed related party transactions, misappropriation of corporate assets, and market manipulation.

92. On March 22, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work performed for [Client I] for the fiscal year ending December 31, 2010" (the "Client I Request").

93. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client I Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

94. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client I Request.

95. On December 3, 2012, the Commission instituted these proceedings against PwC Shanghai under Rule 102(e) based on PwC Shanghai's conduct with respect to the Client H Request and the Client I Request. PwC Shanghai did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

96. In November 2013, PwC Shanghai produced audit workpapers and related documents concerning Client I to the CSRC, in response to a request that PwC Shanghai had received from the CSRC. In March 2014, PwC Shanghai audit workpapers and related documents concerning Client I were provided by the CSRC to the SEC.

E. FACTS CONCERNING COMMISSION REQUESTS FOR ASSISTANCE UNDER INTERNATIONAL SHARING PROTOCOLS

97. Before the December 3, 2012 OIP, in connection with Division investigations, the SEC's Office of International Affairs sent a number of requests for assistance to the CSRC pursuant to the International Organization of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding ("MMOU"), seeking DTTC's audit workpapers and related documents concerning certain of the firm's clients. The SEC did not receive any of the requested documents before the December 3, 2012 OIP. Meanwhile, the SEC issued the nine requests under Section 106 of Sarbanes-Oxley to the Settling Respondents, as described above in Section III.D, among other Section 106 requests.

98. In July 2013, after the start of the hearing in this proceeding, the CSRC produced to the SEC a set of DTTC's audit workpapers concerning a firm client that is unrelated to Clients A through I listed above. The SEC had requested these workpapers from the CSRC before the December 3, 2012 OIP. The July 2013 production was the first time that the CSRC provided audit workpapers to the SEC under any international sharing protocols.[10]

99. After the July 2013 production, the SEC received productions from the CSRC for DTTC Clients A and G, in response to requests that the SEC had made under the IOSCO MMOU before the May 9, 2012 OIP. Also after the July 2013 production, the SEC sought and received productions from the CSRC for EYHM Clients B and C, and PwC Shanghai Client I, as described above in Section III.D. To date, the SEC has not sought the assistance of the CSRC in obtaining audit workpapers and related documents for KPMG Huazhen's Client D, Client E, and Client F, or for PwC Shanghai Client H.

[10] The audit workpapers produced by the CSRC in July 2013, concerning DTTC client Longtop Financial Technologies Limited ("Longtop"), were also the subject of a subpoena enforcement action brought by the SEC against DTTC in federal district court, *SEC v. DTTC*, 1:11mc00512-GK (D.D.C.). That action was dismissed without prejudice following supplemental productions of DTTC documents received by the SEC from the CSRC in January 2014. DTTC's non-production of the Longtop documents directly to the SEC is not the basis of any Division claim against DTTC in this proceeding.

F. VIOLATIONS

100. As noted, Rule 102(e)(1)(iii) of the Commission's Rules of Practice provides that "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(1)(iii).[11] Rule 102(e) "provides the Commission with a means to ensure that the professionals on whom it relies 'perform their tasks diligently.'" *Marrie v. SEC*, 374 F.3d 1196, 1200 (D.C. Cir. 2004) (quoting *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979)). The rule "is directed at protecting the integrity of the Commission's own processes, as well as the confidence of the investing public in the integrity of the financial reporting process." *Marrie*, 374 F.3d at 1200.

101. Section 106(b) of Sarbanes-Oxley provides that a foreign public accounting firm that "performs audit work . . . shall . . . produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work . . . to the Commission . . . upon request of the Commission." 15 U.S.C. § 7216(b)(1). A foreign public accounting firm that willfully violates Section 106(b) is subject to sanction under Rule 102(e).[12]

102. Sarbanes-Oxley Section 106(e) identifies certain conduct that must be considered a violation under Section 106. Specifically, Section 106(e) states that "[a] willful refusal to comply, in whole or in part, with any request by the Commission . . . under this section, shall be deemed a violation of this Act." 15 U.S.C. § 7216(e). Thus, Rule 102(e)(1)(iii) and Section 106(e), considered together, provide that the Commission may censure, or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way, a foreign public accounting firm that is found to have willfully refused to comply with a Commission request for documents covered by Section 106(b).[13]

103. During the relevant time period, each Settling Respondent was a foreign public accounting firm. In addition, the Commission properly served each Settling Respondent with at least two requests under Section 106(b) pertaining to clients or former clients as to which that Settling Respondent had "perform[ed] audit work." In response to these requests, the Settling

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[11] Similarly, Section 4C of the Exchange Act provides, "The Commission may censure any person, or deny temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder." 15 U.S.C. § 78d-3(a)(3).

[12] Furthermore, under Section 3(b) of Sarbanes-Oxley, a violation of Section 106 is to be treated as a violation of the Exchange Act. *See* 15 U.S.C. § 7202(b)(1) ("A violation . . . of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . .").

[13] *See Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965) (discussing meaning of "willfully" under Section 15(b) of the Exchange Act); *Wonsover v. SEC*, 205 F.3d 408, 414-415 (D.C. Cir. 2000).

Respondents informed the Division in writing that they could not, consistent with Chinese law, produce documents directly to the Division. The Division did not receive any of the requested audit workpapers or related documents before this Current Proceeding was instituted.

G. FINDINGS

104. Based on the foregoing and for the purposes of this Order, the Commission finds that each Settling Respondent willfully refused to comply with the requests that were issued to it under Section 106, and each Settling Respondent willfully violated Section 106 of the Sarbanes-Oxley Act.

H. UNDERTAKINGS TO MAKE PAYMENTS

105. Pursuant to the Offers, each Settling Respondent has undertaken to pay $500,000. The Settling Respondents will make their respective payments within thirty (30) days of the issuance of this Order. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment shall be made in one of the following ways:

(1) The Settling Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) The Settling Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http:/www.sec.gov/about/offices/ofm/htm; or

(3) The Settling Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the Settling Respondent as a Respondent in this proceeding, and the file numbers of this proceeding; a copy of the cover letter and check or money order must be sent by overnight commercial mail service to David Mendel, Assistant Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Mail Stop 5971, Washington, DC 20549-5971. The Commission shall remit the funds paid pursuant to this paragraph to the United States Treasury. In determining whether to accept the Offers, the Commission has considered this undertaking by Settling Respondents.

I. STAY OF THIS PROCEEDING

106. In light of the Procedures and Undertakings as to Future Requests, And Possible Additional Proceedings and Remedies set forth below in Section III.J of this Order, this proceeding (the "**Current Proceeding**") is stayed as follows:

a. The stay applies to the Settling Respondents' petition seeking review of the Initial Decision of the Administrative Law Judge, dated January 22, 2014 (the "Initial Decision"), and to the Division's petition for review of the Initial Decision's handling of remedies as to the Settling Respondents, and to any federal court appeal from the result of either such petition for review.

b. The stay is conditioned on the Current Proceeding not being restarted pursuant to paragraph 5 of Section III.J of this Order.

c. In the event the Current Proceeding is restarted, the Commission may resolve all issues as to liability and remedies raised by the OIPs in this proceeding, including all defenses previously raised by the Settling Respondents, consistent with the Commission's May 9, 2014 order granting the parties' petitions for review in the Current Proceeding. Under the Restart scenario, the Commission may resolve, among other issues, whether the OIP in the Current Proceeding was properly served on the Settling Respondents, whether the conduct of the Settling Respondents constitutes a willful violation of Section 106, and whether any or all of the Settling Respondents should be censured or denied the privilege of appearing and practicing before the Commission pursuant to Section 106 of Sarbanes-Oxley and Rule 102(e). Accordingly, in the event of a Restart, this Order and the findings herein shall be without prejudice to any claims, arguments, or defenses that a Settling Respondent or the Division may assert in connection with the petitions for review or in any other proceeding that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order, except that the facts set forth in Annex A (which are repeated in Section III, Sub-Sections B, C, and D of this Order) shall remain admitted by the Settling Respondents for all purposes. Upon the Division's filing of a notice that the Current Proceeding is restarted in accordance with paragraph 5 of Section III.J of this Order, the Current Proceeding will resume from its current status and the Commission will re-set a briefing schedule for consideration of the parties' respective petitions for review, as appropriate.

d. Nothing in this Order, the Offers, or the undertakings shall derogate from the Settling Respondents' rights to appeal any decision of the Commission in the Current Proceeding to the Federal Courts, and in any proceedings before the Commission or the Federal Courts to make all such arguments as are currently available to them. Except for the facts that the Settling Respondents expressly agree to and admit in Annex A, which are repeated in Section III, Sub-Sections B, C, and D of this Order, nothing in this Order or the discussions leading to it may be used as an admission in the Current Proceeding in the event it is restarted.

J. PROCEDURES AND UNDERTAKINGS AS TO FUTURE REQUESTS, AND POSSIBLE ADDITIONAL PROCEEDINGS AND REMEDIES

1. The Settling Respondents and the Division will abide by the procedures set forth in this Section III.J of this Order with respect to future requests for documents covered by Section 106(b) of Sarbanes-Oxley ("**Procedures**"), during the four-year period prescribed by paragraph III.J.7 of this Order. Nothing in the Procedures reflects a determination by the Division or Commission as to the scope of obligations of any foreign public accounting firm under Section 106 of Sarbanes-Oxley, or the steps the Division should or must take in connection with a foreign public accounting firm's satisfaction of its obligations under Section 106. Requests for documents under these Procedures are deemed "covered by Section 106(b) of Sarbanes-Oxley" without regard to whether the relevant Settling Respondent prepared, furnished, or issued any audit report concerning the client for which the documents are sought, and without prejudice to any arguments a Settling Respondent may have with respect to the application of Section 106 in a Restart of the Current Proceeding or any future proceeding based on Section 106 that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order. All references to "paragraphs" in Section III.J of this Order are references to the numbered paragraphs 1 through 8 that appear in Section III.J of this Order, unless expressly indicated otherwise.

2. The following Procedures will apply to future SEC requests for production of documents covered by Section 106(b) of Sarbanes-Oxley from the Settling Respondents:

   i. The Division agrees that, on its own or through other SEC staff (such as the SEC's Office of International Affairs), it will in the first instance issue a request for assistance to the CSRC in respect of such documents under international sharing mechanisms (including, to the extent available, the IOSCO MMOU). On or about the date on which such a request for assistance is sent, the SEC or the Division will do one or both of the following:

      A. Issue a new Section 106 request (mirroring the request made to the CSRC) to the relevant Settling Respondent through its designated U.S. agent. Unless the Division has already provided notice that it is terminating the stay pursuant to paragraph 5 below, the new Section 106 request shall expressly state that, pursuant to Section 106(f), the Division agrees to accept production of documents in accordance with these Procedures; and/or

      B. Provide the relevant Settling Respondent with notice of the request for assistance that was sent to the CSRC, specifying the documents sought by the Division.

References in Section III.J of this Order to the CSRC mean the CSRC and/or such other Chinese authority/ies as may be charged from time to time by the Chinese government with liaising with the SEC on matters of cross-border information-sharing and cooperation.

For the purpose of maximizing efficiency between the CSRC and the SEC in the handling of any request, to the extent practicable the Division will make reasonable efforts (1) to discuss the content of the request with outside counsel for the relevant Settling Respondent in the United States before the request is issued in connection with the Division's investigation; and (2) to consolidate follow-up inquiries with the CSRC in a minimal number of communications after the Division receives a production, and to set forth reasonable periods for responses to such inquiries. However, nothing in this sub-paragraph affects the Settling Respondents' undertakings under paragraph 2(ii) below, the potential remedies available in paragraphs 3 and 4 below, or the Division's ability to restart the Current Proceeding under paragraph 5 below.

ii. The Settling Respondents undertake as follows:

A. Within ninety (90) days of receipt of a request under paragraph 2(i)(A) or (B) above, or within forty-five (45) days from the date the relevant Settling Respondent receives the first corresponding request from the CSRC (**"corresponding request"**), whichever is later, the relevant Settling Respondent will provide the Division with an initial declaration (**"initial declaration"**) which states that the relevant Settling Respondent has produced all responsive documents to the CSRC for production to the SEC, subject to the following:

1. If the Settling Respondent has determined to withhold documents (or portions of documents) under a claim of U.S. privilege, the declaration must attest that the Settling Respondent has described all such information on a privilege log in accordance with U.S. custom and practice (**"privilege log"**);

2. If the Settling Respondent has determined (subject to the CSRC's review) that documents (or portions of documents) should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law, including applicable privilege(s) under Chinese law, the declaration must attest that the Settling Respondent has described all such information on a withholding log (**"withholding log"**). The withholding log must (to the extent permissible under Chinese law) include the date on which the document was created; the document's author(s); all recipients of the document; the document's general subject matter; the reason for proposing the withholding; a description sufficient to identify where the document is located (or would have been located) in the

production; and a unique identifying number (i.e., a bates number) for each page containing withheld information.

3. The Division, in its sole discretion, may authorize one or more extensions of the 90-day deadline (referenced in paragraph 2(ii)(A) above) if the relevant Settling Respondent, in writing, requests and demonstrates good cause for such an extension before the expiration of such deadline.

4. If the relevant Settling Respondent determines not to provide the initial declaration within the 90-day deadline because the Settling Respondent is allowed additional time by virtue of the date on which it receives the first corresponding request from the CSRC in accordance with paragraph 2(ii)(A) above, the Settling Respondent will notify the Division in writing of this determination before the 90-day deadline expires. In addition, upon such notification by the Settling Respondent, or within five days of the Settling Respondent's receipt of the first corresponding request from the CSRC, whichever is later, the Settling Respondent will inform the Division in writing of the date on which it received the first corresponding request.

B. The Settling Respondents will inform the CSRC in writing when they have completed preparation for production to the CSRC of all responsive documents, privilege logs and withholding logs in response to corresponding requests. The Settling Respondents will use all reasonable efforts to facilitate the SEC's receipt of all responsive documents, privilege logs, and withholding logs (finalized in accordance with the CSRC's directions) in as expeditious a manner as possible.

C. Within ten (10) days of the SEC notifying the relevant Settling Respondent that production from the CSRC to the SEC has occurred, the relevant Settling Respondent will provide the Division directly with a certification that it has provided to the CSRC all documents responsive to the CSRC's corresponding request except information set forth on a privilege log, and, where applicable, that it has proposed (subject to the CSRC's review) that documents (or portions of documents) set forth on the withholding log should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law (**"certification of completeness"**). The certification of completeness must append all corresponding requests received by the Settling Respondent from the CSRC, and certified English translations thereof, and describe the Settling Respondent's search for the documents, and (to the extent permissible under Chinese law) the process by which it was determined that information included on the withholding log, if any, should be withheld.

3. Remedy in the form of an Automatic Bar. If the relevant Settling Respondent does not provide the initial declaration as required by paragraph 2(ii)(A) above **or** if the relevant Settling Respondent does not provide the certification of completeness as required by paragraph 2(ii)(C) above, the Division shall notify the relevant Settling Respondent of the failure and give the Settling Respondent twenty (20) days to cure the failure. If, within twenty (20) days of the request for cure by the Division, the relevant Settling Respondent does not provide the initial declaration as required by paragraph 2(ii)(A) above **or** the relevant Settling Respondent does not provide the certification of completeness as required by paragraph 2(ii)(C) above, the Commission, in its sole discretion, and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may determine that the relevant Settling Respondent has not complied with its obligations under this Order and thereupon enter, without further notice, an order of the Commission pursuant to Rule 102(e) in an agreed-upon form (attached as Annex B to this Order), that partially denies the Settling Respondent the privilege of practicing or appearing before the Commission, for a period of six (6) months, according to the terms set forth below (collectively the "**Partial Bar**").[14]

i. A Partial Bar is defined as follows:

A. The Settling Respondent is prohibited from issuing an audit report, or otherwise serving as a principal auditor, for any issuer (as defined in Section 2(a)(7) of Sarbanes-Oxley); and

B. The Settling Respondent is prohibited from playing a 50% or greater role in the preparation or furnishing of an audit report for any issuer, meaning the Settling Respondent is prohibited from performing:

1. Audit work that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, where the engagement hours or fees for such services constitute 50% or more of the total engagement hours or fees, respectively, provided by the principal auditor in connection with the issuance of all or part of its audit report with respect to any issuer; and

2. The majority of audit work with respect to a subsidiary or component of any issuer, the assets or revenues of which constitute 50% or more of the consolidated assets or revenues of the issuer.

ii. If two or more orders imposing a Partial Bar are issued under this paragraph 3 for a particular Settling Respondent (where each such remedy arises from a separate

[14] If an order in the form of Annex B is entered under this paragraph 3 of Section III.J of this Order, the information contained in brackets ("[. . . .]") in Annex B will be replaced by the relevant Settling Respondent's name and the other pertinent details indicated within those brackets.

investigation), the Partial Bars shall be imposed so that each Partial Bar runs its full six-month course in a non-concurrent fashion.

iii. An Order imposing the remedy of a Partial Bar shall be final. There shall be no review by any federal court.

4. Remedy in the form of a Summary Proceeding. If the relevant Settling Respondent provides the initial declaration under paragraph 2(ii)(A) above **and/or** the certification of completeness under paragraph 2(ii)(C) above, but the Division believes that either or both of the documents so provided is inadequate or that the production which the Settling Respondent has made to the CSRC and in respect of which it has given a certificate of completeness is not materially complete (as defined below), the Division shall notify the relevant Settling Respondent of the inadequacy or material non-completeness which it asserts and give the Settling Respondent at least twenty (20) days to cure them or otherwise satisfy the Division. If after twenty (20) days the relevant Settling Respondent has not resolved the matter to the Division's satisfaction, the Commission, upon recommendation by the Division and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may issue an order instituting a summary administrative proceeding ("**Summary Proceeding**"). If the Commission decides to issue an OIP, a Summary Proceeding will commence as follows:

i. The purpose of the Summary Proceeding is to determine whether, in response to a request under the Procedures, the privilege log, withholding log, initial declaration, and/or certification of completeness is or are inadequate; whether U.S. privilege justifies the withholding of any responsive information; and whether the production to the CSRC is otherwise materially complete. These are the sole issues to be determined in a Summary Proceeding. A finding that is adverse to the Settling Respondent on one or more of these issues shall collectively constitute an "offense."

ii. The Summary Proceeding will be adjudicated by an assigned ALJ, who will issue a decision no later than either 180 days from the beginning of the proceeding or an extended date approved by the Commission. The relevant Settling Respondent will be afforded a reasonable opportunity to submit responses and briefs responding to any OIP instituting a Summary Proceeding in accordance with the SEC Rules of Practice. The Rules of Practice will govern the Summary Proceeding, except to the extent inconsistent with the terms of this Order.

iii. A Summary Proceeding may impose, for a first offense, a Partial Bar for a period of up to six (6) months. If, in the same Summary Proceeding or other Summary Proceedings, there is a finding of one or more additional offenses (each arising from a different investigation), the Summary Proceeding may impose a complete bar on appearing or practicing before the Commission for a period up to six (6) months per additional offense. Practice bars imposed for multiple offenses in a single Summary Proceeding may run consecutively. Additionally, whether or not a practice bar is imposed, the

Summary Proceeding may impose a censure on the relevant Settling Respondent and/or a monetary penalty up to U.S. $750,000 per offense.

iv. The Summary Proceeding decision shall be subject to Commission review in accordance with the SEC Rules of Practice. The Commission decision that resolves a petition for review of the ALJ's initial decision shall be final. There shall be no review by any federal court.

v. A "materially complete" production is one concerning which a reasonably diligent search has been conducted by the relevant Settling Respondent to identify responsive documents and where all of the documents identified in such search have been collected by the relevant Settling Respondent and provided to the CSRC, together with an index as required by the CSRC, in accordance with Chinese law protocols. A Summary Proceeding shall not be commenced to determine whether a production is deficient because of documents that are described on a Withholding Log and withheld under a claim that they contain state secrets or state sensitive information. However, neither the definition of "materially complete" nor any limitation on the subject matter of a Summary Proceeding, set forth herein, reflects a determination by the Division or the Commission of the Settling Respondent's full production obligation under Section 106 of Sarbanes-Oxley. Additionally, the Division expressly reserves its rights to restart the Current Proceeding under the circumstances described in paragraph 5 below, including, but not limited to, where the Division has concerns about the nature or scope of withholdings in response to a certain number of requests under the Procedures.

5. Restarting of the Current Proceeding. If any Settling Respondent does not comply with its undertaking to make the payment specified in Section III.H of this Order **or** if the Division in its sole discretion at any time decides that, with respect to two or more requests made collectively to the Settling Respondents under the Procedures, (i) in the Division's view, it has not received a materially complete production and/or an adequate privilege log, withholding log, initial declaration, and/or certification of completeness, as described in paragraph 2(ii) above, and the Division has not commenced a Summary Proceeding based on the request; (ii) in the Division's view a substantial number of documents (or portions of documents) have been withheld from the production in violation of, or without justification under, U.S. law, including, but not limited to, Section 106 of Sarbanes-Oxley; or (iii) in the Division's view its receipt of a production has been substantially delayed (or not received at all) under the Procedures, the Division may recommend to the Commission that the stay referred to in Section III.I of this Order be terminated, and, after receiving approval by the Commission of its recommendation, provide notice to all of the Settling Respondents that the stay has been terminated.

Before deciding that a request forms the basis (or part of the basis) for restarting the Current Proceeding, the Division (on its own or through other SEC staff) will notify the CSRC of the alleged inadequacy and/or make reasonable inquiry of the CSRC of the likely duration of any delay or non-production. A production will not be deemed "substantially delayed" within the meaning of paragraph 5(iii) above if the production is received by the SEC within 225 days of the date of the request made under paragraph 2(i) above (or within any period of time as specifically agreed between the SEC and the CSRC for a particular request) and, in the Division's view, the production is materially complete and accompanied by an adequate privilege log, withholding log, and certification of completeness as described in paragraph 2(ii) above. If a production is received by the Division more than 225 days after the date of the request under paragraph 2(i) above, the Division, in its sole discretion, will determine whether the production is "substantially delayed" within the meaning of paragraph 5(iii) above. In making this determination, the Division will not automatically conclude that a production is "substantially delayed" because it is received more than 225 days after the date of the request, but will consider the particular circumstances of the case, including the SEC staff's communications with the CSRC regarding the timing of production.

To the extent noncompliance with Section III.H of this Order or the matters under (i), (ii) and/or (iii) above in this paragraph 5 relate to fewer than all of the Settling Respondents, the Division, in its discretion, may request of the Settling Respondents that the stay be lifted only as to the relevant Settling Respondent(s) and, if all four of the Settling Respondents agree to lift the stay only as to the relevant Settling Respondent(s), the stay will be lifted only as to the relevant Settling Respondent(s). If not, the stay will be lifted as to all of the Settling Respondents. The Current Proceeding will then resume as to all or some of the Settling Respondents, and those parties' rights will be determined by the Commission or the Federal Courts (should the identified Settling Respondents appeal). The Division's "notice" under this agreement may be by any method reasonably calculated to provide such notice, including, but not limited to, by delivering (under any method set forth in Rule 150(c) of the SEC's Rules of Practice) a copy of such notice to the Settling Respondents' outside counsel in the United States **or** to the respective domestic registered public accounting firms or other United States agents that the Settling Respondents have designated for service under Section 106(d) of Sarbanes-Oxley, 15 U.S.C. § 7216(d). Except with respect to paragraph 5(i) above, the Division's prerogatives under this paragraph are entirely separate from any remedy it may seek under paragraph 4 above.

6. In the event the Commission approves the Division's recommendation to lift the stay in the Current Proceeding, the following terms will apply:

   i. The Division may serve new Section 106 requests on the Settling Respondents, via their designated agents, without reference to the Procedures as required under paragraph 2(i)(A) above. This means that the SEC may exercise its full statutory rights under Section 106.

   ii. With respect to requests under paragraph 2(i) above that predate the lifting of the stay and do not form the basis for restarting the Current Proceeding under paragraph 5(i) above, the Division may initiate or continue to prosecute a Summary Proceeding under paragraph 4 above.

   iii. The Division may not seek to sanction non-compliance by a Settling Respondent with any Section 106 request made after the lifting of the stay ("new Section 106 request"), including through an administrative proceeding under Rule 102(e) of the Commission's Rules of Practice, until there is a Final Commission Order in the Current Proceeding. A "Final Commission Order" means a final order issued by the Commission with respect to the pending petitions for review in the Current Proceeding, without regard to whether any Settling Respondent (or any other party or non-party) seeks federal court review of the order or a stay in connection with such review.

iv. The SEC or Division may not seek to enforce any Section 106 request against a Settling Respondent in federal district court under Section 106(b)(1)(B) of Sarbanes-Oxley until there is a Final Commission Order.

v. Nothing in paragraph 5 above or this paragraph 6 precludes the parties, in the Current Proceeding, in accordance with the Commission's Rules of Practice, from seeking leave to adduce additional evidence that relates to any request made by the Division under the Procedures or Section 106.

7. The provisions of paragraphs 2, 3, 4, 5, and 6 above will be in effect for four (4) years following the date of this Order. The day after this four-year period, these same provisions will expire, except that (i) any remedies ordered under these provisions shall run their full course; and (ii) any Summary Proceeding already instituted under paragraph 4 above and the Current Proceeding, if already restarted by the Division under paragraph 5 above, shall continue until final resolution. Upon expiration of the four-year period, unless the Division has restarted the Current Proceeding, all claims against any of the Settling Respondents in the Current Proceeding will be deemed to be dismissed, except such dismissal will not affect any admissions, findings, or remedies ordered in this Order, which are, and will be, deemed final upon the dismissal of the Current Proceeding.

8. For purposes of the Commission's consideration of any Division recommendation under paragraph 4 or 5 above, or in connection with a remedy or potential remedy under paragraph 3 above, each of the Settling Respondents waives: (i) such provisions of the Commission's Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered in connection with the Division's recommendation, any resulting Summary Proceeding, or the Current Proceeding; and (ii) any right to claim bias or prejudgment by the Commission, in any such order, opinion, finding of fact, or conclusion of law entered in connection with the Division's recommendation, in any Summary Proceeding, or in the Current Proceeding.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Settling Respondents' Offers.

Accordingly, pursuant to Rules 100(c)[15] and 102(e) of the Commission's Rules of Practice, it is hereby ORDERED that:

A. DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each is censured for its willful violations of the securities laws.

B. The Current Proceeding is hereby stayed in accordance with Section III.I of this Order.

C. DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each shall comply with the Procedures and Undertakings as to Future Requests, and Possible Additional Proceedings and Remedies, set forth above in Section III.J of this Order.

D. The Commission may institute additional proceedings and/or impose additional remedies, as appropriate, in accordance with Section III.J of this Order.

By the Commission.

Brent Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

[15] Rule 100(c) of the Rules of Practice states: "The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ACCOUNTING AND AUDITING ENFORCEMENT
Release No.

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of **BDO China Dahua CPA Co., Ltd.;** **Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;** **Ernst & Young Hua Ming LLP;** **KPMG Huazhen (Special General Partnership);** **PricewaterhouseCoopers Zhong Tian CPAs Limited** **Respondents.**	**ANNEX A TO ORDER ON THE BASIS OF OFFERS OF SETTLEMENT OF CERTAIN RESPONDENTS IMPLEMENTING SETTLEMENT**

ANNEX A

Respondents Deloitte Touche Tohmatsu Certified Public Accountants Ltd. ("DTTC"), Ernst & Young Hua Ming LLP ("EYHM"), KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"), and PricewaterhouseCoopers Zhong Tian CPAs Limited Company ("PwC Shanghai") (collectively the "Settling Respondents") admit the facts set forth below (the "Admissions"):

RESPONDENTS

1. DTTC (or "Deloitte") is a special general partnership providing audit and professional services in the PRC. DTTC is located in Shanghai, China, and is a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

2. EYHM (or "Ernst") is a special general partnership providing audit and professional services in the PRC. EYHM is headquartered in Beijing, China, and is a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

3. KPMG Huazhen (or "KPMG") is a special general partnership providing audit and professional services in the PRC. KPMG Huazhen is located in Beijing, China, and is a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

4. PwC Shanghai (or "Pricewaterhouse") is a special general partnership providing audit and professional services in the PRC. PwC Shanghai is headquartered in Shanghai, China, and is a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

OTHER RELEVANT ENTITIES

5. DTTC Client A ("DTTC Client A") is a public company the securities of which are registered with the SEC under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on NASDAQ. DTTC Client A is incorporated in the Province of Ontario, Canada and has its principal operations and principal place of business in the PRC. DTTC Client A designs and manufactures solar products.

6. EYHM Client B ("Client B") is a Delaware corporation with its principal operations and principal place of business in the PRC. Client B's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client B purports to be a leading developer, manufacturer and distributor of organic compound fertilizers in China.

7. EYHM Client C ("Client C") is a Cayman Islands corporation with its primary operations in Beijing, PRC. Client C's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client C purports to provide enhanced recovery services for oil and gas exploration.

8. KPMG Huazhen Client D ("Client D") is a Delaware corporation with its primary operations in Xi'an, PRC. Client D's securities were previously registered with the SEC pursuant

to Section 12(g) of the Exchange Act and listed on NASDAQ. Client D purports to engage in the wholesale distribution of finished oil and heavy oil products, the production and sale of biodiesel, and the operation of retail gas stations.

9. KPMG Huazhen Client E ("Client E") is a Nevada corporation with its primary operations in Ningbo, PRC. Client E's securities are registered with the SEC pursuant to Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client E purports to manufacture and supply various petrochemical products in China.

10. KPMG Huazhen Client F ("Client F") is a Nevada corporation, with its primary operations in Shanghai, PRC. Client F's securities were previously registered with the SEC pursuant to Section 12(b) of the Exchange Act and listed on NASDAQ. Client F purports to manufacture chemical additives used in the production of consumer and industrial products.

11. DTTC Client G ("Client G") is a Wyoming corporation with its primary operations in Beijing, PRC. Client G's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NYSE. Client G purports to design, manufacture, and sell offset printing equipment.

12. PwC Shanghai Client H ("Client H") is a Cayman Islands corporation with its principal operations in the PRC. Client H's securities are registered with the SEC under Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client H purports to own and operate a commercial vehicle financing and service centers network.

13. PwC Shanghai Client I ("Client I") is a Nevada corporation with its primary operations in Beijing, PRC. Client I's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client I purports to manufacture automotive electrical parts in China.

FACTS CONCERNING COMMMISSION REQUESTS TO THE SETTLING RESPONDENTS UNDER SARBANES-OXLEY

1. Regulatory Background

14. Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act"), before it was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in 2010, stated, in relevant part, that "If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented . . . to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report . . . ." Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204 § 106(b).

15. In 2004, the Board posted Frequently Asked Questions to its website which stated, in part: "A registered firm's failure to cooperate with Board requests [for production of documents under Sarbanes-Oxley Section 106] may subject the firm to disciplinary sanctions, including substantial civil money penalties and revocation of the firm's registration. In the staff's view, if a firm fails to cooperate with the Board, the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate."

16. Section 106(b)(1) of Sarbanes-Oxley, as amended by Dodd-Frank, states that: "[i]f a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall . . . produce the audit workpapers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board . . . ."

2. <u>Requests To DTTC</u>

17. On or around April 16, 2004, DTTC[1] applied for registration with the Public Company Accounting Oversight Board (the "PCAOB" or "Board") as required by the Sarbanes-Oxley Act ("Sarbanes-Oxley"), 15 U.S.C. § 7212. The Board confirmed DTTC's registration as a foreign public accounting firm in a letter dated June 4, 2004. DTTC has remained registered with the Board since that time.

18. DTTC knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

19. DTTC knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. DTTC described possible conflicts of law in its April 16, 2004 PCAOB registration filing that included a legal opinion.

20. The Board's June 4, 2004 letter confirming DTTC's registration stated that, although DTTC had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Deloitte's registration . . . does not relieve Deloitte of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Deloitte associated persons. If Deloitte prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Deloitte despite the absence of a consent."

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[1] On January 1, 2013, Deloitte Touche Tohmatsu Certified Public Accountants LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Deloitte Touche Tohmatsu Certified Public Accountants LLP had succeeded to the registration status of its predecessor, Deloitte Touche Tohmatsu CPA Ltd.

21. In June 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, DTTC designated Deloitte & Touche LLP ("DTT US"), the United States member firm of DTT Global, as its agent for receiving service of document requests under Section 106. In so doing, DTTC confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

22. DTTC knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. DTTC also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained power to deny DTTC the privilege of appearing or practicing before the Commission to the extent DTTC willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

23. In the PCAOB reporting years 2010, 2011, 2012, and 2013, DTTC issued audit reports for thirty-two (32), forty-five (45), forty-five (45), and thirty-nine (39) U.S. issuers, respectively.

24. DTTC audited DTTC Client A's financial statements for the fiscal years ended December 31, 2008, 2009, and 2010. DTTC Client A remained DTTC's client as of April 2013.

25. Before April 9, 2010, the Division commenced an investigation into potential accounting fraud involving DTTC Client A, which Client A disclosed in a Form 6-K and accompanying press release filed with the Commission on June 1, 2010. In the press release, DTTC Client A announced that it was postponing the release of its full financial results for the quarter ended March 31, 2010 and its quarterly conference call, scheduled for June 2, as a result of the commencement of an investigation by the Audit Committee of DTTC Client A's Board of Directors. DTTC Client A disclosed that "the investigation was launched after the Company received a subpoena from the [Commission] requesting documents from [DTTC Client A] relating to, among other things, certain sales transactions in 2009."

26. On March 11, 2011, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [DTTC Client A] for the fiscal year ending December 31, 2009" (the "Client A Request").

27. By letter dated April 29, 2011, DTTC, through its U.S. counsel, responded to the Client A Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

28. In July 2011, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client A Request.

29. DTTC was engaged to audit the financial statements of Client G for the fiscal year ended June 30, 2010. In the course of this engagement, DTTC performed audit work on behalf of Client G related to the fiscal year ended June 30, 2010. DTTC did not issue any audit report with respect to Client G.

30. In 2010, Division staff opened an investigation involving Client G, which related to matters reported in a Form 8-K filed by Client G on September 13, 2010. Specifically, Client G reported that:

a. Client G had terminated DTTC's engagement as independent auditor effective September 6, 2010;

b. During the course of DTTC's audit of Client G for the fiscal year ended June 30, 2010, Client G had denied DTTC's request for permission to access original bank statements to verify the identity of certain individuals and entities;

c. Several "reportable events," as defined in Item 304(a)(1)(v) of Regulation S-K, occurred during DTTC's audit of Client G; and

d. Between September 6 and September 8, 2010, Client G's CEO, CFO, and several directors, including the Chair of its Audit Committee, all resigned their positions.

31. On February 14, 2012, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client G] for the fiscal year ended June 30, 2010" (the "Client G Request").

32. By letter dated April 17, 2012, DTTC, through its U.S. counsel, responded to the Client G Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

33. In April 2012, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client G Request.

34. On May 9, 2012 and December 3, 2012, the Commission instituted these proceedings against DTTC under Rule 102(e) based on DTTC's conduct with respect to the Client A Request and the Client G Request, respectively. DTTC did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

35. In 2013, DTTC provided documents related to DTTC Client A to the China Securities Regulatory Commission ("CSRC"), in response to a request that DTTC had received from the CSRC. In November 2013, DTTC audit workpapers concerning DTTC Client A were provided by the CSRC to the SEC.

36. In 2013, DTTC provided documents related to Client G to the CSRC, in response to a request that DTTC had received from the CSRC. In October 2013, DTTC audit workpapers and related documents concerning Client G were provided by the CSRC to the SEC.

3. **Requests To EYHM**

37. On or around May 25, 2004, EYHM[2] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed EYHM's registration as a foreign public accounting firm in a letter dated July 8, 2004. EYHM has remained registered with the PCAOB since that time.

38. EYHM knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

39. EYHM knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. EYHM described possible conflicts of law in its May 25, 2004 PCAOB registration filing that included a legal opinion.

40. The Board's July 8, 2004 letter confirming EYHM's registration stated that, although EYHM had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Ernst's registration . . . does not relieve Ernst of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Ernst's associated persons. If Ernst prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Ernst despite the absence of a consent."

41. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, EYHM designated Ernst & Young LLP ("EY US"), the United States member firm of EY Global, as its agent for receiving service of document requests under Section 106. In so doing, EYHM confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

42. EYHM knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. EYHM also knew, no later than upon the enactment of Dodd-

[2] On September 3, 2012, Ernst & Young Hua Ming LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Ernst & Young Hua Ming LLP had succeeded to the registration status of its predecessor, Ernst & Young Hua Ming Certified Public Accountants.

Frank, in 2010, and at all times subsequent, that that the Commission retained the power to deny EYHM the privilege of appearing or practicing before the Commission to the extent EYHM willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

43. In the PCAOB reporting years 2010, 2011, 2012, and 2013, EYHM issued audit reports for eleven (11), twenty-four (24), twenty-one (21), and twenty (20) U.S. issuers, respectively.

44. EYHM was engaged to audit the financial statements of Client B for the fiscal year ended December 31, 2010. In the course of this engagement, EYHM performed audit work on behalf of Client B related to the fiscal year ended December 31, 2010. EYHM did not issue an audit report on Client B's financial statements for the fiscal year ended December 31, 2010.

45. In March 2011, the Division opened an investigation into Client B. The investigation related to, among other things, public allegations of potential accounting fraud and misleading disclosures by Client B, including overstated revenues, falsified assets and customer relationships, and failure to disclose certain related party transactions.

46. On April 26, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client B] for the fiscal year ending December 31, 2010" (the "Client B Request").

47. By letter dated May 25, 2012, EYHM, through its U.S. counsel, responded to the Client B Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

48. In June 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client B Request.

49. EYHM audited Client C's financial statements for the fiscal year ended September 30, 2010.

50. By September 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client C. The investigation stemmed from a short seller report regarding Client C, and from a letter that EYHM submitted to the Commission, pursuant to Section 10A of the Exchange Act, upon its resignation as Client C's auditor in September 2011. The two primary subjects of the investigation were possible accounting fraud related to asset valuation, and embezzlement by Client C's chairman.

51. On February 2, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents

related to any audit work or interim reviews performed for [Client C] for the fiscal year ending September 30 , 2010 and subsequent periods" (the "Client C Request").

52. By letter dated April 4, 2012, EYHM, through its U.S. counsel, responded to the Client C Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

53. In April 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client C Request.

54. On December 3, 2012, the Commission instituted these proceedings against EYHM under Rule 102(e) based on EYHM's conduct with respect to the Client B Request and the Client C Request. EYHM did not produce any documents responsive to either request to the Commission before the December 3, 2012 OIP.

55. In November 2013, EYHM audit workpapers and related documents concerning Client C were received by the Commission from the CSRC. In March 2014, EYHM audit workpapers and related documents concerning Client B were provided to the Commission by the CSRC.

4. Requests To KPMG Huazhen

56. On or around April 26, 2004, KPMG Huazhen[3] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed KPMG Huazhen's registration as a foreign public accounting firm in a letter dated July 13, 2004. KPMG Huazhen has remained registered with the Board since that time.

57. KPMG Huazhen knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

58. KPMG Huazhen knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. KPMG Huazhen described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

59. The Board's July 13, 2004 letter confirming KPMG Huazhen's registration stated that, although KPMG Huazhen had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of KPMG's registration . . . does not relieve KPMG of the obligation to cooperate in and comply with Board demands

[3] On August 14, 2012, KPMG Huazhen (Special General Partnership) filed with the Public Company Accounting Oversight Board a notification on Form 4 that KPMG Huazhen (Special General Partnership) had succeeded to the registration status of its predecessor, KPMG Huazhen.

(including for documents or testimony) and to enforce such cooperation and compliance by KPMG's associated persons. If KPMG prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to KPMG despite the absence of a consent."

60. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, KPMG Huazhen designated KPMG LLP ("KPMG US"), the United States member firm of KPMG International, as its agent for receiving service of document requests under Section 106. In so doing, KPMG Huazhen confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

61. KPMG Huazhen knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. KPMG Huazhen also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny KPMG Huazhen the privilege of appearing or practicing before the Commission to the extent KPMG Huazhen willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

62. In the PCAOB reporting years 2010, 2011, 2012, and 2013, KPMG Huazhen played a substantial role in the preparation or furnishing of audit reports filed with the SEC (as defined by PCAOB Rule 1001(p)(ii))[4] for twenty-four (24), twenty-three (23), twenty-five (25), and twenty-one (21) U.S. issuers, respectively.

63. KPMG Huazhen was engaged as a component auditor for Client D for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client D related to the fiscal year ended December 31, 2010.

64. By April 2011, the Division opened an investigation into potential accounting fraud at Client D. The investigation concerned allegations made in two short seller reports issued in March 2011, which claimed that Client D's financial statements reported false cash balances, overstated revenues, and failed to disclose a material related party transaction.

65. On February 6, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client D] for the fiscal year ending December 31, 2010" (the "Client D Request").

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[4] PCAOB Rule 1001(p)(ii) defines "Play a Substantial Role in the Preparation or Furnishing of an Audit Report" to mean: "(1) to perform material services that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, or (2) to perform the majority of the audit procedures with respect to a subsidiary or component of any issuer the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer necessary for the principal accountant to issue an audit report on the issuer."

66. KPMG Huazhen was engaged as a component auditor for Client E for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client E related to the fiscal year ended December 31, 2010, but did not complete the engagement.

67. By April 2011, Division staff opened an investigation into potential financial and accounting fraud at Client E. The investigation concerned issues raised in a Form 8-K that Client E filed in April 2011, which stated that Client E would be unable to file its Form 10-K on time because Client E's principal auditor had identified "unexplained issues regarding certain cash transactions and recorded sales."

68. On February 9, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client E] for the fiscal year ending December 31, 2010" (the "Client E Request").

69. KPMG Huazhen was engaged as a component auditor for Client F for the fiscal years ended December 31, 2008, and December 31, 2009. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit reports Client F filed with the Commission related to the fiscal years ended December 31, 2008 and 2009.

70. Before February 2012, Division staff opened an investigation involving potential financial and accounting fraud at Client F. The investigation related to issues raised in a pair of disclosures made by Client F in early 2011:

a. In March 2011, Client F disclosed that it was conducting an internal investigation into "potentially serious discrepancies" in its financial statements for the year ended December 31, 2010, and

b. In May 2011, Client F disclosed that its principal auditor had resigned after identifying what they considered "potentially serious discrepancies and/or unexplained issues relating to [Client F]'s financial records," in response to which Client F failed to take adequate remedial action.

71. On February 3, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit reports issued, audit work performed, or interim reviews conducted for [Client F] from January 1, 2008 to the present" (the "Client F Request").

72. By letter dated March 27, 2012, KPMG Huazhen, through its U.S. counsel, responded to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with any of the requested audit workpapers and related documents. KPMG Huazhen did not include any of the requested audit workpapers or related documents with its March 27 response.

73. In May 2012, the Division issued to KPMG Huazhen a Wells notice that the Division intended to recommend institution of proceedings against KPMG Huazhen because, in the Division's view, KPMG Huazhen had willfully refused to comply with the Client D Request, the Client E Request, and the Client F Request.

74. On December 3, 2012, the Commission instituted these proceedings against KPMG Huazhen under Rule 102(e) based on KPMG Huazhen's conduct with respect to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen did not produce audit workpapers or related documents responsive to any of the requests to the Commission before the December 3, 2012 OIP.

5. Requests To PwC Shanghai

75. On or around April 26, 2004, PwC Shanghai[5] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed PwC Shanghai's registration as a foreign public accounting firm in a letter dated July 13, 2004. PwC Shanghai has remained registered with the Board since that time.

76. PwC Shanghai knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

77. PwC Shanghai knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. PwC Shanghai described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

78. The Board's July 13, 2004 letter confirming PwC Shanghai's registration stated that, although PwC Shanghai had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Pricewaterhouse's registration . . . does not relieve Pricewaterhouse of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Pricewaterhouse's associated persons. If Pricewaterhouse prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Pricewaterhouse despite the absence of a consent."

79. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, PwC Shanghai designated PricewaterhouseCoopers LLP ("PwC US"), the United States member firm of PwCIL, as its agent for receiving service of document requests under Section 106. In so doing, PwC Shanghai confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

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[5] On July 8, 2013, PricewaterhouseCoopers Zhong Tian LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that PricewaterhouseCoopers Zhong Tian LLP had succeeded to the registration status of its predecessor, PricewaterhouseCoopers Zhong Tian CPAs Limited Company.

80. PwC Shanghai knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. PwC Shanghai also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny PwC Shanghai the privilege of appearing or practicing before the Commission to the extent PwC Shanghai willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

81. In the PCAOB reporting years 2010, 2011, 2012, and 2013, PwC Shanghai issued audit reports for seventeen (17), twenty-seven (27), thirty-one (31), and twenty-three (23) U.S. issuers, respectively.

82. PwC Shanghai was engaged to audit the financial statements of Client H for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client H related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client H.

83. By March 2011, the Division opened an investigation into potential accounting fraud at Client H. The investigation concerned public allegations of accounting fraud and market manipulation at Client H. Certain internet reports alleged, among other things, that Client H overstated revenue and earnings by accounting for lease revenues upfront instead of recognizing this revenue over the duration of the leases, and that there were discrepancies between Client H's cash flow and reported net income.

84. On February 8, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client H] for the fiscal year ending December 31, 2010" (the "Client H Request").

85. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client H Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

86. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client H Request.

87. PwC Shanghai was engaged to audit the financial statements of Client I for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client I related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client I.

88. By March 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client I. The investigation focused on potential accounting irregularities, undisclosed related party transactions, misappropriation of corporate assets, and market manipulation.

89. On March 22, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work performed for [Client I] for the fiscal year ending December 31, 2010" (the "Client I Request").

90. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client I Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

91. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client I Request.

92. On December 3, 2012, the Commission instituted these proceedings against PwC Shanghai under Rule 102(e) based on PwC Shanghai's conduct with respect to the Client H Request and the Client I Request. PwC Shanghai did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

93. In November 2013, PwC Shanghai produced audit workpapers and related documents concerning Client I to the CSRC, in response to a request that PwC Shanghai had received from the CSRC. In March 2014, PwC Shanghai audit workpapers and related documents concerning Client I were provided by the CSRC to the SEC.

ANNEX B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ACCOUNTING AND AUDITING ENFORCEMENT
Release No.

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of

BDO China Dahua CPA Co., Ltd.;
Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;
Ernst & Young Hua Ming LLP;
KPMG Huazhen (Special General Partnership);
PricewaterhouseCoopers Zhong Tian CPAs Limited

Respondents.

ORDER MAKING FINDINGS AND PARTIALLY DENYING [NAME OF SETTLING RESPONDENT] THE PRIVILEGE OF PRACTICING OR APPEARING BEFORE THE SECURITIES AND EXCHANGE COMMISSION

I.

The Securities and Exchange Commission ("Commission") issues this Order Making Findings And Partially Denying [Name of Settling Respondent] The Privilege of Practicing Or Appearing Before The Securities and Exchange Commission ("Partial Bar Order") pursuant to the Offer of Settlement submitted by [Name of Settling Respondent], which was accepted by the Commission in its Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement on [MONTH, DAY], 2015 (the "Settlement Order").

II.

Respondent [Name of Settling Respondent ("[Short Form of Settling Respondent's Name – DTTC, EYHM, KPMG Huazhen, or PwC Shanghai]" or "Respondent")] admits the Commission's jurisdiction over it in, and over the subject matter of, this proceeding and any proceeding to enforce or that seeks to challenge this Partial Bar Order or the Settlement Order. In addition, Respondent [Short Form of Settling Respondent's Name] consents to the entry of this Partial Bar Order, as set forth below.

III.

On the basis of this Partial Bar Order, Respondent [Short Form of Settling Respondent's Name]'s Offer of Settlement, the Settlement Order, and Rule 102(e) of the Commission's Rules of Practice, the Commission finds that:

1. [Insert one of the following paragraphs as appropriate:

> As of the date of the Settlement Order, DTTC was a special general partnership providing audit and professional services in the People's Republic of China ("China"). DTTC was located in Shanghai, China, and was a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
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> As of the date of the Settlement Order, KPMG Huazhen was a special general partnership providing audit and professional services in the People's Republic of China ("China"). KPMG Huazhen was located in Beijing, China, and was a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
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> As of the date of the Settlement Order, EYHM was a special general partnership providing audit and professional services in the People's Republic of China ("China"). EYHM was headquartered in Beijing, China, and was a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
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> As of the date of the Settlement Order, PwC Shanghai was a special general partnership providing audit and professional services in the People's Republic of China ("China"). PwC Shanghai was headquartered in Shanghai, China, and was a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai was

a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.]

2. The Settlement Order provides, *inter alia*, that the Commission's Division of Enforcement ("Division"), for a period of four years from the date of the Settlement Order, may issue requests for assistance to the China Securities Regulatory Commission ("CSRC")[1] under international sharing mechanisms with respect to Respondent's audit workpapers and related documents. The Settlement Order also provides that, on or about the date on which such a request for assistance is sent, the SEC or the Division will do one or both of the following: (A) issue a new request under Section 106 of Sarbanes-Oxley, as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") ("Section 106"), to Respondent through its designated U.S. agent, subject to certain conditions set forth in the Settlement Order; and/or (B) provide Respondent with notice of the request for assistance that was sent to the CSRC, specifying the documents sought by the Division. *See* Settlement Order, Section III.J, Paragraph 2(i).

3. The Settlement Order further provides, *inter alia*, that:

    i. Within ninety (90) days of receipt of such a request or within forty-five (45) days from the date Respondent receives the first corresponding request from the CSRC, whichever is later, Respondent will provide the Division with an initial declaration ("initial declaration") which states that Respondent has produced all responsive documents, accompanied by an index describing such documents, to the CSRC for production to the SEC, subject to specific exceptions and conditions as set forth in the Settlement Order. *See* Settlement Order, Section III.J, Paragraphs 2(ii)(A)-(B).

    ii. Within ten (10) days of the SEC notifying Respondent that production from the CSRC to the SEC has occurred, Respondent will provide the Division directly with a certification that it has provided to the CSRC all documents responsive to the CSRC's corresponding request except information set forth on a privilege log, and, where applicable, that it has proposed (subject to the CSRC's review) that documents (or portions of documents) set forth on the withholding log should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law ("certification of completeness"). *See* Settlement Order, Section III.J, Paragraph 2(ii)(C).

[1] References to the CSRC in the Settlement Order mean the CSRC and/or such other Chinese authority/ies as may be charged from time to time by the Chinese government with liaising with the SEC on matters of cross-border information-sharing and cooperation.

iii. If Respondent does not provide the initial declaration as required by the Settlement Order, or if Respondent does not provide the certification of completeness as required by the Settlement Order, the Division shall notify Respondent of the failure and give Respondent twenty (20) days to cure the failure. If, within twenty (20) days of the request for cure by the Division, the Respondent does not provide the initial declaration or the certification of completeness as required by the Settlement Order, the Commission, in its sole discretion, and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may determine that the relevant Settling Respondent has not complied with its obligations under the Settlement Order and thereupon enter, without further notice, this Partial Bar Order. *See* Settlement Order, Section III.J, Paragraph 3.

4. On [date of request], the SEC or the Division issued a Section 106 request and/or notice of a request for assistance to the CSRC for audit workpapers and related documents of Respondent [Short Form of Settling Respondent's Name], in connection with a Division investigation, [investigation matter number].

5. The Commission, in its sole discretion, has determined that Respondent failed to provide an initial declaration required by the Settlement Order, or that Respondent failed to provide a certification of completeness as required by the Settlement Order, and did not cure such failure within twenty (20) days of a request for cure by the Division. Thus, in accordance with Paragraph 3 of Section III.J of the Settlement Order, the Commission, in its sole discretion, has determined that Respondent has not complied with its obligations under the Settlement Order.

FINDINGS

6. Based on the foregoing, the Commission finds that Respondent has violated its obligations under Paragraphs 2 and 3 of Paragraph III.J of the Settlement Order.

IV.

In view of the foregoing, the Commission deems it appropriate to impose on Respondent [Short Form of Settling Respondent's Name] the remedy agreed to in [Short Form of Settling Respondent's Name] Offer of Settlement, and required by the Settlement Order.

Accordingly, pursuant to Rule 102(e) of the Commission's Rules of Practice, Respondent [Short Form of Settling Respondent's Name]'s Offer of Settlement, and the Settlement Order, it is hereby ORDERED that Respondent [Short Form of Settling Respondent's Name] is partially denied the privilege of practicing or appearing before the Commission for a period of 180 days commencing on [the date of this Partial Bar Order *OR* the day immediately following expiration of the last Partial Bar Order imposed on Settling Respondent under the Settlement Order, if any], as follows:

A. Respondent is prohibited from issuing an audit report, or otherwise serving as a principal auditor, for any issuer (as defined in Section 2(a)(7) of Sarbanes-Oxley); and

B. Respondent is prohibited from playing a 50% or greater role in the preparation or furnishing of an audit report for any issuer, meaning the respondent is prohibited from performing:

1. Audit work that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, where the engagement hours or fees for such services constitute 50% or more of the total engagement hours or fees, respectively, provided by the principal auditor in connection with the issuance of all or part of its audit report with respect to any issuer; and

2. The majority of audit work with respect to a subsidiary or component of any issuer, the assets or revenues of which constitute 50% or more of the consolidated assets or revenues of the issuer.

By the Commission.

[name of Secretary or designated official]
[Title]

Commissioner Gallagher
Commissioner Piwowar
Dissent to the provisions
regarding the preclusion
of Federal Court Review.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74217 / February 6, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3627 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of

BDO China Dahua CPA Co., Ltd.;
Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;
Ernst & Young Hua Ming LLP;
KPMG Huazhen (Special General Partnership);
PricewaterhouseCoopers Zhong Tian CPAs Limited

Respondents.

CORRECTED ORDER ON THE BASIS OF OFFERS OF SETTLEMENT OF CERTAIN RESPONDENTS IMPLEMENTING SETTLEMENT

I.

The Securities and Exchange Commission ("SEC" or "Commission") instituted public administrative proceedings pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice against Deloitte Touche Tohmatsu Certified Public Accountants Ltd. ("DTTC") on May 9, 2012.[1]

[1] Rule 102(e)(1)(iii) provides, in pertinent part, that: "The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person

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The Commission also instituted public administrative proceedings pursuant to Rule 102(e)(1)(iii) against BDO China Dahua CPA Co., Ltd. ("Dahua"); DTTC; Ernst & Young Hua Ming LLP ("EYHM"); KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"); and PricewaterhouseCoopers Zhong Tian CPAs Limited Company ("PwC Shanghai") on December 3, 2012. The two proceedings were consolidated on December 20, 2012, pursuant to Commission Rule 201(a), and constitute the current proceeding ("Current Proceeding"). On May 9, 2014, we granted the respective petitions for review of four of the five respondents, DTTC, EYHM, KPMG Huazhen, and PwC Shanghai (collectively the "Settling Respondents"), and the Division of Enforcement ("Division") of the initial decision of the Administrative Law Judge ("ALJ") issued on January 22, 2014 ("Initial Decision").[2]

II.

The Settling Respondents have submitted Offers of Settlement (the "Offers"), which the Commission has determined to accept. The Settling Respondents admit only the facts set forth in Annex A attached hereto; and admit the Commission's jurisdiction over them in, and over the subject matter of, the Current Proceeding, any proceeding to enforce or that seeks to challenge this Order, and any proceeding contemplated by Section III.J.3 or III.J.4 of this Order. In addition, without admitting or denying the findings herein the Settling Respondents consent to the entry of this Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement ("Order") containing the following findings, undertakings to make payments as part of the Offers, procedures and undertakings as to future requests and possible additional proceedings and remedies, as set forth below, and a stay of the Current Proceeding as to the Settling Respondents (defined herein).

III.

On the basis of this Order and the Settling Respondents' Offers, and the facts contained in Annex A, the Commission finds[3] that:

A. SUMMARY

1. The Settling Respondents are foreign public accounting firms, as defined by Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act"), 15 U.S.C. § 7216(b), all based in the People's Republic of China ("China" or "PRC"). They registered with the Public Company Accounting Oversight Board ("PCAOB" or "Board") in 2004. Each Settling Respondent performed audit work for one or more clients identified in these proceedings with the

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who is found . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(1)(iii).

[2] The remaining respondent, Dahua, did not file a petition for review.

[3] The findings herein are made pursuant to the Settling Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

letter designations DTTC Client A and Client B through I. The Division opened accounting fraud investigations related to each of these nine clients.

2. Pursuant to Section 106 of Sarbanes-Oxley, as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") ("Section 106"), the Division served requests for audit workpapers and related documents pertaining to the nine clients on the Settling Respondents, through their designated agents, at various times between March 11, 2011, and April 26, 2012. The Settling Respondents responded to these requests, stating that PRC laws prevented them from producing responsive documents directly to the Division. The Settling Respondents have not produced any responsive audit workpapers and related documents directly to the Division, nor did the Division receive any of the requested workpapers and related documents through any other channel before commencement of the Current Proceeding. Because of the lack of direct production, the Commission issued the above-referenced orders instituting proceedings under Commission Rule of Practice 102(e) against the Settling Respondents based on willful violations of Section 106 (the "OIPs"). The Administrative Law Judge issued the Initial Decision in the Current Proceeding finding that DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each willfully violated Sarbanes-Oxley Section 106 by willfully refusing to comply with at least one SEC request under that provision.

3. As set forth below, this Order (i) finds, for purposes of this Order, that the Settling Respondents willfully violated Section 106, (ii) censures the Settling Respondents, and (iii) memorializes certain undertakings by them, including a payment by each of them in the amount of $500,000 to the United States Treasury. This Order also stays the Current Proceeding as to the Settling Respondents for a period of four years. During this time, the Settling Respondents will perform specified undertakings in response to any future requests for documents covered by Section 106 of Sarbanes-Oxley. Moreover, this Order provides at least three additional forms of relief in the event the Division is unsatisfied by the productions of documents that it receives in response to future requests.

- First, if a Settling Respondent fails to attest that it has produced documents as required by the undertakings, that Settling Respondent is subject to automatic issuance of a Commission order that partially denies that Settling Respondent the privilege of appearing or practicing before it for a period of six months (an "Automatic Bar").

- Second, if the Division believes that a production from a Settling Respondent is deficient in certain ways as set forth in the undertakings, the Commission, on the basis of the Division's allegations, may institute a separate, expedited administrative proceeding against that Settling Respondent (a "Summary Proceeding").

- Third, if two or more productions from the Settling Respondents are substantially delayed, are deficient in certain ways, or lack substantial volumes of requested documents (or portions of documents) in violation of, or without justification under, U.S. law, including, but not limited to, Section 106 of Sarbanes-Oxley, the Division may request that the Commission terminate the stay and resume the Current Proceeding ("Restart").

Under the Restart scenario, the Commission may resolve all issues as to liability and remedies raised by the OIPs, including all defenses previously raised by the Settling Respondents, consistent with the Commission's May 9, 2014 order granting the parties' petitions for review in the Current Proceeding.[4] Absent a Restart within the four-year undertaking period, this Current Proceeding will be deemed dismissed. However, such dismissal will not affect any admissions, findings, or remedies ordered in this Order, which are, and will be, deemed final upon the dismissal of the Current Proceeding.

B. SETTLING RESPONDENTS

4. DTTC (or "Deloitte") is a special general partnership providing audit and professional services in the PRC. DTTC is located in Shanghai, China, and is a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

5. EYHM (or "Ernst") is a special general partnership providing audit and professional services in the PRC. EYHM is headquartered in Beijing, China, and is a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

6. KPMG Huazhen (or "KPMG") is a special general partnership providing audit and professional services in the PRC. KPMG Huazhen is located in Beijing, China, and is a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

7. PwC Shanghai (or "Pricewaterhouse") is a special general partnership providing audit and professional services in the PRC. PwC Shanghai is headquartered in Shanghai, China, and is a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

[4] In the event of a Restart, as set forth more fully in Section III.I of this Order, this Order and the findings herein shall be without prejudice to any claims, arguments, or defenses that a Settling Respondent or the Division may assert in connection with the petitions for review or in any other proceeding that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order, except that the facts set forth in Annex A shall remain admitted by the Settling Respondents for all purposes. In the event of a Restart, the findings in Sections III.F and III.G of this Order shall be vacated as to any Settling Respondent for whom the Current Proceeding is restarted. In no event, however, may any Settling Respondent recover any payment made under Section III.H of this Order.

C. OTHER RELEVANT ENTITIES

8. DTTC Client A ("DTTC Client A") is a public company the securities of which are registered with the SEC under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on NASDAQ. DTTC Client A is incorporated in the Province of Ontario, Canada and has its principal operations and principal place of business in the PRC. DTTC Client A designs and manufactures solar products.

9. EYHM Client B ("Client B") is a Delaware corporation with its principal operations and principal place of business in the PRC. Client B's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client B purports to be a leading developer, manufacturer and distributor of organic compound fertilizers in China.

10. EYHM Client C ("Client C") is a Cayman Islands corporation with its primary operations in Beijing, PRC. Client C's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client C purports to provide enhanced recovery services for oil and gas exploration.

11. KPMG Huazhen Client D ("Client D") is a Delaware corporation with its primary operations in Xi'an, PRC. Client D's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client D purports to engage in the wholesale distribution of finished oil and heavy oil products, the production and sale of biodiesel, and the operation of retail gas stations.

12. KPMG Huazhen Client E ("Client E") is a Nevada corporation with its primary operations in Ningbo, PRC. Client E's securities are registered with the SEC pursuant to Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client E purports to manufacture and supply various petrochemical products in China.

13. KPMG Huazhen Client F ("Client F") is a Nevada corporation, with its primary operations in Shanghai, PRC. Client F's securities were previously registered with the SEC pursuant to Section 12(b) of the Exchange Act and listed on NASDAQ. Client F purports to manufacture chemical additives used in the production of consumer and industrial products.

14. DTTC Client G ("Client G") is a Wyoming corporation with its primary operations in Beijing, PRC. Client G's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NYSE. Client G purports to design, manufacture, and sell offset printing equipment.

15. PwC Shanghai Client H ("Client H") is a Cayman Islands corporation with its principal operations in the PRC. Client H's securities are registered with the SEC under Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client H purports to own and operate a commercial vehicle financing and service centers network.

16. PwC Shanghai Client I ("Client I") is a Nevada corporation with its primary operations in Beijing, PRC. Client I's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client I purports to manufacture automotive electrical parts in China.

D. FACTS CONCERNING COMMMISSION REQUESTS TO THE SETTLING RESPONDENTS UNDER SARBANES-OXLEY

1. Regulatory Background

17. Section 106 of the Sarbanes-Oxley Act of 2002, before it was amended by Dodd-Frank in 2010, stated, in relevant part, that "If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented . . . to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report . . . ." Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204 § 106(b).

18. In 2004, the Board posted Frequently Asked Questions to its website which stated, in part: "A registered firm's failure to cooperate with Board requests [for production of documents under Sarbanes-Oxley Section 106] may subject the firm to disciplinary sanctions, including substantial civil money penalties and revocation of the firm's registration. In the staff's view, if a firm fails to cooperate with the Board, the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate."

19. Section 106(b)(1) of Sarbanes-Oxley, as amended by Dodd-Frank, states that: "[i]f a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall . . . produce the audit workpapers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board . . . ."

2. Requests To DTTC

20. On or around April 16, 2004, DTTC[5] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed DTTC's registration as a foreign public accounting firm in a letter dated June 4, 2004. DTTC has remained registered with the Board since that time.

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[5] On January 1, 2013, Deloitte Touche Tohmatsu Certified Public Accountants LLP filed with the PCAOB a notification on Form 4 that Deloitte Touche Tohmatsu Certified Public Accountants LLP had succeeded to the registration status of its predecessor, Deloitte Touche Tohmatsu CPA Ltd.

21. DTTC knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

22. DTTC knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. DTTC described possible conflicts of law in its April 16, 2004 PCAOB registration filing that included a legal opinion.

23. The Board's June 4, 2004 letter confirming DTTC's registration stated that, although DTTC had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Deloitte's registration . . . does not relieve Deloitte of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Deloitte associated persons. If Deloitte prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Deloitte despite the absence of a consent."

24. In June 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, DTTC designated Deloitte & Touche LLP ("DTT US"), the United States member firm of DTT Global, as its agent for receiving service of document requests under Section 106. In so doing, DTTC confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

25. DTTC knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. DTTC also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained power to deny DTTC the privilege of appearing or practicing before the Commission to the extent DTTC willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

26. In the PCAOB reporting years 2010, 2011, 2012, and 2013, DTTC issued audit reports for thirty-two (32), forty-five (45), forty-five (45), and thirty-nine (39) U.S. issuers, respectively.

27. DTTC audited DTTC Client A's financial statements for the fiscal years ended December 31, 2008, 2009, and 2010. DTTC Client A remained DTTC's client as of April 2013.

28. Before April 9, 2010, the Division commenced an investigation into potential accounting fraud involving DTTC Client A, which Client A disclosed in a Form 6-K and accompanying press release filed with the Commission on June 1, 2010. In the press release, DTTC Client A announced that it was postponing the release of its full financial results for the quarter ended March 31, 2010 and its quarterly conference call, scheduled for June 2, as a result of the commencement of an investigation by the Audit Committee of DTTC Client A's Board of Directors. DTTC Client A disclosed that "the investigation was launched after the Company received a subpoena from the [Commission] requesting documents from [DTTC Client A] relating to, among other things, certain sales transactions in 2009."

29. On March 11, 2011, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [DTTC Client A] for the fiscal year ending December 31, 2009" (the "Client A Request").

30. By letter dated April 29, 2011, DTTC, through its U.S. counsel, responded to the Client A Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

31. In July 2011, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client A Request.

32. DTTC was engaged to audit the financial statements of Client G for the fiscal year ended June 30, 2010. In the course of this engagement, DTTC performed audit work on behalf of Client G related to the fiscal year ended June 30, 2010. DTTC did not issue any audit report with respect to Client G.

33. In 2010, Division staff opened an investigation involving Client G, which related to matters reported in a Form 8-K filed by Client G on September 13, 2010. Specifically, Client G reported that:

a. Client G had terminated DTTC's engagement as independent auditor effective September 6, 2010;

b. During the course of DTTC's audit of Client G for the fiscal year ended June 30, 2010, Client G had denied DTTC's request for permission to access original bank statements to verify the identity of certain individuals and entities;

c. Several "reportable events," as defined in Item 304(a)(1)(v) of Regulation S-K, occurred during DTTC's audit of Client G; and

d. Between September 6 and September 8, 2010, Client G's CEO, CFO, and several directors, including the Chair of its Audit Committee, all resigned their positions.

34. On February 14, 2012, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client G] for the fiscal year ended June 30, 2010" (the "Client G Request").

35. By letter dated April 17, 2012, DTTC, through its U.S. counsel, responded to the Client G Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited

the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

36. In April 2012, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client G Request.

37. On May 9, 2012 and December 3, 2012, the Commission instituted these proceedings against DTTC under Rule 102(e) based on DTTC's conduct with respect to the Client A Request and the Client G Request, respectively. DTTC did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

38. In 2013, DTTC provided documents related to DTTC Client A to the China Securities Regulatory Commission ("CSRC"), in response to a request that DTTC had received from the CSRC. In November 2013, DTTC audit workpapers concerning DTTC Client A were provided by the CSRC to the SEC.

39. In 2013, DTTC provided documents related to Client G to the CSRC, in response to a request that DTTC had received from the CSRC. In October 2013, DTTC audit workpapers and related documents concerning Client G were provided by the CSRC to the SEC.

3. Requests To EYHM

40. On or around May 25, 2004, EYHM[6] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed EYHM's registration as a foreign public accounting firm in a letter dated July 8, 2004. EYHM has remained registered with the PCAOB since that time.

41. EYHM knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

42. EYHM knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. EYHM described possible conflicts of law in its May 25, 2004 PCAOB registration filing that included a legal opinion.

43. The Board's July 8, 2004 letter confirming EYHM's registration stated that, although EYHM had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Ernst's registration . . . does not relieve Ernst of the obligation to cooperate in and comply with Board demands (including for

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[6] On September 3, 2012, Ernst & Young Hua Ming LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Ernst & Young Hua Ming LLP had succeeded to the registration status of its predecessor, Ernst & Young Hua Ming Certified Public Accountants.

documents or testimony) and to enforce such cooperation and compliance by Ernst's associated persons. If Ernst prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Ernst despite the absence of a consent."

44. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, EYHM designated Ernst & Young LLP ("EY US"), the United States member firm of EY Global, as its agent for receiving service of document requests under Section 106. In so doing, EYHM confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

45. EYHM knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. EYHM also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that that the Commission retained the power to deny EYHM the privilege of appearing or practicing before the Commission to the extent EYHM willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

46. In the PCAOB reporting years 2010, 2011, 2012, and 2013, EYHM issued audit reports for eleven (11), twenty-four (24), twenty-one (21), and twenty (20) U.S. issuers, respectively.

47. EYHM was engaged to audit the financial statements of Client B for the fiscal year ended December 31, 2010. In the course of this engagement, EYHM performed audit work on behalf of Client B related to the fiscal year ended December 31, 2010. EYHM did not issue an audit report on Client B's financial statements for the fiscal year ended December 31, 2010.

48. In March 2011, the Division opened an investigation into Client B. The investigation related to, among other things, public allegations of potential accounting fraud and misleading disclosures by Client B, including overstated revenues, falsified assets and customer relationships, and failure to disclose certain related party transactions.

49. On April 26, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client B] for the fiscal year ending December 31, 2010" (the "Client B Request").

50. By letter dated May 25, 2012, EYHM, through its U.S. counsel, responded to the Client B Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

51. In June 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client B Request.

52. EYHM audited Client C's financial statements for the fiscal year ended September 30, 2010.

53. By September 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client C. The investigation stemmed from a short seller report regarding Client C, and from a letter that EYHM submitted to the Commission, pursuant to Section 10A of the Exchange Act, upon its resignation as Client C's auditor in September 2011. The two primary subjects of the investigation were possible accounting fraud related to asset valuation, and embezzlement by Client C's chairman.

54. On February 2, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client C] for the fiscal year ending September 30, 2010 and subsequent periods" (the "Client C Request").

55. By letter dated April 4, 2012, EYHM, through its U.S. counsel, responded to the Client C Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

56. In April 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client C Request.

57. On December 3, 2012, the Commission instituted these proceedings against EYHM under Rule 102(e) based on EYHM's conduct with respect to the Client B Request and the Client C Request. EYHM did not produce any documents responsive to either request to the Commission before the December 3, 2012 OIP.

58. In November 2013, EYHM audit workpapers and related documents concerning Client C were received by the Commission from the CSRC. In March 2014, EYHM audit workpapers and related documents concerning Client B were provided to the Commission by the CSRC.

4. Requests To KPMG Huazhen

59. On or around April 26, 2004, KPMG Huazhen[7] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed KPMG Huazhen's registration as a foreign public accounting firm in a letter dated July 13, 2004. KPMG Huazhen has remained registered with the Board since that time.

60. KPMG Huazhen knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

61. KPMG Huazhen knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. KPMG Huazhen described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

62. The Board's July 13, 2004 letter confirming KPMG Huazhen's registration stated that, although KPMG Huazhen had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of KPMG's registration . . . does not relieve KPMG of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by KPMG's associated persons. If KPMG prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to KPMG despite the absence of a consent."

63. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, KPMG Huazhen designated KPMG LLP ("KPMG US"), the United States member firm of KPMG International, as its agent for receiving service of document requests under Section 106. In so doing, KPMG Huazhen confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

64. KPMG Huazhen knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. KPMG Huazhen also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny KPMG Huazhen the privilege of appearing or practicing before the Commission to the extent KPMG Huazhen willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

65. In the PCAOB reporting years 2010, 2011, 2012, and 2013, KPMG Huazhen played a substantial role in the preparation or furnishing of audit reports filed with the SEC (as

[7] On August 14, 2012, KPMG Huazhen (Special General Partnership) filed with the Public Company Accounting Oversight Board a notification on Form 4 that KPMG Huazhen (Special General Partnership) had succeeded to the registration status of its predecessor, KPMG Huazhen.

defined by PCAOB Rule 1001(p)(ii))[8] for twenty-four (24), twenty-three (23), twenty-five (25), and twenty-one (21) U.S. issuers, respectively.

66. KPMG Huazhen was engaged as a component auditor for Client D for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client D related to the fiscal year ended December 31, 2010.

67. By April 2011, the Division opened an investigation into potential accounting fraud at Client D. The investigation concerned allegations made in two short seller reports issued in March 2011, which claimed that Client D's financial statements reported false cash balances, overstated revenues, and failed to disclose a material related party transaction.

68. On February 6, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client D] for the fiscal year ending December 31, 2010" (the "Client D Request").

69. KPMG Huazhen was engaged as a component auditor for Client E for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client E related to the fiscal year ended December 31, 2010, but did not complete the engagement.

70. By April 2011, Division staff opened an investigation into potential financial and accounting fraud at Client E. The investigation concerned issues raised in a Form 8-K that Client E filed in April 2011, which stated that Client E would be unable to file its Form 10-K on time because Client E's principal auditor had identified "unexplained issues regarding certain cash transactions and recorded sales."

71. On February 9, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client E] for the fiscal year ending December 31, 2010" (the "Client E Request").

72. KPMG Huazhen was engaged as a component auditor for Client F for the fiscal years ended December 31, 2008, and December 31, 2009. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit reports Client F filed with the Commission related to the fiscal years ended December 31, 2008 and 2009.

[8] PCAOB Rule 1001(p)(ii) defines "Play a Substantial Role in the Preparation or Furnishing of an Audit Report" to mean: "(1) to perform material services that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, or (2) to perform the majority of the audit procedures with respect to a subsidiary or component of any issuer the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer necessary for the principal accountant to issue an audit report on the issuer."

73. Before February 2012, Division staff opened an investigation involving potential financial and accounting fraud at Client F. The investigation related to issues raised in a pair of disclosures made by Client F in early 2011:

a. In March 2011, Client F disclosed that it was conducting an internal investigation into "potentially serious discrepancies" in its financial statements for the year ended December 31, 2010, and

b. In May 2011, Client F disclosed that its principal auditor had resigned after identifying what they considered "potentially serious discrepancies and/or unexplained issues relating to [Client F]'s financial records," in response to which Client F failed to take adequate remedial action.

74. On February 3, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit reports issued, audit work performed, or interim reviews conducted for [Client F] from January 1, 2008 to the present" (the "Client F Request").

75. By letter dated March 27, 2012, KPMG Huazhen, through its U.S. counsel, responded to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with any of the requested audit workpapers and related documents. KPMG Huazhen did not include any of the requested audit workpapers or related documents with its March 27 response.

76. In May 2012, the Division issued to KPMG Huazhen a Wells notice that the Division intended to recommend institution of proceedings against KPMG Huazhen because, in the Division's view, KPMG Huazhen had willfully refused to comply with the Client D Request, the Client E Request, and the Client F Request.

77. On December 3, 2012, the Commission instituted these proceedings against KPMG Huazhen under Rule 102(e) based on KPMG Huazhen's conduct with respect to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen did not produce audit workpapers or related documents responsive to any of the requests to the Commission before the December 3, 2012 OIP.

5. Requests To PwC Shanghai

78. On or around April 26, 2004, PwC Shanghai[9] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed PwC

[9] On July 8, 2013, PricewaterhouseCoopers Zhong Tian LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that PricewaterhouseCoopers Zhong Tian LLP had succeeded to the registration status of its predecessor, PricewaterhouseCoopers Zhong Tian CPAs Limited Company.

Shanghai's registration as a foreign public accounting firm in a letter dated July 13, 2004. PwC Shanghai has remained registered with the Board since that time.

79. PwC Shanghai knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

80. PwC Shanghai knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. PwC Shanghai described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

81. The Board's July 13, 2004 letter confirming PwC Shanghai's registration stated that, although PwC Shanghai had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Pricewaterhouse's registration . . . does not relieve Pricewaterhouse of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Pricewaterhouse's associated persons. If Pricewaterhouse prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Pricewaterhouse despite the absence of a consent."

82. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, PwC Shanghai designated PricewaterhouseCoopers LLP ("PwC US"), the United States member firm of PwCIL, as its agent for receiving service of document requests under Section 106. In so doing, PwC Shanghai confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

83. PwC Shanghai knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. PwC Shanghai also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny PwC Shanghai the privilege of appearing or practicing before the Commission to the extent PwC Shanghai willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

84. In the PCAOB reporting years 2010, 2011, 2012, and 2013, PwC Shanghai issued audit reports for seventeen (17), twenty-seven (27), thirty-one (31), and twenty-three (23) U.S. issuers, respectively.

85. PwC Shanghai was engaged to audit the financial statements of Client H for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client H related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client H.

86. By March 2011, the Division opened an investigation into potential accounting fraud at Client H. The investigation concerned public allegations of accounting fraud and market

manipulation at Client H. Certain internet reports alleged, among other things, that Client H overstated revenue and earnings by accounting for lease revenues upfront instead of recognizing this revenue over the duration of the leases, and that there were discrepancies between Client H's cash flow and reported net income.

87. On February 8, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client H] for the fiscal year ending December 31, 2010" (the "Client H Request").

88. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client H Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

89. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client H Request.

90. PwC Shanghai was engaged to audit the financial statements of Client I for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client I related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client I.

91. By March 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client I. The investigation focused on potential accounting irregularities, undisclosed related party transactions, misappropriation of corporate assets, and market manipulation.

92. On March 22, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work performed for [Client I] for the fiscal year ending December 31, 2010" (the "Client I Request").

93. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client I Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

94. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client I Request.

95. On December 3, 2012, the Commission instituted these proceedings against PwC Shanghai under Rule 102(e) based on PwC Shanghai's conduct with respect to the Client H Request and the Client I Request. PwC Shanghai did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

96. In November 2013, PwC Shanghai produced audit workpapers and related documents concerning Client I to the CSRC, in response to a request that PwC Shanghai had received from the CSRC. In March 2014, PwC Shanghai audit workpapers and related documents concerning Client I were provided by the CSRC to the SEC.

E. FACTS CONCERNING COMMISSION REQUESTS FOR ASSISTANCE UNDER INTERNATIONAL SHARING PROTOCOLS

97. Before the December 3, 2012 OIP, in connection with Division investigations, the SEC's Office of International Affairs sent a number of requests for assistance to the CSRC pursuant to the International Organization of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding ("MMOU"), seeking DTTC's audit workpapers and related documents concerning certain of the firm's clients. The SEC did not receive any of the requested documents before the December 3, 2012 OIP. Meanwhile, the SEC issued the nine requests under Section 106 of Sarbanes-Oxley to the Settling Respondents, as described above in Section III.D, among other Section 106 requests.

98. In July 2013, after the start of the hearing in this proceeding, the CSRC produced to the SEC a set of DTTC's audit workpapers concerning a firm client that is unrelated to Clients A through I listed above. The SEC had requested these workpapers from the CSRC before the December 3, 2012 OIP. The July 2013 production was the first time that the CSRC provided audit workpapers to the SEC under any international sharing protocols.[10]

99. After the July 2013 production, the SEC received productions from the CSRC for DTTC Clients A and G, in response to requests that the SEC had made under the IOSCO MMOU before the May 9, 2012 OIP. Also after the July 2013 production, the SEC sought and received productions from the CSRC for EYHM Clients B and C, and PwC Shanghai Client I, as described above in Section III.D. To date, the SEC has not sought the assistance of the CSRC in obtaining audit workpapers and related documents for KPMG Huazhen's Client D, Client E, and Client F, or for PwC Shanghai Client H.

[10] The audit workpapers produced by the CSRC in July 2013, concerning DTTC client Longtop Financial Technologies Limited ("Longtop"), were also the subject of a subpoena enforcement action brought by the SEC against DTTC in federal district court, *SEC v. DTTC*, 1:11mc00512-GK (D.D.C.). That action was dismissed without prejudice following supplemental productions of DTTC documents received by the SEC from the CSRC in January 2014. DTTC's non-production of the Longtop documents directly to the SEC is not the basis of any Division claim against DTTC in this proceeding.

F. VIOLATIONS

100. As noted, Rule 102(e)(1)(iii) of the Commission's Rules of Practice provides that "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . [t]o have willfully violated . . . any provision of the Federal securities laws or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(1)(iii).[11] Rule 102(e) "provides the Commission with a means to ensure that the professionals on whom it relies 'perform their tasks diligently.'" *Marrie v. SEC*, 374 F.3d 1196, 1200 (D.C. Cir. 2004) (quoting *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979)). The rule "is directed at protecting the integrity of the Commission's own processes, as well as the confidence of the investing public in the integrity of the financial reporting process." *Marrie*, 374 F.3d at 1200.

101. Section 106(b) of Sarbanes-Oxley provides that a foreign public accounting firm that "performs audit work . . . shall . . . produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work . . . to the Commission . . . upon request of the Commission." 15 U.S.C. § 7216(b)(1). A foreign public accounting firm that willfully violates Section 106(b) is subject to sanction under Rule 102(e).[12]

102. Sarbanes-Oxley Section 106(e) identifies certain conduct that must be considered a violation under Section 106. Specifically, Section 106(e) states that "[a] willful refusal to comply, in whole or in part, with any request by the Commission . . . under this section, shall be deemed a violation of this Act." 15 U.S.C. § 7216(e). Thus, Rule 102(e)(1)(iii) and Section 106(e), considered together, provide that the Commission may censure, or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way, a foreign public accounting firm that is found to have willfully refused to comply with a Commission request for documents covered by Section 106(b).[13]

103. During the relevant time period, each Settling Respondent was a foreign public accounting firm. In addition, the Commission properly served each Settling Respondent with at least two requests under Section 106(b) pertaining to clients or former clients as to which that Settling Respondent had "perform[ed] audit work." In response to these requests, the Settling

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[11] Similarly, Section 4C of the Exchange Act provides, "The Commission may censure any person, or deny temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder." 15 U.S.C. § 78d-3(a)(3).

[12] Furthermore, under Section 3(b) of Sarbanes-Oxley, a violation of Section 106 is to be treated as a violation of the Exchange Act. *See* 15 U.S.C. § 7202(b)(1) ("A violation . . . of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . .").

[13] *See Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965) (discussing meaning of "willfully" under Section 15(b) of the Exchange Act); *Wonsover v. SEC*, 205 F.3d 408, 414-415 (D.C. Cir. 2000).

Respondents informed the Division in writing that they could not, consistent with Chinese law, produce documents directly to the Division. The Division did not receive any of the requested audit workpapers or related documents before this Current Proceeding was instituted.

G. FINDINGS

104. Based on the foregoing and for the purposes of this Order, the Commission finds that each Settling Respondent willfully refused to comply with the requests that were issued to it under Section 106, and each Settling Respondent willfully violated Section 106 of the Sarbanes-Oxley Act.

H. UNDERTAKINGS TO MAKE PAYMENTS

105. Pursuant to the Offers, each Settling Respondent has undertaken to pay $500,000. The Settling Respondents will make their respective payments within thirty (30) days of the issuance of this Order. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment shall be made in one of the following ways:

(1) The Settling Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) The Settling Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http:/www.sec.gov/about/offices/ofm/htm; or

(3) The Settling Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying the Settling Respondent as a Respondent in this proceeding, and the file numbers of this proceeding; a copy of the cover letter and check or money order must be sent by overnight commercial mail service to David Mendel, Assistant Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Mail Stop 5971, Washington, DC 20549-5971. The Commission shall remit the funds paid pursuant to this paragraph to the United States Treasury. In determining whether to accept the Offers, the Commission has considered this undertaking by Settling Respondents.

I. STAY OF THIS PROCEEDING

106. In light of the Procedures and Undertakings as to Future Requests, And Possible Additional Proceedings and Remedies set forth below in Section III.J of this Order, this proceeding (the "**Current Proceeding**") is stayed as follows:

a. The stay applies to the Settling Respondents' petition seeking review of the Initial Decision of the Administrative Law Judge, dated January 22, 2014 (the "Initial Decision"), and to the Division's petition for review of the Initial Decision's handling of remedies as to the Settling Respondents, and to any federal court appeal from the result of either such petition for review.

b. The stay is conditioned on the Current Proceeding not being restarted pursuant to paragraph 5 of Section III.J of this Order.

c. In the event the Current Proceeding is restarted, the Commission may resolve all issues as to liability and remedies raised by the OIPs in this proceeding, including all defenses previously raised by the Settling Respondents, consistent with the Commission's May 9, 2014 order granting the parties' petitions for review in the Current Proceeding. Under the Restart scenario, the Commission may resolve, among other issues, whether the OIP in the Current Proceeding was properly served on the Settling Respondents, whether the conduct of the Settling Respondents constitutes a willful violation of Section 106, and whether any or all of the Settling Respondents should be censured or denied the privilege of appearing and practicing before the Commission pursuant to Section 106 of Sarbanes-Oxley and Rule 102(e). Accordingly, in the event of a Restart, this Order and the findings herein shall be without prejudice to any claims, arguments, or defenses that a Settling Respondent or the Division may assert in connection with the petitions for review or in any other proceeding that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order, except that the facts set forth in Annex A (which are repeated in Section III, Sub-Sections B, C, and D of this Order) shall remain admitted by the Settling Respondents for all purposes. Upon the Division's filing of a notice that the Current Proceeding is restarted in accordance with paragraph 5 of Section III.J of this Order, the Current Proceeding will resume from its current status and the Commission will re-set a briefing schedule for consideration of the parties' respective petitions for review, as appropriate.

d. Nothing in this Order, the Offers, or the undertakings shall derogate from the Settling Respondents' rights to appeal any decision of the Commission in the Current Proceeding to the Federal Courts, and in any proceedings before the Commission or the Federal Courts to make all such arguments as are currently available to them. Except for the facts that the Settling Respondents expressly agree to and admit in Annex A, which are repeated in Section III, Sub-Sections B, C, and D of this Order, nothing in this Order or the discussions leading to it may be used as an admission in the Current Proceeding in the event it is restarted.

J. PROCEDURES AND UNDERTAKINGS AS TO FUTURE REQUESTS, AND POSSIBLE ADDITIONAL PROCEEDINGS AND REMEDIES

1. The Settling Respondents and the Division will abide by the procedures set forth in this Section III.J of this Order with respect to future requests for documents covered by Section 106(b) of Sarbanes-Oxley ("**Procedures**"), during the four-year period prescribed by paragraph III.J.7 of this Order. Nothing in the Procedures reflects a determination by the Division or Commission as to the scope of obligations of any foreign public accounting firm under Section 106 of Sarbanes-Oxley, or the steps the Division should or must take in connection with a foreign public accounting firm's satisfaction of its obligations under Section 106. Requests for documents under these Procedures are deemed "covered by Section 106(b) of Sarbanes-Oxley" without regard to whether the relevant Settling Respondent prepared, furnished, or issued any audit report concerning the client for which the documents are sought, and without prejudice to any arguments a Settling Respondent may have with respect to the application of Section 106 in a Restart of the Current Proceeding or any future proceeding based on Section 106 that does not arise under paragraph 3 or paragraph 4 of Section III.J of this Order. All references to "paragraphs" in Section III.J of this Order are references to the numbered paragraphs 1 through 8 that appear in Section III.J of this Order, unless expressly indicated otherwise.

2. The following Procedures will apply to future SEC requests for production of documents covered by Section 106(b) of Sarbanes-Oxley from the Settling Respondents:

   i. The Division agrees that, on its own or through other SEC staff (such as the SEC's Office of International Affairs), it will in the first instance issue a request for assistance to the CSRC in respect of such documents under international sharing mechanisms (including, to the extent available, the IOSCO MMOU). On or about the date on which such a request for assistance is sent, the SEC or the Division will do one or both of the following:

      A. Issue a new Section 106 request (mirroring the request made to the CSRC) to the relevant Settling Respondent through its designated U.S. agent. Unless the Division has already provided notice that it is terminating the stay pursuant to paragraph 5 below, the new Section 106 request shall expressly state that, pursuant to Section 106(f), the Division agrees to accept production of documents in accordance with these Procedures; and/or

      B. Provide the relevant Settling Respondent with notice of the request for assistance that was sent to the CSRC, specifying the documents sought by the Division.

References in Section III.J of this Order to the CSRC mean the CSRC and/or such other Chinese authority/ies as may be charged from time to time by the Chinese government with liaising with the SEC on matters of cross-border information-sharing and cooperation.

For the purpose of maximizing efficiency between the CSRC and the SEC in the handling of any request, to the extent practicable the Division will make reasonable efforts (1) to discuss the content of the request with outside counsel for the relevant Settling Respondent in the United States before the request is issued in connection with the Division's investigation; and (2) to consolidate follow-up inquiries with the CSRC in a minimal number of communications after the Division receives a production, and to set forth reasonable periods for responses to such inquiries. However, nothing in this sub-paragraph affects the Settling Respondents' undertakings under paragraph 2(ii) below, the potential remedies available in paragraphs 3 and 4 below, or the Division's ability to restart the Current Proceeding under paragraph 5 below.

ii. The Settling Respondents undertake as follows:

A. Within ninety (90) days of receipt of a request under paragraph 2(i)(A) or (B) above, or within forty-five (45) days from the date the relevant Settling Respondent receives the first corresponding request from the CSRC ("**corresponding request**"), whichever is later, the relevant Settling Respondent will provide the Division with an initial declaration ("**initial declaration**") which states that the relevant Settling Respondent has produced all responsive documents to the CSRC for production to the SEC, subject to the following:

1. If the Settling Respondent has determined to withhold documents (or portions of documents) under a claim of U.S. privilege, the declaration must attest that the Settling Respondent has described all such information on a privilege log in accordance with U.S. custom and practice ("**privilege log**");

2. If the Settling Respondent has determined (subject to the CSRC's review) that documents (or portions of documents) should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law, including applicable privilege(s) under Chinese law, the declaration must attest that the Settling Respondent has described all such information on a withholding log ("**withholding log**"). The withholding log must (to the extent permissible under Chinese law) include the date on which the document was created; the document's author(s); all recipients of the document; the document's general subject matter; the reason for proposing the withholding; a description sufficient to identify where the document is located (or would have been located) in the

production; and a unique identifying number (i.e., a bates number) for each page containing withheld information.

3. The Division, in its sole discretion, may authorize one or more extensions of the 90-day deadline (referenced in paragraph 2(ii)(A) above) if the relevant Settling Respondent, in writing, requests and demonstrates good cause for such an extension before the expiration of such deadline.

4. If the relevant Settling Respondent determines not to provide the initial declaration within the 90-day deadline because the Settling Respondent is allowed additional time by virtue of the date on which it receives the first corresponding request from the CSRC in accordance with paragraph 2(ii)(A) above, the Settling Respondent will notify the Division in writing of this determination before the 90-day deadline expires. In addition, upon such notification by the Settling Respondent, or within five days of the Settling Respondent's receipt of the first corresponding request from the CSRC, whichever is later, the Settling Respondent will inform the Division in writing of the date on which it received the first corresponding request.

B. The Settling Respondents will inform the CSRC in writing when they have completed preparation for production to the CSRC of all responsive documents, privilege logs and withholding logs in response to corresponding requests. The Settling Respondents will use all reasonable efforts to facilitate the SEC's receipt of all responsive documents, privilege logs, and withholding logs (finalized in accordance with the CSRC's directions) in as expeditious a manner as possible.

C. Within ten (10) days of the SEC notifying the relevant Settling Respondent that production from the CSRC to the SEC has occurred, the relevant Settling Respondent will provide the Division directly with a certification that it has provided to the CSRC all documents responsive to the CSRC's corresponding request except information set forth on a privilege log, and, where applicable, that it has proposed (subject to the CSRC's review) that documents (or portions of documents) set forth on the withholding log should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law (**"certification of completeness"**). The certification of completeness must append all corresponding requests received by the Settling Respondent from the CSRC, and certified English translations thereof, and describe the Settling Respondent's search for the documents, and (to the extent permissible under Chinese law) the process by which it was determined that information included on the withholding log, if any, should be withheld.

3. Remedy in the form of an Automatic Bar. If the relevant Settling Respondent does not provide the initial declaration as required by paragraph 2(ii)(A) above **or** if the relevant Settling Respondent does not provide the certification of completeness as required by paragraph 2(ii)(C) above, the Division shall notify the relevant Settling Respondent of the failure and give the Settling Respondent twenty (20) days to cure the failure. If, within twenty (20) days of the request for cure by the Division, the relevant Settling Respondent does not provide the initial declaration as required by paragraph 2(ii)(A) above **or** the relevant Settling Respondent does not provide the certification of completeness as required by paragraph 2(ii)(C) above, the Commission, in its sole discretion, and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may determine that the relevant Settling Respondent has not complied with its obligations under this Order and thereupon enter, without further notice, an order of the Commission pursuant to Rule 102(e) in an agreed-upon form (attached as Annex B to this Order), that partially denies the Settling Respondent the privilege of practicing or appearing before the Commission, for a period of six (6) months, according to the terms set forth below (collectively the "**Partial Bar**").[14]

i. A Partial Bar is defined as follows:

A. The Settling Respondent is prohibited from issuing an audit report, or otherwise serving as a principal auditor, for any issuer (as defined in Section 2(a)(7) of Sarbanes-Oxley); and

B. The Settling Respondent is prohibited from playing a 50% or greater role in the preparation or furnishing of an audit report for any issuer, meaning the Settling Respondent is prohibited from performing:

1. Audit work that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, where the engagement hours or fees for such services constitute 50% or more of the total engagement hours or fees, respectively, provided by the principal auditor in connection with the issuance of all or part of its audit report with respect to any issuer; and

2. The majority of audit work with respect to a subsidiary or component of any issuer, the assets or revenues of which constitute 50% or more of the consolidated assets or revenues of the issuer.

ii. If two or more orders imposing a Partial Bar are issued under this paragraph 3 for a particular Settling Respondent (where each such remedy arises from a separate

[14] If an order in the form of Annex B is entered under this paragraph 3 of Section III.J of this Order, the information contained in brackets ("[. . . .]") in Annex B will be replaced by the relevant Settling Respondent's name and the other pertinent details indicated within those brackets.

investigation), the Partial Bars shall be imposed so that each Partial Bar runs its full six-month course in a non-concurrent fashion.

iii. An Order imposing the remedy of a Partial Bar shall be final. There shall be no review by any federal court.

4. <u>Remedy in the form of a Summary Proceeding</u>. If the relevant Settling Respondent provides the initial declaration under paragraph 2(ii)(A) above **<u>and/or</u>** the certification of completeness under paragraph 2(ii)(C) above, but the Division believes that either or both of the documents so provided is inadequate or that the production which the Settling Respondent has made to the CSRC and in respect of which it has given a certificate of completeness is not materially complete (as defined below), the Division shall notify the relevant Settling Respondent of the inadequacy or material non-completeness which it asserts and give the Settling Respondent at least twenty (20) days to cure them or otherwise satisfy the Division. If after twenty (20) days the relevant Settling Respondent has not resolved the matter to the Division's satisfaction, the Commission, upon recommendation by the Division and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may issue an order instituting a summary administrative proceeding ("**Summary Proceeding**"). If the Commission decides to issue an OIP, a Summary Proceeding will commence as follows:

   i. The purpose of the Summary Proceeding is to determine whether, in response to a request under the Procedures, the privilege log, withholding log, initial declaration, and/or certification of completeness is or are inadequate; whether U.S. privilege justifies the withholding of any responsive information; and whether the production to the CSRC is otherwise materially complete. These are the sole issues to be determined in a Summary Proceeding. A finding that is adverse to the Settling Respondent on one or more of these issues shall collectively constitute an "offense."

   ii. The Summary Proceeding will be adjudicated by an assigned ALJ, who will issue a decision no later than either 180 days from the beginning of the proceeding or an extended date approved by the Commission. The relevant Settling Respondent will be afforded a reasonable opportunity to submit responses and briefs responding to any OIP instituting a Summary Proceeding in accordance with the SEC Rules of Practice. The Rules of Practice will govern the Summary Proceeding, except to the extent inconsistent with the terms of this Order.

   iii. A Summary Proceeding may impose, for a first offense, a Partial Bar for a period of up to six (6) months. If, in the same Summary Proceeding or other Summary Proceedings, there is a finding of one or more additional offenses (each arising from a different investigation), the Summary Proceeding may impose a complete bar on appearing or practicing before the Commission for a period up to six (6) months per additional offense. Practice bars imposed for multiple offenses in a single Summary Proceeding may run consecutively. Additionally, whether or not a practice bar is imposed, the

Summary Proceeding may impose a censure on the relevant Settling Respondent and/or a monetary penalty up to U.S. $750,000 per offense.

iv. The Summary Proceeding decision shall be subject to Commission review in accordance with the SEC Rules of Practice. The Commission decision that resolves a petition for review of the ALJ's initial decision shall be final. There shall be no review by any federal court.

v. A "materially complete" production is one concerning which a reasonably diligent search has been conducted by the relevant Settling Respondent to identify responsive documents and where all of the documents identified in such search have been collected by the relevant Settling Respondent and provided to the CSRC, together with an index as required by the CSRC, in accordance with Chinese law protocols. A Summary Proceeding shall not be commenced to determine whether a production is deficient because of documents that are described on a Withholding Log and withheld under a claim that they contain state secrets or state sensitive information. However, neither the definition of "materially complete" nor any limitation on the subject matter of a Summary Proceeding, set forth herein, reflects a determination by the Division or the Commission of the Settling Respondent's full production obligation under Section 106 of Sarbanes-Oxley. Additionally, the Division expressly reserves its rights to restart the Current Proceeding under the circumstances described in paragraph 5 below, including, but not limited to, where the Division has concerns about the nature or scope of withholdings in response to a certain number of requests under the Procedures.

5. Restarting of the Current Proceeding. If any Settling Respondent does not comply with its undertaking to make the payment specified in Section III.H of this Order **or** if the Division in its sole discretion at any time decides that, with respect to two or more requests made collectively to the Settling Respondents under the Procedures, (i) in the Division's view, it has not received a materially complete production and/or an adequate privilege log, withholding log, initial declaration, and/or certification of completeness, as described in paragraph 2(ii) above, and the Division has not commenced a Summary Proceeding based on the request; (ii) in the Division's view a substantial number of documents (or portions of documents) have been withheld from the production in violation of, or without justification under, U.S. law, including, but not limited to, Section 106 of Sarbanes-Oxley; or (iii) in the Division's view its receipt of a production has been substantially delayed (or not received at all) under the Procedures, the Division may recommend to the Commission that the stay referred to in Section III.I of this Order be terminated, and, after receiving approval by the Commission of its recommendation, provide notice to all of the Settling Respondents that the stay has been terminated.

Before deciding that a request forms the basis (or part of the basis) for restarting the Current Proceeding, the Division (on its own or through other SEC staff) will notify the CSRC of the alleged inadequacy and/or make reasonable inquiry of the CSRC of the likely duration of any delay or non-production. A production will not be deemed "substantially delayed" within the meaning of paragraph 5(iii) above if the production is received by the SEC within 225 days of the date of the request made under paragraph 2(i) above (or within any period of time as specifically agreed between the SEC and the CSRC for a particular request) and, in the Division's view, the production is materially complete and accompanied by an adequate privilege log, withholding log, and certification of completeness as described in paragraph 2(ii) above. If a production is received by the Division more than 225 days after the date of the request under paragraph 2(i) above, the Division, in its sole discretion, will determine whether the production is "substantially delayed" within the meaning of paragraph 5(iii) above. In making this determination, the Division will not automatically conclude that a production is "substantially delayed" because it is received more than 225 days after the date of the request, but will consider the particular circumstances of the case, including the SEC staff's communications with the CSRC regarding the timing of production.

To the extent noncompliance with Section III.H of this Order or the matters under (i), (ii) and/or (iii) above in this paragraph 5 relate to fewer than all of the Settling Respondents, the Division, in its discretion, may request of the Settling Respondents that the stay be lifted only as to the relevant Settling Respondent(s) and, if all four of the Settling Respondents agree to lift the stay only as to the relevant Settling Respondent(s), the stay will be lifted only as to the relevant Settling Respondent(s). If not, the stay will be lifted as to all of the Settling Respondents. The Current Proceeding will then resume as to all or some of the Settling Respondents, and those parties' rights will be determined by the Commission or the Federal Courts (should the identified Settling Respondents appeal). The Division's "notice" under this agreement may be by any method reasonably calculated to provide such notice, including, but not limited to, by delivering (under any method set forth in Rule 150(c) of the SEC's Rules of Practice) a copy of such notice to the Settling Respondents' outside counsel in the United States **or** to the respective domestic registered public accounting firms or other United States agents that the Settling Respondents have designated for service under Section 106(d) of Sarbanes-Oxley, 15 U.S.C. § 7216(d). Except with respect to paragraph 5(i) above, the Division's prerogatives under this paragraph are entirely separate from any remedy it may seek under paragraph 4 above.

6. In the event the Commission approves the Division's recommendation to lift the stay in the Current Proceeding, the following terms will apply:

   i. The Division may serve new Section 106 requests on the Settling Respondents, via their designated agents, without reference to the Procedures as required under paragraph 2(i)(A) above. This means that the SEC may exercise its full statutory rights under Section 106.

   ii. With respect to requests under paragraph 2(i) above that predate the lifting of the stay and do not form the basis for restarting the Current Proceeding under paragraph 5(i) above, the Division may initiate or continue to prosecute a Summary Proceeding under paragraph 4 above.

   iii. The Division may not seek to sanction non-compliance by a Settling Respondent with any Section 106 request made after the lifting of the stay ("new Section 106 request"), including through an administrative proceeding under Rule 102(e) of the Commission's Rules of Practice, until there is a Final Commission Order in the Current Proceeding. A "Final Commission Order" means a final order issued by the Commission with respect to the pending petitions for review in the Current Proceeding, without regard to whether any Settling Respondent (or any other party or non-party) seeks federal court review of the order or a stay in connection with such review.

iv. The SEC or Division may not seek to enforce any Section 106 request against a Settling Respondent in federal district court under Section 106(b)(l)(B) of Sarbanes-Oxley until there is a Final Commission Order.

v. Nothing in paragraph 5 above or this paragraph 6 precludes the parties, in the Current Proceeding, in accordance with the Commission's Rules of Practice, from seeking leave to adduce additional evidence that relates to any request made by the Division under the Procedures or Section 106.

7. The provisions of paragraphs 2, 3, 4, 5, and 6 above will be in effect for four (4) years following the date of this Order. The day after this four-year period, these same provisions will expire, except that (i) any remedies ordered under these provisions shall run their full course; and (ii) any Summary Proceeding already instituted under paragraph 4 above and the Current Proceeding, if already restarted by the Division under paragraph 5 above, shall continue until final resolution. Upon expiration of the four-year period, unless the Division has restarted the Current Proceeding, all claims against any of the Settling Respondents in the Current Proceeding will be deemed to be dismissed, except such dismissal will not affect any admissions, findings, or remedies ordered in this Order, which are, and will be, deemed final upon the dismissal of the Current Proceeding.

8. For purposes of the Commission's consideration of any Division recommendation under paragraph 4 or 5 above, or in connection with a remedy or potential remedy under paragraph 3 above, each of the Settling Respondents waives: (i) such provisions of the Commission's Rules of Practice or other requirements of law as may be construed to prevent any member of the Commission's staff from participating in the preparation of, or advising the Commission as to, any order, opinion, finding of fact, or conclusion of law to be entered in connection with the Division's recommendation, any resulting Summary Proceeding, or the Current Proceeding; and (ii) any right to claim bias or prejudgment by the Commission, in any such order, opinion, finding of fact, or conclusion of law entered in connection with the Division's recommendation, in any Summary Proceeding, or in the Current Proceeding.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Settling Respondents' Offers.

Accordingly, pursuant to Rules 100(c)[15] and 102(e) of the Commission's Rules of Practice, it is hereby ORDERED that:

A. DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each is censured for its willful violations of the securities laws.

B. The Current Proceeding is hereby stayed in accordance with Section III.I of this Order.

C. DTTC, EYHM, KPMG Huazhen, and PwC Shanghai each shall comply with the Procedures and Undertakings as to Future Requests, and Possible Additional Proceedings and Remedies, set forth above in Section III.J of this Order.

D. The Commission may institute additional proceedings and/or impose additional remedies, as appropriate, in accordance with Section III.J of this Order.

By the Commission.

Brent Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

[15] Rule 100(c) of the Rules of Practice states: "The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ACCOUNTING AND AUDITING ENFORCEMENT
Release No.

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of

BDO China Dahua CPA Co., Ltd.;
Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;
Ernst & Young Hua Ming LLP;
KPMG Huazhen (Special General Partnership);
PricewaterhouseCoopers Zhong Tian CPAs Limited

Respondents.

ANNEX A TO ORDER ON THE BASIS OF OFFERS OF SETTLEMENT OF CERTAIN RESPONDENTS IMPLEMENTING SETTLEMENT

ANNEX A

Respondents Deloitte Touche Tohmatsu Certified Public Accountants Ltd. ("DTTC"), Ernst & Young Hua Ming LLP ("EYHM"), KPMG Huazhen (Special General Partnership) ("KPMG Huazhen"), and PricewaterhouseCoopers Zhong Tian CPAs Limited Company ("PwC Shanghai") (collectively the "Settling Respondents") admit the facts set forth below (the "Admissions"):

RESPONDENTS

1. DTTC (or "Deloitte") is a special general partnership providing audit and professional services in the PRC. DTTC is located in Shanghai, China, and is a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

2. EYHM (or "Ernst") is a special general partnership providing audit and professional services in the PRC. EYHM is headquartered in Beijing, China, and is a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

3. KPMG Huazhen (or "KPMG") is a special general partnership providing audit and professional services in the PRC. KPMG Huazhen is located in Beijing, China, and is a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

4. PwC Shanghai (or "Pricewaterhouse") is a special general partnership providing audit and professional services in the PRC. PwC Shanghai is headquartered in Shanghai, China, and is a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai is a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.

OTHER RELEVANT ENTITIES

5. DTTC Client A ("DTTC Client A") is a public company the securities of which are registered with the SEC under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and listed on NASDAQ. DTTC Client A is incorporated in the Province of Ontario, Canada and has its principal operations and principal place of business in the PRC. DTTC Client A designs and manufactures solar products.

6. EYHM Client B ("Client B") is a Delaware corporation with its principal operations and principal place of business in the PRC. Client B's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client B purports to be a leading developer, manufacturer and distributor of organic compound fertilizers in China.

7. EYHM Client C ("Client C") is a Cayman Islands corporation with its primary operations in Beijing, PRC. Client C's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NASDAQ. Client C purports to provide enhanced recovery services for oil and gas exploration.

8. KPMG Huazhen Client D ("Client D") is a Delaware corporation with its primary operations in Xi'an, PRC. Client D's securities were previously registered with the SEC pursuant

to Section 12(g) of the Exchange Act and listed on NASDAQ. Client D purports to engage in the wholesale distribution of finished oil and heavy oil products, the production and sale of biodiesel, and the operation of retail gas stations.

9. KPMG Huazhen Client E ("Client E") is a Nevada corporation with its primary operations in Ningbo, PRC. Client E's securities are registered with the SEC pursuant to Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client E purports to manufacture and supply various petrochemical products in China.

10. KPMG Huazhen Client F ("Client F") is a Nevada corporation, with its primary operations in Shanghai, PRC. Client F's securities were previously registered with the SEC pursuant to Section 12(b) of the Exchange Act and listed on NASDAQ. Client F purports to manufacture chemical additives used in the production of consumer and industrial products.

11. DTTC Client G ("Client G") is a Wyoming corporation with its primary operations in Beijing, PRC. Client G's securities were previously registered with the SEC pursuant to Section 12(g) of the Exchange Act and listed on NYSE. Client G purports to design, manufacture, and sell offset printing equipment.

12. PwC Shanghai Client H ("Client H") is a Cayman Islands corporation with its principal operations in the PRC. Client H's securities are registered with the SEC under Section 12(g) of the Exchange Act and were previously listed on NASDAQ. Client H purports to own and operate a commercial vehicle financing and service centers network.

13. PwC Shanghai Client I ("Client I") is a Nevada corporation with its primary operations in Beijing, PRC. Client I's securities were previously registered with the SEC under Section 12(g) of the Exchange Act and listed on NASDAQ. Client I purports to manufacture automotive electrical parts in China.

FACTS CONCERNING COMMMISSION REQUESTS TO THE SETTLING RESPONDENTS UNDER SARBANES-OXLEY

1. Regulatory Background

14. Section 106 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act"), before it was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in 2010, stated, in relevant part, that "If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented . . . to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report . . . ." Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub. L. No. 107-204 § 106(b).

15. In 2004, the Board posted Frequently Asked Questions to its website which stated, in part: "A registered firm's failure to cooperate with Board requests [for production of documents under Sarbanes-Oxley Section 106] may subject the firm to disciplinary sanctions, including substantial civil money penalties and revocation of the firm's registration. In the staff's view, if a firm fails to cooperate with the Board, the fact that the firm has not obtained a client consent that might be necessary (under non-U.S. law) to allow the firm to cooperate is not a defense to a disciplinary action for failure to cooperate."

16. Section 106(b)(1) of Sarbanes-Oxley, as amended by Dodd-Frank, states that: "[i]f a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall . . . produce the audit workpapers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board . . . ."

2. Requests To DTTC

17. On or around April 16, 2004, DTTC[1] applied for registration with the Public Company Accounting Oversight Board (the "PCAOB" or "Board") as required by the Sarbanes-Oxley Act ("Sarbanes-Oxley"), 15 U.S.C. § 7212. The Board confirmed DTTC's registration as a foreign public accounting firm in a letter dated June 4, 2004. DTTC has remained registered with the Board since that time.

18. DTTC knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

19. DTTC knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. DTTC described possible conflicts of law in its April 16, 2004 PCAOB registration filing that included a legal opinion.

20. The Board's June 4, 2004 letter confirming DTTC's registration stated that, although DTTC had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Deloitte's registration . . . does not relieve Deloitte of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Deloitte associated persons. If Deloitte prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Deloitte despite the absence of a consent."

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[1] On January 1, 2013, Deloitte Touche Tohmatsu Certified Public Accountants LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Deloitte Touche Tohmatsu Certified Public Accountants LLP had succeeded to the registration status of its predecessor, Deloitte Touche Tohmatsu CPA Ltd.

21. In June 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, DTTC designated Deloitte & Touche LLP ("DTT US"), the United States member firm of DTT Global, as its agent for receiving service of document requests under Section 106. In so doing, DTTC confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

22. DTTC knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. DTTC also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained power to deny DTTC the privilege of appearing or practicing before the Commission to the extent DTTC willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

23. In the PCAOB reporting years 2010, 2011, 2012, and 2013, DTTC issued audit reports for thirty-two (32), forty-five (45), forty-five (45), and thirty-nine (39) U.S. issuers, respectively.

24. DTTC audited DTTC Client A's financial statements for the fiscal years ended December 31, 2008, 2009, and 2010. DTTC Client A remained DTTC's client as of April 2013.

25. Before April 9, 2010, the Division commenced an investigation into potential accounting fraud involving DTTC Client A, which Client A disclosed in a Form 6-K and accompanying press release filed with the Commission on June 1, 2010. In the press release, DTTC Client A announced that it was postponing the release of its full financial results for the quarter ended March 31, 2010 and its quarterly conference call, scheduled for June 2, as a result of the commencement of an investigation by the Audit Committee of DTTC Client A's Board of Directors. DTTC Client A disclosed that "the investigation was launched after the Company received a subpoena from the [Commission] requesting documents from [DTTC Client A] relating to, among other things, certain sales transactions in 2009."

26. On March 11, 2011, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [DTTC Client A] for the fiscal year ending December 31, 2009" (the "Client A Request").

27. By letter dated April 29, 2011, DTTC, through its U.S. counsel, responded to the Client A Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

28. In July 2011, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client A Request.

29. DTTC was engaged to audit the financial statements of Client G for the fiscal year ended June 30, 2010. In the course of this engagement, DTTC performed audit work on behalf of Client G related to the fiscal year ended June 30, 2010. DTTC did not issue any audit report with respect to Client G.

30. In 2010, Division staff opened an investigation involving Client G, which related to matters reported in a Form 8-K filed by Client G on September 13, 2010. Specifically, Client G reported that:

a. Client G had terminated DTTC's engagement as independent auditor effective September 6, 2010;

b. During the course of DTTC's audit of Client G for the fiscal year ended June 30, 2010, Client G had denied DTTC's request for permission to access original bank statements to verify the identity of certain individuals and entities;

c. Several "reportable events," as defined in Item 304(a)(1)(v) of Regulation S-K, occurred during DTTC's audit of Client G; and

d. Between September 6 and September 8, 2010, Client G's CEO, CFO, and several directors, including the Chair of its Audit Committee, all resigned their positions.

31. On February 14, 2012, the Division properly served on DTTC a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client G] for the fiscal year ended June 30, 2010" (the "Client G Request").

32. By letter dated April 17, 2012, DTTC, through its U.S. counsel, responded to the Client G Request. DTTC stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. DTTC did not include any of the requested audit workpapers or related documents with its response.

33. In April 2012, the Division issued to DTTC a Wells notice that the Division intended to recommend institution of proceedings against DTTC because, in the Division's view, DTTC had willfully refused to comply with the Client G Request.

34. On May 9, 2012 and December 3, 2012, the Commission instituted these proceedings against DTTC under Rule 102(e) based on DTTC's conduct with respect to the Client A Request and the Client G Request, respectively. DTTC did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

35. In 2013, DTTC provided documents related to DTTC Client A to the China Securities Regulatory Commission ("CSRC"), in response to a request that DTTC had received from the CSRC. In November 2013, DTTC audit workpapers concerning DTTC Client A were provided by the CSRC to the SEC.

36. In 2013, DTTC provided documents related to Client G to the CSRC, in response to a request that DTTC had received from the CSRC. In October 2013, DTTC audit workpapers and related documents concerning Client G were provided by the CSRC to the SEC.

3. Requests To EYHM

37. On or around May 25, 2004, EYHM[2] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed EYHM's registration as a foreign public accounting firm in a letter dated July 8, 2004. EYHM has remained registered with the PCAOB since that time.

38. EYHM knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

39. EYHM knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. EYHM described possible conflicts of law in its May 25, 2004 PCAOB registration filing that included a legal opinion.

40. The Board's July 8, 2004 letter confirming EYHM's registration stated that, although EYHM had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Ernst's registration . . . does not relieve Ernst of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Ernst's associated persons. If Ernst prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Ernst despite the absence of a consent."

41. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, EYHM designated Ernst & Young LLP ("EY US"), the United States member firm of EY Global, as its agent for receiving service of document requests under Section 106. In so doing, EYHM confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

42. EYHM knew at all relevant times that it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. EYHM also knew, no later than upon the enactment of Dodd-

[2] On September 3, 2012, Ernst & Young Hua Ming LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that Ernst & Young Hua Ming LLP had succeeded to the registration status of its predecessor, Ernst & Young Hua Ming Certified Public Accountants.

Frank, in 2010, and at all times subsequent, that that the Commission retained the power to deny EYHM the privilege of appearing or practicing before the Commission to the extent EYHM willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

43. In the PCAOB reporting years 2010, 2011, 2012, and 2013, EYHM issued audit reports for eleven (11), twenty-four (24), twenty-one (21), and twenty (20) U.S. issuers, respectively.

44. EYHM was engaged to audit the financial statements of Client B for the fiscal year ended December 31, 2010. In the course of this engagement, EYHM performed audit work on behalf of Client B related to the fiscal year ended December 31, 2010. EYHM did not issue an audit report on Client B's financial statements for the fiscal year ended December 31, 2010.

45. In March 2011, the Division opened an investigation into Client B. The investigation related to, among other things, public allegations of potential accounting fraud and misleading disclosures by Client B, including overstated revenues, falsified assets and customer relationships, and failure to disclose certain related party transactions.

46. On April 26, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client B] for the fiscal year ending December 31, 2010" (the "Client B Request").

47. By letter dated May 25, 2012, EYHM, through its U.S. counsel, responded to the Client B Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

48. In June 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client B Request.

49. EYHM audited Client C's financial statements for the fiscal year ended September 30, 2010.

50. By September 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client C. The investigation stemmed from a short seller report regarding Client C, and from a letter that EYHM submitted to the Commission, pursuant to Section 10A of the Exchange Act, upon its resignation as Client C's auditor in September 2011. The two primary subjects of the investigation were possible accounting fraud related to asset valuation, and embezzlement by Client C's chairman.

51. On February 2, 2012, the Division properly served on EYHM a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents

related to any audit work or interim reviews performed for [Client C] for the fiscal year ending September 30 , 2010 and subsequent periods" (the "Client C Request").

52. By letter dated April 4, 2012, EYHM, through its U.S. counsel, responded to the Client C Request. EYHM stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. EYHM did not include any of the requested audit workpapers or related documents with its response.

53. In April 2012, the Division issued to EYHM a Wells notice that the Division intended to recommend institution of proceedings against EYHM because, in the Division's view, EYHM had willfully refused to comply with the Client C Request.

54. On December 3, 2012, the Commission instituted these proceedings against EYHM under Rule 102(e) based on EYHM's conduct with respect to the Client B Request and the Client C Request. EYHM did not produce any documents responsive to either request to the Commission before the December 3, 2012 OIP.

55. In November 2013, EYHM audit workpapers and related documents concerning Client C were received by the Commission from the CSRC. In March 2014, EYHM audit workpapers and related documents concerning Client B were provided to the Commission by the CSRC.

4. Requests To KPMG Huazhen

56. On or around April 26, 2004, KPMG Huazhen[3] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The Board confirmed KPMG Huazhen's registration as a foreign public accounting firm in a letter dated July 13, 2004. KPMG Huazhen has remained registered with the Board since that time.

57. KPMG Huazhen knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

58. KPMG Huazhen knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. KPMG Huazhen described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

59. The Board's July 13, 2004 letter confirming KPMG Huazhen's registration stated that, although KPMG Huazhen had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of KPMG's registration . . . does not relieve KPMG of the obligation to cooperate in and comply with Board demands

[3] On August 14, 2012, KPMG Huazhen (Special General Partnership) filed with the Public Company Accounting Oversight Board a notification on Form 4 that KPMG Huazhen (Special General Partnership) had succeeded to the registration status of its predecessor, KPMG Huazhen.

(including for documents or testimony) and to enforce such cooperation and compliance by KPMG's associated persons. If KPMG prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to KPMG despite the absence of a consent."

60. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, KPMG Huazhen designated KPMG LLP ("KPMG US"), the United States member firm of KPMG International, as its agent for receiving service of document requests under Section 106. In so doing, KPMG Huazhen confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

61. KPMG Huazhen knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. KPMG Huazhen also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny KPMG Huazhen the privilege of appearing or practicing before the Commission to the extent KPMG Huazhen willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

62. In the PCAOB reporting years 2010, 2011, 2012, and 2013, KPMG Huazhen played a substantial role in the preparation or furnishing of audit reports filed with the SEC (as defined by PCAOB Rule 1001(p)(ii))[4] for twenty-four (24), twenty-three (23), twenty-five (25), and twenty-one (21) U.S. issuers, respectively.

63. KPMG Huazhen was engaged as a component auditor for Client D for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client D related to the fiscal year ended December 31, 2010.

64. By April 2011, the Division opened an investigation into potential accounting fraud at Client D. The investigation concerned allegations made in two short seller reports issued in March 2011, which claimed that Client D's financial statements reported false cash balances, overstated revenues, and failed to disclose a material related party transaction.

65. On February 6, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client D] for the fiscal year ending December 31, 2010" (the "Client D Request").

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[4] PCAOB Rule 1001(p)(ii) defines "Play a Substantial Role in the Preparation or Furnishing of an Audit Report" to mean: "(1) to perform material services that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, or (2) to perform the majority of the audit procedures with respect to a subsidiary or component of any issuer the assets or revenues of which constitute 20% or more of the consolidated assets or revenues of such issuer necessary for the principal accountant to issue an audit report on the issuer."

66. KPMG Huazhen was engaged as a component auditor for Client E for the fiscal year ended December 31, 2010. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit of Client E related to the fiscal year ended December 31, 2010, but did not complete the engagement.

67. By April 2011, Division staff opened an investigation into potential financial and accounting fraud at Client E. The investigation concerned issues raised in a Form 8-K that Client E filed in April 2011, which stated that Client E would be unable to file its Form 10-K on time because Client E's principal auditor had identified "unexplained issues regarding certain cash transactions and recorded sales."

68. On February 9, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client E] for the fiscal year ending December 31, 2010" (the "Client E Request").

69. KPMG Huazhen was engaged as a component auditor for Client F for the fiscal years ended December 31, 2008, and December 31, 2009. In the course of this engagement, KPMG Huazhen played a substantial role with respect to the audit reports Client F filed with the Commission related to the fiscal years ended December 31, 2008 and 2009.

70. Before February 2012, Division staff opened an investigation involving potential financial and accounting fraud at Client F. The investigation related to issues raised in a pair of disclosures made by Client F in early 2011:

a. In March 2011, Client F disclosed that it was conducting an internal investigation into "potentially serious discrepancies" in its financial statements for the year ended December 31, 2010, and

b. In May 2011, Client F disclosed that its principal auditor had resigned after identifying what they considered "potentially serious discrepancies and/or unexplained issues relating to [Client F]'s financial records," in response to which Client F failed to take adequate remedial action.

71. On February 3, 2012, the Division properly served on KPMG Huazhen a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit reports issued, audit work performed, or interim reviews conducted for [Client F] from January 1, 2008 to the present" (the "Client F Request").

72. By letter dated March 27, 2012, KPMG Huazhen, through its U.S. counsel, responded to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with any of the requested audit workpapers and related documents. KPMG Huazhen did not include any of the requested audit workpapers or related documents with its March 27 response.

73. In May 2012, the Division issued to KPMG Huazhen a Wells notice that the Division intended to recommend institution of proceedings against KPMG Huazhen because, in the Division's view, KPMG Huazhen had willfully refused to comply with the Client D Request, the Client E Request, and the Client F Request.

74. On December 3, 2012, the Commission instituted these proceedings against KPMG Huazhen under Rule 102(e) based on KPMG Huazhen's conduct with respect to the Client D Request, the Client E Request, and the Client F Request. KPMG Huazhen did not produce audit workpapers or related documents responsive to any of the requests to the Commission before the December 3, 2012 OIP.

5. Requests To PwC Shanghai

75. On or around April 26, 2004, PwC Shanghai[5] applied for registration with the PCAOB as required by Sarbanes-Oxley, 15 U.S.C. § 7212. The PCAOB confirmed PwC Shanghai's registration as a foreign public accounting firm in a letter dated July 13, 2004. PwC Shanghai has remained registered with the Board since that time.

76. PwC Shanghai knew when it registered with the PCAOB that the PCAOB or the SEC could request documents under Section 106, as originally enacted as part of Sarbanes-Oxley.

77. PwC Shanghai knew when it registered with the PCAOB that there were possible conflicts between its obligations under U.S. and Chinese law. PwC Shanghai described possible conflicts of law in its April 26, 2004 PCAOB registration filing that included a legal opinion.

78. The Board's July 13, 2004 letter confirming PwC Shanghai's registration stated that, although PwC Shanghai had not provided with its application a "Consent to Cooperate" with Board inspections and requests for documents, "the Board's approval of Pricewaterhouse's registration . . . does not relieve Pricewaterhouse of the obligation to cooperate in and comply with Board demands (including for documents or testimony) and to enforce such cooperation and compliance by Pricewaterhouse's associated persons. If Pricewaterhouse prepares or issues, or plays a substantial role in preparing or issuing, an audit report with respect to any issuer . . . U.S. law and the Board's rules impose cooperation and compliance requirements that apply to Pricewaterhouse despite the absence of a consent."

79. In March 2011, pursuant to Sarbanes-Oxley Section 106(d), as amended by Dodd-Frank, PwC Shanghai designated PricewaterhouseCoopers LLP ("PwC US"), the United States member firm of PwCIL, as its agent for receiving service of document requests under Section 106. In so doing, PwC Shanghai confirmed its understanding that the PCAOB or the SEC could request documents under Section 106.

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[5] On July 8, 2013, PricewaterhouseCoopers Zhong Tian LLP filed with the Public Company Accounting Oversight Board a notification on Form 4 that PricewaterhouseCoopers Zhong Tian LLP had succeeded to the registration status of its predecessor, PricewaterhouseCoopers Zhong Tian CPAs Limited Company.

80. PwC Shanghai knew at all relevant times it was possible that it could not, consistent with Chinese law, produce documents directly to the SEC in response to requests for documents under Sarbanes-Oxley Section 106. PwC Shanghai also knew, no later than upon the enactment of Dodd-Frank, in 2010, and at all times subsequent, that the Commission retained the power to deny PwC Shanghai the privilege of appearing or practicing before the Commission to the extent PwC Shanghai willfully refused to comply with requests for documents under Sarbanes-Oxley Section 106.

81. In the PCAOB reporting years 2010, 2011, 2012, and 2013, PwC Shanghai issued audit reports for seventeen (17), twenty-seven (27), thirty-one (31), and twenty-three (23) U.S. issuers, respectively.

82. PwC Shanghai was engaged to audit the financial statements of Client H for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client H related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client H.

83. By March 2011, the Division opened an investigation into potential accounting fraud at Client H. The investigation concerned public allegations of accounting fraud and market manipulation at Client H. Certain internet reports alleged, among other things, that Client H overstated revenue and earnings by accounting for lease revenues upfront instead of recognizing this revenue over the duration of the leases, and that there were discrepancies between Client H's cash flow and reported net income.

84. On February 8, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work or interim reviews performed for [Client H] for the fiscal year ending December 31, 2010" (the "Client H Request").

85. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client H Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

86. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client H Request.

87. PwC Shanghai was engaged to audit the financial statements of Client I for the fiscal year ended December 31, 2010. In the course of this engagement, PwC Shanghai performed audit work on behalf of Client I related to the fiscal year ended December 31, 2010. PwC Shanghai did not issue any audit report with respect to Client I.

88. By March 2011, Division staff opened an investigation involving potential financial and accounting fraud at Client I. The investigation focused on potential accounting irregularities, undisclosed related party transactions, misappropriation of corporate assets, and market manipulation.

89. On March 22, 2012, the Division properly served on PwC Shanghai a Commission request under Section 106 for the production of "[a]ll audit work papers and all other documents related to any audit work performed for [Client I] for the fiscal year ending December 31, 2010" (the "Client I Request").

90. By letter dated April 12, 2012, PwC Shanghai, through its U.S. counsel, responded to the Client I Request. PwC Shanghai stated in the letter that the laws and regulations of the PRC prohibited the firm from providing the SEC directly with the requested audit workpapers and related documents. PwC Shanghai did not include any of the requested audit workpapers or related documents with its response.

91. In April 2012, the Division issued to PwC Shanghai a Wells notice that the Division intended to recommend institution of proceedings against PwC Shanghai because, in the Division's view, PwC Shanghai had willfully refused to comply with the Client I Request.

92. On December 3, 2012, the Commission instituted these proceedings against PwC Shanghai under Rule 102(e) based on PwC Shanghai's conduct with respect to the Client H Request and the Client I Request. PwC Shanghai did not produce audit workpapers and related documents responsive to either request to the Commission before the December 3, 2012 OIP.

93. In November 2013, PwC Shanghai produced audit workpapers and related documents concerning Client I to the CSRC, in response to a request that PwC Shanghai had received from the CSRC. In March 2014, PwC Shanghai audit workpapers and related documents concerning Client I were provided by the CSRC to the SEC.

ANNEX B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ACCOUNTING AND AUDITING ENFORCEMENT
Release No.

ADMINISTRATIVE PROCEEDING
File Nos. 3-14872, 3-15116

In the Matter of **BDO China Dahua CPA Co., Ltd.;** **Deloitte Touche Tohmatsu Certified Public Accountants Ltd.;** **Ernst & Young Hua Ming LLP;** **KPMG Huazhen (Special General Partnership);** **PricewaterhouseCoopers Zhong Tian CPAs Limited** **Respondents.**	**ORDER MAKING FINDINGS AND PARTIALLY DENYING [NAME OF SETTLING RESPONDENT] THE PRIVILEGE OF PRACTICING OR APPEARING BEFORE THE SECURITIES AND EXCHANGE COMMISSION**

I.

The Securities and Exchange Commission ("Commission") issues this Order Making Findings And Partially Denying [Name of Settling Respondent] The Privilege of Practicing Or Appearing Before The Securities and Exchange Commission ("Partial Bar Order") pursuant to the Offer of Settlement submitted by [Name of Settling Respondent], which was accepted by the Commission in its Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement on [MONTH, DAY], 2015 (the "Settlement Order").

II.

Respondent [Name of Settling Respondent ("[Short Form of Settling Respondent's Name – DTTC, EYHM, KPMG Huazhen, or PwC Shanghai]" or "Respondent")] admits the Commission's jurisdiction over it in, and over the subject matter of, this proceeding and any proceeding to enforce or that seeks to challenge this Partial Bar Order or the Settlement Order. In addition, Respondent [Short Form of Settling Respondent's Name] consents to the entry of this Partial Bar Order, as set forth below.

III.

On the basis of this Partial Bar Order, Respondent [Short Form of Settling Respondent's Name]'s Offer of Settlement, the Settlement Order, and Rule 102(e) of the Commission's Rules of Practice, the Commission finds that:

1. [Insert one of the following paragraphs as appropriate:

> As of the date of the Settlement Order, DTTC was a special general partnership providing audit and professional services in the People's Republic of China ("China"). DTTC was located in Shanghai, China, and was a member firm of Deloitte Touche Tohmatsu Limited ("DTT Global"), a UK private company limited by guarantee. DTTC was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
>
> As of the date of the Settlement Order, KPMG Huazhen was a special general partnership providing audit and professional services in the People's Republic of China ("China"). KPMG Huazhen was located in Beijing, China, and was a member firm of KPMG International Cooperative ("KPMG International"), a Swiss entity. KPMG Huazhen was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
>
> As of the date of the Settlement Order, EYHM was a special general partnership providing audit and professional services in the People's Republic of China ("China"). EYHM was headquartered in Beijing, China, and was a member firm of Ernst & Young Global Limited ("EY Global"), a UK private company limited by guarantee. EYHM was a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.
>
> As of the date of the Settlement Order, PwC Shanghai was a special general partnership providing audit and professional services in the People's Republic of China ("China"). PwC Shanghai was headquartered in Shanghai, China, and was a member firm of PricewaterhouseCoopers International Limited ("PwCIL"), a UK private company limited by guarantee. PwC Shanghai was

a foreign public accounting firm as defined by Section 106 of Sarbanes-Oxley.]

2. The Settlement Order provides, *inter alia*, that the Commission's Division of Enforcement ("Division"), for a period of four years from the date of the Settlement Order, may issue requests for assistance to the China Securities Regulatory Commission ("CSRC")[1] under international sharing mechanisms with respect to Respondent's audit workpapers and related documents. The Settlement Order also provides that, on or about the date on which such a request for assistance is sent, the SEC or the Division will do one or both of the following: (A) issue a new request under Section 106 of Sarbanes-Oxley, as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") ("Section 106"), to Respondent through its designated U.S. agent, subject to certain conditions set forth in the Settlement Order; and/or (B) provide Respondent with notice of the request for assistance that was sent to the CSRC, specifying the documents sought by the Division. *See* Settlement Order, Section III.J, Paragraph 2(i).

3. The Settlement Order further provides, *inter alia*, that:

   i. Within ninety (90) days of receipt of such a request or within forty-five (45) days from the date Respondent receives the first corresponding request from the CSRC, whichever is later, Respondent will provide the Division with an initial declaration ("initial declaration") which states that Respondent has produced all responsive documents, accompanied by an index describing such documents, to the CSRC for production to the SEC, subject to specific exceptions and conditions as set forth in the Settlement Order. *See* Settlement Order, Section III.J, Paragraphs 2(ii)(A)-(B).

   ii. Within ten (10) days of the SEC notifying Respondent that production from the CSRC to the SEC has occurred, Respondent will provide the Division directly with a certification that it has provided to the CSRC all documents responsive to the CSRC's corresponding request except information set forth on a privilege log, and, where applicable, that it has proposed (subject to the CSRC's review) that documents (or portions of documents) set forth on the withholding log should be withheld under Chinese law governing state sensitive information or state secrets, or for any other reason under Chinese law ("certification of completeness"). *See* Settlement Order, Section III.J, Paragraph 2(ii)(C).

[1] References to the CSRC in the Settlement Order mean the CSRC and/or such other Chinese authority/ies as may be charged from time to time by the Chinese government with liaising with the SEC on matters of cross-border information-sharing and cooperation.

iii. If Respondent does not provide the initial declaration as required by the Settlement Order, or if Respondent does not provide the certification of completeness as required by the Settlement Order, the Division shall notify Respondent of the failure and give Respondent twenty (20) days to cure the failure. If, within twenty (20) days of the request for cure by the Division, the Respondent does not provide the initial declaration or the certification of completeness as required by the Settlement Order, the Commission, in its sole discretion, and without regard to the procedures set forth in Rule 5(c) of SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(c), may determine that the relevant Settling Respondent has not complied with its obligations under the Settlement Order and thereupon enter, without further notice, this Partial Bar Order. *See* Settlement Order, Section III.J, Paragraph 3.

4. On [date of request], the SEC or the Division issued a Section 106 request and/or notice of a request for assistance to the CSRC for audit workpapers and related documents of Respondent [Short Form of Settling Respondent's Name], in connection with a Division investigation, [investigation matter number].

5. The Commission, in its sole discretion, has determined that Respondent failed to provide an initial declaration required by the Settlement Order, or that Respondent failed to provide a certification of completeness as required by the Settlement Order, and did not cure such failure within twenty (20) days of a request for cure by the Division. Thus, in accordance with Paragraph 3 of Section III.J of the Settlement Order, the Commission, in its sole discretion, has determined that Respondent has not complied with its obligations under the Settlement Order.

FINDINGS

6. Based on the foregoing, the Commission finds that Respondent has violated its obligations under Paragraphs 2 and 3 of Paragraph III.J of the Settlement Order.

IV.

In view of the foregoing, the Commission deems it appropriate to impose on Respondent [Short Form of Settling Respondent's Name] the remedy agreed to in [Short Form of Settling Respondent's Name] Offer of Settlement, and required by the Settlement Order.

Accordingly, pursuant to Rule 102(e) of the Commission's Rules of Practice, Respondent [Short Form of Settling Respondent's Name]'s Offer of Settlement, and the Settlement Order, it is hereby ORDERED that Respondent [Short Form of Settling Respondent's Name] is partially denied the privilege of practicing or appearing before the Commission for a period of 180 days commencing on [the date of this Partial Bar Order *OR* the day immediately following expiration of the last Partial Bar Order imposed on Settling Respondent under the Settlement Order, if any], as follows:

A. Respondent is prohibited from issuing an audit report, or otherwise serving as a principal auditor, for any issuer (as defined in Section 2(a)(7) of Sarbanes-Oxley); and

B. Respondent is prohibited from playing a 50% or greater role in the preparation or furnishing of an audit report for any issuer, meaning the respondent is prohibited from performing:

1. Audit work that a public accounting firm uses or relies on in issuing all or part of its audit report with respect to any issuer, where the engagement hours or fees for such services constitute 50% or more of the total engagement hours or fees, respectively, provided by the principal auditor in connection with the issuance of all or part of its audit report with respect to any issuer; and

2. The majority of audit work with respect to a subsidiary or component of any issuer, the assets or revenues of which constitute 50% or more of the consolidated assets or revenues of the issuer.

By the Commission.

[name of Secretary or designated official]
[Title]

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4022 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16376

In the Matter of **JOHN A. GERINGER,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against John A. Geringer ("Geringer" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2. and III.4. below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Geringer is the sole member of GLR Advisors, LLC ("GLR Advisors"), which was registered as an investment adviser with the State of California from 2003 to 2013. Geringer, 50 years old, is a resident of Santa Cruz, California.

2. On February 3, 2015, a final judgment was entered by consent against Geringer and GLR Advisors, permanently enjoining them from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 26 of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. GLR Capital Management, LLC, et al., Civil Action Number 12-CV-2663, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that since at least 2005, Geringer raised in excess of $60 million from investors by misrepresenting the performance and strategy of a private investment fund he managed, the GLR Growth Fund, L.P. (the "Fund"), based in Scotts Valley, California. The complaint further alleged that Geringer and GLR Advisors acted as investment advisers to the Fund and sent investors false account statements making it seem like the Fund was generating returns from successful investments when, in fact, it was suffering losses. The complaint also alleged that Geringer falsified brokerage account records to conceal his fraud, and that Geringer and GLR Advisors sent account statements to investors falsely claiming that the Fund investments were "SEC Approved."

4. On June 4, 2014, Geringer pled guilty to one count each of conspiracy to commit mail and wire fraud in violation of Title 18 United States Code, Section 1349; mail fraud in violation of Title 18 United States Code, Section 1341; and securities fraud in violation of Title 15 United States Code, Section 78j(b) and 17 Code of Federal Regulations, Section 240.10b-5 before the United States District Court for the Northern District of California, in United States v. John Geringer, Criminal Action Number CR-12-0888-EJD.

5. The counts of the criminal indictment to which Geringer plead guilty alleged, inter alia, that Geringer sent misleading account statements to Fund investors through the United States Postal Service, and that he misled investors as to how the Fund's assets were being invested.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Geringer's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act, that Respondent Geringer be, and hereby is barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4023 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16377

In the Matter of

GLR ADVISORS, LLC,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against GLR Advisors, LLC ("GLR Advisors" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings and the findings contained in Section III.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. John A. Geringer ("Geringer") is the sole member of GLR Advisors, which was registered as an investment adviser with the State of California from 2003 to 2013. Geringer, 50 years old, is a resident of Santa Cruz, California.

2. On February 3, 2015, a final judgment was entered by consent against Geringer and GLR Advisors, permanently enjoining them from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 26 of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. GLR Capital Management, LLC, et al., Civil Action Number 12-CV-2663, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that since at least 2005, Geringer raised in excess of $60 million from investors by misrepresenting the performance and strategy of a private investment fund he managed, the GLR Growth Fund, L.P. (the "Fund"), based in Scotts Valley, California. The complaint further alleged that Geringer and GLR Advisors acted as investment advisers to the Fund and sent investors false account statements making it seem like the Fund was generating returns from successful investments when, in fact, it was suffering losses. The complaint also alleged that Geringer falsified brokerage account records to conceal his fraud, and that Geringer and GLR Advisors sent account statements to investors falsely claiming that the Fund investments were "SEC Approved."

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent GLR Advisors' Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(e) of the Advisers Act, that Respondent GLR Advisors be, and hereby is censured.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74223; File No. 4-668)

February 6, 2015

Joint Industry Plan; Notice of Amendment to the National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail by BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, and NYSE MKT LLC, NYSE Arca, Inc.

I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 thereunder[2], notice is hereby given that, on December 12, 2014, BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively, "SROs" or "Participants"), filed with the Securities and Exchange Commission (the "Commission") a proposal to amend the Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail (the "Selection Plan").

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

II. Background

On July 11, 2012, the Commission adopted Rule 613 to require the SROs to jointly submit a national market system ("NMS") plan to create, implement, and maintain a consolidated audit trail ("CAT NMS Plan").[3] To facilitate the development of the consolidated audit trail, following the adoption of Rule 613, the SROs created a working group consisting of representatives from each SRO. The SROs also decided to engage in a request for proposal ("RFP") process to help them develop the CAT NMS Plan and to solicit bids ("Bids[4]") for the role of Plan Processor to build, operate, administer, and maintain the consolidated audit trail.[5] In addition, on September 3, 2013, the SROs filed, for approval, the Selection Plan to govern how the SROs would proceed with formulating and submitting the CAT NMS Plan—and, as part of that process, how the SROs would review, evaluate, and narrow down the Bids submitted in response to the RFP—and ultimately selecting the Plan Processor.[6] The Selection Plan was approved on February 21, 2014.[7]

The SROs propose to amend the Selection Plan in two ways. First, the SROs propose to provide opportunities to accept revised Bids prior to approval of the CAT NMS Plan, and second, to allow the list of Shortlisted Bids to be narrowed prior to Commission approval of the CAT NMS Plan. A copy of the proposed amendment to the Selection Plan is attached as Exhibit

3 Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012).

4 Pursuant to Section I(C) of the Selection NMS Plan, a "Bid" is a proposal submitted by a Bidder in response to the RFP.

5 See Securities Exchange Act Release No. 70892 (Nov. 15, 2013), 78 FR 69910 (Nov. 21, 2013)(Notice of Selection NMS Plan).

6 Id.

7 See Securities Exchange Act Release No. 71596 (Feb. 21, 2014), 79 FR 11152 (Feb. 27, 2014)(Approval Order).

A hereto. The Commission is publishing this notice to solicit comments from interested persons on the proposed amendment to the Selection Plan.

III. Description of the Plan

Set forth in this Section II is the statement of the purpose of the Selection Plan, along with the information required by Rule 608(a)(4) and (5) under the Exchange Act,[8] prepared and submitted by the SROs to the Commission.[9]

A. Background

The Selection Plan governs the process for Participant review of Bids for the role of Plan Processor for the CAT NMS Plan, the procedures for evaluating the Bids, and ultimately, until approval of the CAT NMS Plan, the selection of the Plan Processor. The CAT NMS Plan was filed with the Commission for approval on September 30, 2014.

After gaining experience with the development process for the CAT NMS Plan, the Participants believe it is necessary to amend the Selection Plan to ensure that the Participants will be able to choose a Plan Processor within the timeframe provided in the Selection Plan and Rule 613. The Participants propose amending the Selection Plan to (1) provide for additional opportunities to accept revised Bids and (2) allow the set of Shortlisted Bids to be narrowed prior to Commission approval of the CAT NMS Plan.

1. The Selection Plan Currently Allows Bid Revisions Only Following CAT NMS Plan Approval, and Does Not Allow for Narrowing of the Set of Shortlisted Bids

Under the Selection Plan, Shortlisted Bidders are only eligible to revise Bids following Commission approval of the CAT NMS Plan. The Selection Plan specifies that, following

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8 See 17 CFR 242.608(a)(4) and (a)(5).

9 See Letter from the Participants to Brent J. Fields, Secretary, Commission, dated December 12, 2014.

approval of the CAT NMS Plan by the SEC, Shortlisted Bidders for the role of Plan Processor may be permitted to revise their Bids based on the provisions in the approved CAT NMS Plan, including further discussions if determined to be necessary by the Selection Committee described in the Selection Plan.[10] The Selection Plan provides that a Shortlisted Bidder will be permitted to revise its Bid only upon approval by a majority of the Selection Committee, subject to certain recusal provisions in the Selection Plan, that revisions are necessary or appropriate in the light of the content of the Shortlisted Bidder's initial Bid and the provisions in the approved CAT NMS Plan.[11]

The Selection Plan also requires that selection of the Plan Processor occur from among the initial set of Shortlisted Bids.[12] Under the current Selection Plan, the Participants are not permitted to narrow the list of Shortlisted Bids determined pursuant to Section VI(B) of the Selection Plan.

2. Allowing Revision(s) of Bids In Light of Additional Information Available to Shortlisted Bidders and Providing for Narrowing the Set of Shortlisted Bidders Will Allow the Participants to Select the Plan Processor More Effectively and Efficiently Within the Rule 613 Timeframe

The Participants believe that providing the Shortlisted Bidders with an additional opportunity or opportunities to revise their Bids prior to the approval of the CAT NMS Plan is critical to the timely and considered selection of the Plan Processor. Since the Bidders submitted their Bids, the Participants have expended substantial effort in analyzing potential solutions for the consolidated audit trail ("CAT") by gathering and evaluating data and information from a variety of market participants, including Bidders, broker-dealers, vendors, regulators and others.

10 See 78 FR 69910 at 69917.

11 Id.

12 Id. at 69917-18.

As a result, since the original Bid date, the Participants have made substantial strides in identifying characteristics of an optimal solution and formalizing these determinations in the proposed CAT NMS Plan and related technical documents. Given the development of the requirements for an optimal solution for the CAT, the Participants believe that waiting until after the approval of the CAT NMS Plan to permit the Shortlisted Bidders to revise their Bids will shortchange the Bid process to the detriment of the final plan. Moreover, given the passage of time since the original Bids, Bidders have indicated that new technological and other beneficial solutions are now available that may further improve the Bids, and, ultimately, the proposed solutions.

In addition, the Participants believe that delaying the Bid revision process until after the approval of the CAT NMS Plan will prevent Bidders from submitting, and the Participants from adequately reviewing the most relevant, informative and fulsome Bids before selecting a Plan Processor. Specifically, Rule 613(a)(2)(i) requires the Participants to select the Plan Processor within two months after effectiveness of the CAT NMS Plan. The Participants anticipate permitting the Shortlisted Bidders to revise their Bids, pursuant to Section VI(D) of the Selection Plan, after approval of the CAT NMS Plan, if there are substantial changes to the CAT NMS Plan before the CAT NMS Plan is approved by the Commission. Therefore, the Participants will have only a short time period of two months to analyze the Shortlisted Bids – Bids that are likely to have substantial revisions after the approval of the CAT NMS Plan for the reasons discussed above. Given the very large amount of information to digest in the revised Bids and the importance of appropriately analyzing such information, the Participants do not believe that two months will be sufficient to select the Plan Processor given the limitations of the current Selection Plan. However, if the Shortlisted Bidders are able to revise their Bids to reflect the provisions of the proposed CAT NMS Plan and any draft technical materials, as well as any new technology or other relevant developments, prior to the approval of the CAT NMS Plan, then the Participants believe that they will be able to select the Plan Processor within the time limits imposed by Rule 613 in a more thoughtful and deliberative manner.

In addition, the Participants believe that providing the Selection Committee the discretion to further reduce the number of Shortlisted Bids, either before or after any revisions to Shortlisted Bids are accepted, would also facilitate the selection of the Plan Processor within the time limits imposed by Rule 613. Allowing the Selection Committee to reduce the number of Shortlisted Bids before approval of the CAT NMS Plan could allow the Participants to more efficiently select the Plan Processor by focusing attention on a more refined set of options during the limited two month time period for selection following approval of the CAT NMS Plan.

B. Requirements Pursuant to Rule 608(a)

1. Description of the Amendments to the Selection Plan

The Participants propose amending the Selection Plan to permit the Shortlisted Bidders to revise their Bids one or more times prior to approval of the CAT NMS Plan if the Selection Committee determines, by majority vote, subject to the applicable recusal provisions, that such revisions are necessary and appropriate. The proposed amendment would not affect Section VI(D) of the Selection Plan, which allows for revisions to Shortlisted Bids following Commission approval of the CAT NMS Plan.

The Participants also propose amending the Selection Plan to provide the Selection Committee discretion to narrow the set of Shortlisted Bids prior to approval of the CAT NMS Plan. Specifically, the proposed amendment would authorize another round of voting to narrow the set of Shortlisted Bids. This round of voting, which could occur either before or after any revisions to Shortlisted Bids are accepted, would be commenced upon at least a two-thirds vote of the Selection Committee, and would proceed in a manner similar to the initial round for voting for the Shortlisted Bids. Each Voting Senior Officer would choose a first, second, and third choice Shortlisted Bid, with each choice receiving a weight of, respectively, three points, two points, and one point. The three bids receiving the highest cumulative number of points would constitute the new set of Shortlisted Bids. In the event of a tie that would result in more than three final Shortlisted Bids, the votes would be recounted, excluding each Voting Senior Officer's third choice. The three Shortlisted Bids receiving the largest number of cumulative votes in this recount would be the new Shortlisted Bids. If this recount were to result in a tie leading to a larger or equal number of final Shortlisted Bids than the initial count, the results of the initial count would constitute the new set of Shortlisted Bids. The proposed amendment also includes, for the sake of clarity, a provision ensuring that at least one Non-SRO Bid is included in the narrowed set of Shortlisted Bids. The individual scores and rankings under any vote to narrow the list of Shortlisted Bids shall be kept confidential.

Finally, the proposed amendment includes provisions with respect to the recusal of Participants that also are Shortlisted Bidders. Under this proposed provision, no Bidding Participant shall vote in the process narrowing the set of Shortlisted Bidders, if a Bid submitted by or including the Participant or an Affiliate of the Participant is a Shortlisted Bid.

2. Governing or Constituent Documents

Not applicable.

3. Implementation of Amendment

The terms of the proposed amendments will be operative immediately upon approval of the amendments by the Commission.

4. Development and Implementation Phases

Not applicable.

5. Analysis of Impact on Competition

The proposed amendments do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The SROs believe that the amendments are reasonably designed to help assure that the SROs receive more updated and informed submissions from Shortlisted Bidders before the CAT NMS Plan is finalized, thereby helping to assure that the selection of the Plan Processor for the CAT NMS Plan proceeds efficiently within the timeframe provided by Rule 613. Moreover, the SROs believe that the amended process will facilitate the development of an audit trail that maximizes its regulatory utility while minimizing unnecessary costs, to the benefit of all market participants. Furthermore, providing the ability to narrow the list of Bidders at an earlier stage will prevent Bidders whose Bids are unlikely to be selected from misallocating their resources toward the further development of their Bid.

6. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan.

Not applicable.

7. Statement that the Amendments Have Been Approved by the Plan Sponsors

The Selection Plan provides that amendments to the Selection Plan shall be effected by means of a written amendment that: (1) sets forth the change, addition, or deletion; (2) is executed by over two-thirds of the Participants; and (3) is approved by the SEC pursuant to Rule 608, or otherwise becomes effective under Rule 608.[13]

[13] 17 CFR 242.608.

The proposed amendments have been executed by eighteen of the Participants, and have consequently been approved by the SROs. One Participant which is also a Shortlisted Bidder, abstained from the decision whether to adopt these amendments to avoid potential conflicts of interest.

8. Terms and Conditions of Access

Not applicable.

9. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

10. Method and Frequency of Processor Evaluation

Not applicable.

11. Dispute Resolution

Not applicable.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Amendment to the Plan is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-668 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-668. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Amendment to the Plan that are filed with the Commission, and all written communications relating to the Amendment to the Plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the Participants' principal offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-668 and should be submitted on or before [insert date 30 days from publication in the Federal Register].

By the Commission.

Brent J. Fields
Secretary

Exhibit A

Proposed new language is italicized; proposed deletions are in [brackets].

PROPOSED AMENDMENT TEXT

Plan Processor Evaluation and Selection Plan

I. Definitions

* * * * *

(X) "Shortlisted Bid" means a Bid submitted by a Qualified Bidder and selected as a Shortlisted Bid by the Selection Committee pursuant to Section VI(B) and, if applicable, pursuant to Section VI(C)(3) of the Plan.

* * * * *

III. Operating Committee

* * * * *

(E) Conflicts and Recusals

A Participant may recuse itself from voting on any matter under consideration by the Operating Committee if the Participant determines that voting on such matter raises a conflict of interest. Except as provided in Sections V(B)(2), ~~and~~ V(B)(3), and V(B)(4) of the Plan, no Participant is automatically recused from voting on any matter.

* * * * *

V. Selection Committee

* * * * *

(B) Voting

* * * * *

(2) No Bidding Participant shall vote on whether a Shortlisted Bidder will be permitted to revise its Bid pursuant to Section VI(C)(2) or Section VI(D)(1) below if a Bid submitted by or including the Participant or an Affiliate of the Participant is a Shortlisted Bid.

(3) No Bidding Participant shall vote in the process narrowing the set of Shortlisted Bidders as set forth in Section VI(C)(3) if a Bid submitted by or including the Participant or an Affiliate of the Participant is a Shortlisted Bid.

(4) No Bidding Participant shall vote in the second round set forth in Section VI(E)(4) below if a Bid submitted by or including the Participant or an Affiliate of the Participant is part of the second round.

(5) All votes by the Selection Committee shall be confidential and non-public. All such votes will be tabulated by an independent third party approved by the Operating Committee, and a Participant's individual votes will not be disclosed to other Participants or to the public.

* * * * *

VI. RFP Bid Evaluation and Plan Processor Selection

* * * * *

(C) Formulation of the CAT NMS Plan

(1) The Selection Committee shall review the Shortlisted Bids to identify optimal proposed solutions for the consolidated audit trail and provide descriptions of such proposed solutions for inclusion in the CAT NMS Plan. This process may, but is not required to, include iterative discussions with Shortlisted Bidders to address any aspects of an optimal proposed solution that were not fully addressed in a particular Bid.

(2) Prior to the approval of the CAT NMS Plan, all Shortlisted Bidders will be

permitted to revise their Bids one or more times if the Selection Committee determines, by majority vote, that such revision(s) are necessary or appropriate.

(3) Prior to approval of the CAT NMS Plan, and either before or after any revisions to Shortlisted Bids are accepted, the Selection Committee may determine, by at least a two-thirds vote, to narrow the number of Shortlisted Bids to three Bids, in accordance with the process in this Paragraph (C)(3).

(a) Each Voting Senior Officer shall select a first, second, and third choice from among the Shortlisted Bids.

(b) A weighted score shall be assigned to each choice as follows:

- First—3 points
- Second—2 points
- Third—1 point

(c) The three Shortlisted Bids receiving the highest cumulative scores will be the new set of Shortlisted Bids.

(d) In the event of a tie that would result in more than three final Shortlisted Bids, the votes shall be recounted, omitting each Voting Senior Officer's third choice, in order to break the tie. If this recount produces a tie that would result in a number of final Shortlisted Bids larger than or equal to that from the initial count, the results of the initial count shall constitute the final set of Shortlisted Bids.

(e) To the extent there are Non-SRO Bids that are Shortlisted Bids, the final Shortlisted Bids selected pursuant to this Section VI(C)(3) must, if possible, include at least one Non-SRO Bid. If following the vote set forth in this Section VI(C)(3), no Non-SRO Bid was selected as a final Shortlisted Bid, the Non-SRO Bid receiving the highest cumulative votes shall be retained as a Shortlisted Bid.

(f) The third party tabulating votes, as specified in Section V(B)(5), shall identify to the Selection Committee the new set of Shortlisted Bids, but shall keep confidential the individual scores and rankings of the Shortlisted Bids from the process in this Paragraph (C)(3).

(4) The Participants shall incorporate information on optimal proposed solutions in the CAT NMS Plan, including cost-benefit information as required by SEC Rule 613.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74226 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16378

In the Matter of **MOUNTAIN SHARE TRANSFER, LLC and ERIK STERLING NELSON,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 17A(c) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Mountain Share Transfer, LLC ("MST") and Erik Sterling Nelson (collectively, "Respondents") pursuant to Sections 17A(c) and 21C of the Securities Exchange Act of 1934 ("Exchange Act").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 17A(c) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds[1] that:

Summary

1. Between at least September 2012 and October 2014, MST, a Georgia-based transfer agent registered with the Commission, and its predecessor, Mountain Share Transfer, Inc., failed to comply with various transfer agent registration, record-keeping and other provisions of the Securities Exchange Act of 1934 ("Exchange Act") and rules promulgated thereunder. Specifically, among other things, MST, under the control of Nelson, its President and sole employee, filed with the Commission in March 2013 a false and misleading amended Form TA-1 (Registration of Transfer Agent), which affirmatively misrepresented that Nelson had never been involved in a violation of the rules of a self-regulatory organization ("SRO") or been disciplined, expelled, suspended or barred by an SRO. In fact, in 1995, Nelson was disciplined by the National Association of Securities Dealers ("NASD"), including a bar and sanctions for taking private payments in exchange for recommending that his clients purchase certain securities offerings. Further, MST's amended Form TA-1 was filed with the Commission in March 2013 – more than five months after Nelson acquired the company and relocated it from Colorado to Georgia – well beyond the 60-day limit for filing an amended Form TA-1 to report the change in ownership and address of the principal office where transfer agent activities were or were to be performed, including a new mailing address, if different.

2. Under Nelson's control, MST also filed with the Commission in March 2013 a false and misleading Form TA-2 (Transfer Agent Annual Activities Disclosure), which incorrectly indicated that MST had amended its existing Form TA-1 during calendar year 2012 within 60 days of any information on the TA-1 becoming inaccurate, incomplete or misleading. The certification by MST on this Form TA-2 was incorrect because MST did not file any Form TA-1 during calendar year 2012. Further, MST filed a separate Form TA-2 during April 2014 on which it certified that it had also followed the 60-day Form TA-1 amendment requirement during calendar year 2013. However, the only Form TA-1 for MST filed during 2013 was filed more than 60 days after Nelson acquired and moved the business to Georgia and affirmatively misrepresented Nelson's disciplinary history. MST filed an amended Form TA-1 in March 2014 on which Nelson's disciplinary history was disclosed.

3. In addition to these false and untimely filings with the Commission, MST, under Nelson's control, failed to comply with other provisions of the Exchange Act and the rules thereunder governing transfer agents. Specifically, MST failed to: (i) follow record-keeping requirements by making and keeping current appointment and/or termination documentation or other contracts and documents concerning the transfer agent services that MST performed for securities issuers; (ii) maintain written procedures describing MST's obligation to search for lost security holders; (iii) establish and implement written procedures for the cancellation, storage,

[1] The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

transportation, destruction and disposition of securities certificates, as well as provide in such procedures for the timely and complete reporting of any cancelled certificate that is lost, stolen, missing, or counterfeit; and (iv) comply with required procedures for the fingerprinting of all transfer agent employees.

Respondents

4. **MST** is a transfer agent registered with the Commission. In September 2012, Nelson acquired Mountain Share Transfer, Inc. from its previous owners in Colorado and relocated the business to Georgia. In 2013, Nelson created Mountain Share Transfer, LLC, a Georgia limited liability company, and merged Mountain Share Transfer, Inc. into Mountain Share Transfer, LLC in January 2014, resulting in Mountain Share Transfer, LLC emerging as the surviving entity. Mountain Share Transfer, LLC is now registered with the Commission as a transfer agent. As of 2014, MST had been engaged as a transfer agent by approximately 20 corporate issuers to perform various shareholder administrative functions, including recording changes in ownership of the issuers' stock, maintaining the issuers' security holder records, canceling and issuing stock certificates and resolving problems arising from lost, destroyed or stolen certificates.

5. **Nelson**, 47, and a resident of Atlanta, Georgia, is the President and the sole employee of MST, a securities transfer agent which Nelson runs out of his house in Atlanta. Nelson acquired MST on or about September 19, 2012. Previously, Nelson worked as a registered representative for several broker-dealers between 1989 and 1995, when NASD barred and sanctioned Nelson for taking private payments in exchange for recommending that his clients purchase certain securities offerings.

Registration and Reporting

6. On or about September 19, 2012, Nelson acquired MST through a stock purchase agreement between MST's former owners and Sterling Investment Services, Inc., a separate corporation owned by Nelson. Nelson then moved MST's operations to his home in Atlanta, Georgia.

7. On or about March 14, 2013, more than five months after Nelson acquired MST and moved it to Georgia, MST filed with the Commission, through Nelson and under his signature, an amended Form TA-1. The Form TA-1, and instructions thereto, required MST, among other information, to disclose: (1) its officers, owners, and control persons; (2) the address of the principal office where MST's transfer agent activities occur; and (3) the disciplinary history of MST and any control affiliates, defined as an individual or firm that directly or indirectly controls, is under common control with, or is controlled by MST.

8. The Form TA-1 that MST filed with the Commission on March 14, 2013, identified Nelson as the new President of MST and provided MST's new principal office address in Georgia. MST's filing of this Form TA-1 was more than 60 days after Nelson acquired the entity and moved it to Georgia.

9. Further, MST, on its Form TA-1 filed on March 14, 2013, affirmatively misrepresented Nelson's discipline by the NASD stemming from Nelson's prior work as a registered representative for a broker-dealer. On the Form TA-1, MST answered "No" to questions asking whether Nelson, as the "control affiliate" of MST, was ever involved in the violation of the rules of an SRO or was ever disciplined, expelled, suspended or barred by an SRO. Because MST's responses to the disciplinary questions were incorrect from the moment they were filed with the Commission, this information was immediately inaccurate, misleading, or incomplete, triggering MST's obligation to amend the Form TA-1 within 60 days, which did not happen until nearly one year later in March 2014.

10. On or about March 27, 2013, MST, through Nelson and under his signature, filed with the Commission a Form TA-2 on which MST indicated that it had amended its Form TA-1 during calendar year 2012 within 60 calendar days following the date on which information reported on the Form TA-1 became inaccurate, incomplete, or misleading. However, MST did not file any Form TA-1 during calendar year 2012. Further, MST filed a separate Form TA-2 with the Commission in April 2014 on which MST also indicated it followed the 60-day Form TA-1 amendment requirement for calendar year 2013. However, MST only filed one Form TA-1 with the Commission during 2013. That Form TA-1 was filed more than five months after Nelson acquired and moved MST to Georgia in September 2012 and did not disclose Nelson's disciplinary history with the NASD, and instead affirmatively denied that such discipline had occurred. MST filed an amended Form TA-1 disclosing Nelson's disciplinary history in March 2014.

Record Keeping

11. Beginning on or about September 19, 2012, when Nelson acquired MST, and continuing until at least August 2014, MST lacked appointment documentation for various issuers for which MST was serving as a transfer agent. Nelson, as the President and sole employee of MST, learned of the lack of appointment documentation after he acquired MST and failed to make prompt efforts to remedy the problem until staff from the Commission's National Exam Program noted in 2013 that Nelson lacked written contracts for sixteen of the nineteen issuers that MST was serving at that time.

Written Policies and Procedures

12. Beginning on or about September 19, 2012, when Nelson acquired MST, and continuing until at least the fall of 2013, MST lacked any written procedures describing MST's methodology for complying with its obligation to search for lost security holders.

13. Beginning on or about September 19, 2012, when Nelson acquired MST, and continuing until at least the summer of 2013, MST failed to establish and implement written procedures for the cancellation, storage, transportation, destruction or other disposition of securities certificates.

Fingerprinting

14. Beginning on or about September 19, 2012, when Nelson acquired MST, and continuing until at least August 2013, MST failed to have Nelson fingerprinted. Further, not until October 2014 did MST submit Nelson's fingerprints to the appropriate designee.

Violations

As a result of the conduct described above, MST willfully[2] violated:

15. Section 17A(d) of the Exchange Act which prohibits a transfer agent from engaging in any activity as a transfer agent in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise;

16. Section 17A(c) of the Exchange Act and Rule 17Ac2-1 thereunder, which require that transfer agents: (1) register with the Commission by filing a true, correct, and complete Form TA-1 in accordance with the instructions therein (Rule 17Ac2-1(a)); and (2) file an amended Form TA-1 within 60 days (Rule 17Ac2-1(c)) if any information in a transfer agent's Form TA-1 became inaccurate, misleading or incomplete to correct the information;

17. Section 17A(c) of the Exchange Act and Rule 17Ac2-2 thereunder, by filing with the Commission a false and misleading Form TA-2 on which MST certified that it had amended its Form TA-1 within 60 days of any information becoming inaccurate, misleading or incomplete;

18. Sections 17(a)(1) and 17(a)(3) of the Exchange Act and Rules 17Ad-6(a)(8) and 17Ad-7 thereunder, which require transfer agents to make and keep current and to retain for prescribed periods of time certain records, respectively, including documents concerning the appointment and termination of the transfer agent to act in any capacity for a securities issuer;

19. Rule 17Ad-17 under the Exchange Act, which requires that recordkeeping transfer agents maintain records to demonstrate compliance with the requirements of the rule, which records must include written procedures describing the transfer agent's methodology for complying with its obligation to search for lost security holders;

20. Rule 17Ad-19 under the Exchange Act, which requires that transfer agents involved in the handling, processing, or storage of securities certificates shall establish and implement written procedures for the cancellation, storage, transportation, destruction or other disposition of securities certificates; and

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (*quoting Hughes v. SEC*, 174 F.2d 969,977 (D.C. Cir. 1949)).

21. Section 17(f)(2) of the Exchange Act and Rule 17f-2 thereunder, requiring transfer agents to have all partners, directors, officers and employees fingerprinted and to have those fingerprints submitted to the Attorney General of the United States or its designee.

22. As a result of the conduct described above, Nelson willfully aided and abetted and caused MST's violations of Sections 17(a)(1), 17(a)(3), 17(f)(2), 17A(c) and 17A(d) of the Exchange Act and Rules 17f-2, 17Ac2-1, 17Ac2-2, 17Ad-6(a)(8), 17Ad-7, 17Ad-17, and 17Ad-19 thereunder.

Undertakings

MST undertakes to:

23. Retain within 30 days after entry of this Order, the services of an Independent Consultant, not unacceptable to the Commission's staff, and thereafter exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant. MST shall retain the Independent Consultant to conduct a comprehensive review of, and recommend corrective measures concerning, its policies and procedures relating to the making, keeping and filing of Forms TA-1 and Forms TA-2 with the Commission, as well as its record keeping requirements, its obligation to establish and maintain written policies, and its fingerprinting requirements. MST shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to MST's files, books, records, and personnel as reasonably requested;

24. No more than 120 days after the entry of this Order, submit to the Commission's staff a written report that MST will obtain from the Independent Consultant regarding MST's policies and procedures. The report will include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies and procedures, and a procedure for implementing any recommended changes;

25. Adopt all recommendations made by the Independent Consultant, provided, however, that within 150 days after the entry of this Order, MST will advise the Independent Consultant and the staff of the Commission in writing of any recommendations which MST considers unnecessary or inappropriate. MST need not adopt such recommendations at that time, but instead propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation with respect to MST's policies or procedures on which MST and the Independent Consultant do not agree, MST will attempt in good faith to reach an agreement with the Independent Consultant within 180 days of the entry of this Order. In the event that MST and the Independent Consultant are unable to agree on an alternative proposal, MST will abide by the determinations of the Independent Consultant;

26. Ensure the independence of the Independent Consultant. MST: (a) shall not have authority to terminate the Independent Consultant without prior written approval of the Commission's staff; (b) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to this Order at their reasonable

and customary rates; (c) shall not be in and shall not have an attorney-client relationship with the Independent Consultant, and shall not seek to invoke the attorney-client privilege or any other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports, or documents to the Commission or the Commission's staff;

27. Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with MST or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with MST or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement; and

28. Certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and MST agrees to provide such evidence. The certification and supporting material shall be submitted to William P. Hicks, Associate Regional Director, U.S. Securities and Exchange Commission, Atlanta Regional Office, 950 East Paces Ferry Road NE, Suite 900, Atlanta, Georgia 30326, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street NE, Washington, D.C. 20549, no later than 60 days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Sections 17A(c) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent MST cease and desist from committing or causing any violations or future violations of Sections 17(a)(1), 17(a)(3), 17(f)(2), 17A(c) and 17A(d) of the Exchange Act and Rules 17f-2, 17Ac2-1, 17Ac2-2, 17Ad-6(a)(8), 17Ad-7, 17Ad-17, and 17Ad-19 thereunder;

B. Respondent Nelson cease and desist from committing or causing any violations or future violations of Sections 17(a)(1), 17(a)(3), 17(f)(2), 17A(c) and 17A(d) of the Exchange Act and Rules 17f-2, 17Ac2-1, 17Ac2-2, 17Ad-6(a)(8), 17Ad-7, 17Ad-17, and 17Ad-19 thereunder;

C. Respondents MST and Nelson are censured;

D. Respondent Nelson shall pay civil penalties of $10,000 to the United States Treasury. Payment shall be made in the following installments: $833.33 within 30 calendar days of this order; $833.33 within 60 calendar days of this order; $833.33 within 90 calendar days of this order; $833.33 within 120 calendar days of this order; $833.33 within 150 calendar days of this order; $833.33 within 180 calendar days of this order; $833.33 within 210 calendar days of this order; $833.33 within 240 calendar days of this order; $833.33 within 270 calendar days of this order; $833.33 within 300 calendar days of this order; $833.33 within 330 calendar days of this order; and $833.37 within 360 calendar days of this order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately without further application. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Nelson as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to William P. Hicks, Associate Regional Director, U.S. Securities and Exchange Commission, Atlanta Regional Office, 950 East Paces Ferry Road NE, Suite 900, Atlanta, Georgia 30326; and

E. Respondent MST shall comply with the undertakings enumerated in Section III, Paragraphs 23-28 above.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74227 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16379

In the Matter of LAWRENCE FOSTER, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Lawrence Foster ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From December 2009 to January 2013, Respondent was the President of Paradise is Mine, LLC ("Paradise is Mine"), a Florida-based company that offered investors the opportunity to invest in purported land development deals in the Bahamas. Neither Respondent nor Paradise is Mine has ever been registered with the Commission in any capacity. Respondent, 49 years old, a former resident of Miami-Dade County, Florida, is currently incarcerated in a federal detention facility in Miami, Florida.

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On October 22, 2014, after a jury trial, Respondent was convicted of one count of conspiracy to commit wire fraud and seven counts of wire fraud in violation of Title 18 of the United States Code, Sections 1349 and 1343 before the United States District Court for the Southern District of Florida, in United States v. Lawrence Foster, et al., Case No. 1:13-cr-20063-DLG.

3. The counts of the indictment to which Respondent was convicted alleged, inter alia, that Respondent knowingly and willfully devised and intended to devise a scheme and artifice to defraud others and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and that he knowingly transmitted and caused to be transmitted wire transfers of funds in furtherance of the scheme.

4. Respondent acted as an unregistered broker. The counts of the indictment to which Respondent was convicted further alleged that Respondent solicited individuals to invest in Paradise is Mine, representing that the company would purchase and develop land in the Bahamas. Respondent offered potential investors the ability to fund their investments using personal assets such as stocks and promised investors a fixed rate of return of 10-20% on their investments. To further induce investors, Respondent fabricated news stories about Paradise is Mine and represented to potential investors that Paradise is Mine had been featured in publications like the Wall Street Journal, and that professional athletes and celebrities had invested in Paradise is Mine. Furthermore, Respondent received compensation in the form of misappropriated funds and spent investor money on personal expenses, including a luxury vehicle.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74228 / February 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16380

In the Matter of **JORDON MCCARTY,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Jordon McCarty ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 2009 to 2012, Respondent worked for Paradise is Mine, LLC ("Paradise is Mine"), a Florida-based company that offered investors the ability to invest in purported land developments in the Bahamas. Neither Respondent nor Paradise is Mine has ever been registered with the Commission in any capacity. Respondent, 36 years old, a former resident of Miami-Dade County, Florida, is currently incarcerated in a federal detention facility in Pensacola, Florida.

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On September 13, 2013, Respondent pled guilty to one count of conspiracy to commit wire fraud in violation of Title 18 of the United States Code, Section 1349 before the United States District Court for the Southern District of Florida, in United States v. Lawrence Foster, et al., Case No. 1:13-cr-20063-DLG. On November 26, 2013, a judgment in the criminal case was entered against Respondent. He was sentenced to a prison term of 78 months followed by three years of supervised release.

3. The count of the indictment to which Respondent pled guilty alleged, inter alia, that Respondent willfully and knowingly conspired with others with the intent to devise a scheme to obtain money and property by means of materially false and fraudulent representations and promises, knowing that they were false and fraudulent when made, and for the purpose of executing such scheme using means of interstate and foreign commerce.

4. Respondent acted as an unregistered broker. According to the count of the indictment to which Respondent pled guilty and the facts in the plea agreement to which Respondent agreed, Respondent solicited individuals to invest in Paradise is Mine, representing that the company would purchase and develop land in the Bahamas. Respondent offered potential investors the ability to fund their investments using personal assets such as stocks and promised investors a fixed rate of return of 10-20% on their investments. To further induce investors, Respondent fabricated news stories about Paradise is Mine and represented to potential investors that Paradise is Mine had been featured in publications like the Wall Street Journal, and that professional athletes and celebrities had invested in Paradise is Mine. Furthermore, Respondent received compensation in the form of misappropriated funds.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229 AND 240

RELEASE NO. 33-9723; 34-74232; IC-31450; File No. S7-01-15

RIN 3235-AL49

DISCLOSURE OF HEDGING BY EMPLOYEES, OFFICERS AND DIRECTORS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules to implement Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires annual meeting proxy statement disclosure of whether employees or members of the board of directors are permitted to engage in transactions to hedge or offset any decrease in the market value of equity securities granted to the employee or board member as compensation, or held directly or indirectly by the employee or board member. The proposed disclosure would be required in a proxy statement or information statement relating to an election of directors, whether by vote of security holders at a meeting or an action authorized by written consent.

DATES: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);

- Send an email to rule-comments@sec.gov. Please include File Number S7-01-15 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, U. S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-01-15. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Carolyn Sherman, Special Counsel, or Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, in the Office of Chief Counsel, Division of Corporation Finance, and Nicholas Panos, Senior Special Counsel, at (202) 551-3440, in the Office of Mergers and Acquisitions, Division of Corporation Finance; or, with respect to investment companies, Michael Pawluk, Branch Chief, at (202) 551-6792, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549.

SUPPLEMENTARY INFORMATION: We propose to amend Item 402[1] of Regulation S-K[2] by revising paragraph (b) to add Instruction 6; to amend Item 407[3] of Regulation S-K to add new paragraph (i); and to amend Schedule 14A[4] to revise Items 7 and 22.

TABLE OF CONTENTS

[1] 17 CFR 229.402.

[2] 17 CFR 229.10 et seq.

[3] 17 CFR 229.407.

[4] 17 CFR 14a-101.

I. INTRODUCTION

We are proposing rule amendments to implement Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"),[5] which adds new Section 14(j) to the Securities Exchange Act of 1934 (the "Exchange Act").[6] Section 14(j) directs the Commission to require, by rule, each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer whether any employee or member of the board of directors of the issuer, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities either (1) granted to the employee or director by the issuer as part of the compensation of the employee or director; or (2) held, directly or indirectly, by the employee or director.

A report issued by the Senate Committee on Banking, Housing, and Urban Affairs stated that Section 14(j) is intended to "allow shareholders to know if executives are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform."[7] In this regard, we infer that the statutory purpose of Section 14(j) is to provide transparency to shareholders, if action is to be taken with respect to the election of

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[5] Pub. L. No. 111-203, 124 Stat. 1900 (July 21, 2010).

[6] 15 U.S.C. 78a et seq.

[7] See Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. 3217, Report No. 111-176 (Apr. 30, 2010) ("Senate Report 111-176").

directors, about whether employees or directors are permitted to engage in transactions that mitigate or avoid the incentive alignment associated with equity ownership.

We propose to implement Section 14(j) as described in detail below. Neither Section 14(j) nor the proposed amendments would require a company to prohibit hedging transactions or to otherwise adopt practices or a policy addressing hedging by any category of individuals.

II. BACKGROUND

The current disclosure obligations relating to company hedging policies are provided by Item 402(b) of Regulation S-K, which sets forth the disclosure required in the company's Compensation Discussion and Analysis ("CD&A"). CD&A requires disclosure of material information necessary to an understanding of a company's compensation policies and decisions regarding the named executive officers.[8] Item 402(b)(2)(xiii) includes, as an example of the kind of information that should be provided, if material, the company's equity or other security ownership requirements or guidelines (specifying applicable amounts and forms of ownership) and any company policies regarding hedging the economic risk of such ownership. This CD&A disclosure item requirement, which does not apply to smaller

[8] As defined in Item 402(a)(3) of Regulation S-K, "named executive officers" are all individuals serving as the company's principal executive officer during the last completed fiscal year, all individuals serving as the company's principal financial officer during that fiscal year, the company's three other most highly compensated executive officers who were serving as executive officers at the end of that year, and up to two additional individuals who would have been among the three most highly compensated but for not serving as executive officers at the end of that year.

reporting companies,[9] emerging growth companies,[10] registered investment companies[11] or foreign private issuers,[12] by its terms addresses only hedging by the named executive officers. In providing their CD&A disclosure, however, some companies describe policies that address hedging by employees and directors, as well as the named executive officers.

In addition, disclosures pursuant to other requirements may reveal when company equity securities have been hedged:

- For companies with a class of equity securities registered pursuant to Section 12 of the Exchange Act,[13] hedging transactions by officers and directors in transactions involving one or more derivative securities – such as options, warrants, convertible securities, security futures products, equity swaps, stock appreciation rights and other securities that have an exercise or conversion price related to a company equity security or derive their value from a company equity security – are subject to reporting within two business days on Form 4, pursuant to Exchange Act Section 16(a).[14]

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[9] As defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2].

[10] Section 101 of the Jumpstart Our Business Start-Ups Act (the "JOBS Act") [Pub. L. No. 112-106, 126 Stat. 306 (2012)] codified the definition of "emerging growth company" in Section 3(a)(80) of the Exchange Act and Section 2(a)(19) of the Securities Act.

[11] Registered investment companies are investment companies registered under Section 8 of the Investment Company Act of 1940 ("Investment Company Act"). 15 U.S.C. 80a et seq.

[12] As defined in Rule 3b-4 [17 CFR 240.3b-4].

[13] 15 U.S.C. 78l.

[14] 15 U.S.C. 78p(a). For Section 16 purposes, the term "derivative securities" is defined in Exchange Act Rule 16a-1(c), which excludes rights with an exercise or conversion privilege at a price that is not fixed. Exchange Act Rule 16a-1(d) defines "equity security of the issuer" as any equity security or derivative security relating to

- Some hedging transactions, such as prepaid variable forward contracts,[15] may involve pledges of the underlying company equity securities as collateral. Item 403(b) of Regulation S-K requires disclosure of the amount of company equity securities beneficially owned by directors, director nominees and named executive officers,[16] including the amount of shares that are pledged as security.[17]

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the issuer, whether or not issued by that issuer. See also Exchange Act Rule 16a-4, which provides that for Section 16 purposes, both derivative securities and the underlying securities to which they relate shall be deemed to be the same class of equity securities.

The Commission has clarified that Section 16 applies to equity swap and similar transactions that a Section 16 insider may use to hedge, and has addressed how these derivative securities transactions should be reported, including specifically identifying them through the use of transaction code K. See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-34514 (Aug. 10, 1994) [59 FR 42449] at Section III.G; and Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-37260 (May 31, 1996) [61 FR 30376] at Sections III.H and III.I. The Commission also has clarified how transactions in securities futures should be reported. Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Release No. 33-8107 (June 21, 2002) [67 FR 43234] at Q. 13.

[15] A prepaid variable forward contract obligates the seller to sell, and the counterparty to purchase, a variable number of shares at a specified future maturity date. The number of shares deliverable will depend on the per share market price of the shares close to the maturity date. The contract specifies maximum and minimum numbers of shares subject to delivery, and at the time the contract is entered into, the seller will pledge to the counterparty the maximum number of shares. The Commission has indicated that forward sales contracts are derivative securities transactions subject to Section 16(a) reporting. Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release No. 33-8230 (May 7, 2003) [68 FR 25788], text at n. 42.

[16] Item 403(b) of Regulation S-K [17 CFR 229.403(b)]. Disclosure is required on an individual basis as to each director, nominee, and named executive officer, and on an aggregate basis as to executive officers of the issuer as a group and must be provided in proxy statements, annual reports on Form 10-K [referenced in 17 CFR 240.310], and registration statements under the Securities Act and under the Exchange Act on Form 10.

[17] The Commission's rationale for requiring the disclosure of the amount of shares pledged as security was as follows: "To the extent that shares owned by named executive officers, directors and director nominees are used as collateral, these shares may be subject to material risk or contingencies that do not apply to other shares beneficially owned by these persons." Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (the "2006 Executive Compensation Disclosure Release") at Section IV.

III. DISCUSSION OF THE PROPOSED AMENDMENTS

We propose to implement Section 14(j) by adding new paragraph (i) to Item 407 of Regulation S-K to require companies to disclose whether they permit employees and directors to hedge their company's securities. We believe that the disclosure called for by Section 14(j) is primarily corporate governance-related because it requires a company to provide in its proxy statement information giving shareholders insight into whether the company has policies affecting how the equity holdings and equity compensation of all of a company's employees and directors may or may not align with shareholders' interests. Because Section 14(j) calls for disclosure about employees and directors, we believe that this information raises broader issues with respect to the alignment of shareholders' interests with those of employees' and directors', and is more closely related to the Item 407 corporate governance disclosure requirements than to Item 402 of Regulation S-K, which focuses only on the compensation of named executive officers and directors. We propose to amend Item 407 in this manner to keep disclosure requirements relating to corporate governance matters together in a single item in Regulation S-K.[18]

The proposed amendments implement Section 14(j) in the following ways:

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[18] As a result, the proposed disclosure would not be subject to shareholder advisory votes to approve the compensation of named executive officers, as disclosed pursuant to Item 402, that are required pursuant to Section 14A(a)(1) of the Exchange Act and Rule 14a-21(a) [17 CFR 240.14a-21(a)]. We recognize, however, that there is an executive compensation component of the proposed disclosure as it relates to existing CD&A obligations. See Section III.D.3, below.

- include within the scope of the proposed disclosure requirement other transactions with economic consequences comparable to the financial instruments specified in Section 14(j);
- specify that the equity securities for which disclosure is required are only equity securities of the company, any parent of the company, any subsidiary of the company or any subsidiary of any parent of the company that are registered under Section 12 of the Exchange Act;[19]
- require the disclosure in any proxy statement on Schedule 14A or information statement on Schedule 14C[20] with respect to the election of directors because the information seems most relevant for shareholders voting or receiving information about the election of directors; and
- clarify that the term "employee" includes officers of the company.

A. Transactions Subject to the Disclosure Requirement

Section 14(j) requires disclosure of whether any employee or director of the issuer, or any designee of such employee or director, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds[21])

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[19] 15 U.S.C. 78l.

[20] 17 CFR 240.14c-101.

[21] By covering "exchange funds," we believe that Section 14(j) can be interpreted to cover transactions involving dispositions or sales of securities. This is because an employee or director can acquire an interest in an exchange fund only in exchange for a disposition to the exchange fund of equity securities held by the employee or director. Whether the disposition to the exchange fund is a hedging transaction will depend on the terms of the fund.

that are designed to hedge or offset any decrease in the market value of equity securities. Our proposal would implement this requirement and would also require disclosure of transactions with economic consequences comparable to the purchase of the specified financial instruments.

As noted above, a Senate report indicated that Section 14(j) was added so that shareholders would know whether executive officers are able "to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform."[22] Although Section 14(j) expressly refers only to the purchase of financial instruments designed to hedge or offset any decrease in the market value of equity securities, there are other transactions that could have the same economic effects, the disclosure of which would be consistent with the purpose of Section 14(j).[23] For example, a short sale can hedge the economic risk of ownership. Similarly, selling a security future establishes a position that increases in value as the value of the underlying equity security decreases, thereby establishing the downside price protection that is the essence of the transactions contemplated by Section 14(j).

We are concerned that if the proposed disclosure requirement is not sufficiently principles-based, the result would be incomplete disclosure as to the scope of hedging transactions that an issuer permits. If, for example, a company discloses that it prohibits the

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[22] See Senate Report 111-176.

[23] Section 14(j) refers to financial instruments that are designed to hedge or offset any decrease in market value. The proposed amendments do not define the term "hedge," as we believe the meaning of hedge is generally understood and should be applied as a broad principle.

purchase of the types of financial instruments specifically listed in the statute, and does not otherwise disclose whether it permits other types of hedging transactions that may have the same economic effects as the purchase of the listed financial instruments, a shareholder might assume that the company does not permit any hedging transactions at all, even though that may not be the case. Similarly, failing to cover transactions with the same economic effects as purchase of the listed financial instruments might cause employees and directors to use those transactions that are not covered by the disclosure requirement. In order for the disclosure to be complete and to avoid discouraging or promoting the use of particular hedging transactions, our proposed amendment would require disclosure of whether an issuer permits other types of transactions that have the same hedging effect as the purchase of those instruments specifically identified in Section 14(j). Proposed Item 407(i) would require disclosure of whether an employee, officer or director, or any of their designees, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities. The proposed amendment would therefore cover all transactions that establish downside price protection – whether by purchasing or selling a security or derivative security or otherwise,[24] consistent with the statutory purpose and providing more complete disclosure.

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[24] A pledge or loan of equity securities that does not involve a prepaid variable forward or similar transaction, would not be considered a hedging transaction covered by the proposed disclosure rule even though such a pledge or loan may be viewed as an "offer or sale" of a security under Securities Act Section 17(a) [15 U.S.C. §77q(a)]. See Rubin v. United States, 449 U.S. 424 (1981). This is because such stand-alone pledges and loans

Like the existing CD&A disclosure item, which applies to company policies regarding hedging the economic risk of named executive officers' ownership of the company's securities,[25] the scope of the proposed amendment is not limited to any particular types of hedging transactions.

A proposed instruction would clarify that the company must disclose which categories of transactions it permits and which categories of transactions it prohibits.[26] Disclosure of both the categories prohibited and those permitted conveys a complete understanding of the scope of hedging at the company. However, we recognize that where, for example, a company only prohibits specified hedging transactions, potentially limitless disclosure of each specific category otherwise permitted may not be meaningful. Accordingly, if a company specifically prohibits certain hedging transactions, it would disclose the categories of transactions it specifically prohibits, and could, if true, disclose that it permits all other hedging transactions in lieu of listing all of the specific categories that are permitted. For example, a company could disclose that it prohibits prepaid variable forward contracts, but permits all other hedging transactions. Conversely, where a company specifies only the hedging transactions that it permits, in addition to disclosing the particular categories of transactions permitted, it may, if true, disclose that it prohibits all other hedging transactions in lieu of listing all of the specific categories that are prohibited. For example, a

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generally contemplate the return of the pledged or borrowed securities to the employee, with no consequent change in the employee's economic risk in ownership of the securities.

[25] Item 402(b)(2)(xiii) of Regulation S-K, discussed in Section II.D, below.

[26] Proposed Instruction 3 to Item 407(i).

company could disclose that it permits exchange fund transactions, but prohibits all other hedging transactions. If a company does not permit any hedging transactions, or permits all hedging transactions, it should so state and would not need to describe them by category. An additional instruction would require a company that permits hedging transactions to disclose sufficient detail to explain the scope of such permitted transactions.[27] For example, a company that permits hedging of equity securities that have been held for a specified period of time would need to disclose the period of time the securities must have been held.

If a company permits some, but not all, of the categories of persons covered by the proposed amendment to engage in hedging transactions, the company would disclose both the categories of persons who are permitted to hedge and those who are not.[28] For example, a company might disclose that it prohibits all hedging transactions by executive officers and directors, but does not restrict hedging transactions by other employees. Disclosing both categories of transactions and persons would provide investors a more complete understanding of the persons permitted to engage in hedging transactions, if any, and the types of hedging transactions permitted by the company.

B. Specifying the Term "Equity Securities"

We are proposing an instruction to specify that the term "equity securities," as used in proposed Item 407(i), would mean any equity securities (as defined in Exchange Act Section

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[27] Proposed Instruction 4 to Item 407(i).

[28] Proposed Instruction 2 to Item 407(i).

3(a)(11)[29] and Exchange Act Rule 3a11-1)[30] issued by the company, any parent of the company, any subsidiary of the company or any subsidiary of any parent of the company that are registered under Section 12 of the Exchange Act.[31] As proposed, the disclosure requirement would apply to the equity securities issued by the company and its parents, subsidiaries or subsidiaries of the company's parents that are registered on a national securities exchange[32] or registered under Exchange Act Section 12(g).[33] We believe that the equity securities registered under Exchange Act Section 12 encompass the securities that are more likely to be readily traded, and more easily hedged. Because the Exchange Act and Exchanges Act Rules definitions of "equity security" do not specify the issuer, and Section 14(j) does not itself do so, without an instruction that narrows the scope, the term "equity securities" could be interpreted to include the equity securities of any company that are held directly or indirectly by an employee or director.

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[29] 15 U.S.C. 78c(a)(11). Exchange Act Section 3(a)(11) defines "equity security" as any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

[30] 17 CFR 240.3a11-1. Exchange Act Rule 3a11-1 defines "equity security" to include any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

[31] 15 U.S.C. 78l; Proposed Instruction 1 to Item 407(i).

[32] 15 U.S.C. 78l(b).

[33] 15 U.S.C. 78l(g).

The proposed instruction would specify the scope of covered equity securities for both paragraphs (1) (compensatory equity securities grants) and (2) (other equity securities holdings) of proposed Item 407(i). Disclosure of whether a director or employee is permitted to hedge equity securities granted as compensation or otherwise held from whatever source acquired will more fully inform shareholders whether employees and directors are able to engage in transactions that reduce the alignment of their interests with the economic interests of other shareholders of the company and any affiliated company in which the employees or directors might have an interest. Shareholders would receive the Item 407(i) disclosure because they hold equity securities of the company and action is to be taken with respect to the election of directors for that company. The disclosure would provide additional information on whether the company has policies affecting the alignment of incentives for employees and directors of the company whose securities they hold. We therefore believe that disclosure about whether employees and directors are permitted to hedge equity securities issued by the company, its parents, subsidiaries or subsidiaries of the company's parents that are registered under Exchange Act Section 12 would be most relevant when providing information about the election of directors. We believe that, in certain instances,[34] companies may grant equity securities of affiliated companies to their employees or directors that are intended to achieve similar incentive alignment as grants in the company's equity securities. In these instances, we believe it would be relevant for shareholders to know

[34]Examples may include, but are not limited to, where a company reorganizes to create a publicly-traded subsidiary.

whether such persons are permitted to mitigate or avoid the risks associated with long-term ownership of these securities.

C. Employees and Directors Subject to the Proposed Disclosure Requirement

Section 14(j) covers hedging transactions conducted by any employee or member of the board of directors or any of their designees. Consistent with that mandate, we believe the term "employee" should be interpreted to include everyone employed by an issuer, including its officers. We believe it is just as relevant for shareholders to know if officers are allowed to effectively avoid restrictions on long-term compensation as it is for directors and other employees of the company.[35] Accordingly, we propose to implement Section 14(j) by adding the parenthetical "(including officers)" after the term "employees" in the language of the proposed disclosure requirement.[36] In sum, the proposed amendment uses the language "any employees (including officers) or directors of the registrant, or any of their designees" in describing the persons covered by the disclosure requirement.[37]

Request for Comment

1. Should the disclosure required by Section 14(j) be implemented by amending the corporate governance disclosures required by Item 407, as proposed?

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[35] See Senate Report 111-176.

[36] The parenthetical "(including officers)" in proposed Item 407(i) is intended to include officers employed by an issuer and avoid possible confusion with Exchange Act Rule 12b-2 [17 CFR 240.12b-2], which states that the term "employee" does not include a director, trustee, or officer.

[37] Section 14(j) refers to "designee[s]" of employees and directors. Under the proposed disclosure requirement, whether someone is a "designee" would be determined by a company based on the particular facts and circumstances.

Alternatively, should it be implemented by amending the Item 402 executive compensation disclosure requirements? Are there advantages or disadvantages to requiring these disclosures under Item 402? If so, please explain why.

2. Should the scope of the proposed Item 407(i) disclosure requirement cover transactions that are not expressly listed in Exchange Act Section 14(j) but have economic consequences comparable to the purchase of the financial instruments specifically identified in Section 14(j), as proposed? If not, why not?

3. Should the scope of transactions covered by proposed Item 407(i) be clarified? We are of the view that there is a meaningful distinction between an index that includes a broad range of equity securities, one component of which is company equity securities, and a financial instrument, even one nominally based on a broad index, designed to or having the effect of hedging the economic exposure to company equity securities. Should we clarify the application of Item 407(i) to account for this situation? If so, how? For example, if an issuer prohibited hedging generally, but permitted the purchase of broad-based indices, should we specify that the issuer could nonetheless disclose that it prohibits all hedging transactions? Should the rule explicitly distinguish between instruments that provide exposure to a broad range of issuers or securities and those that are designed to hedge particular securities

or have that effect? Would a principles-based or numerical threshold approach be most helpful in this regard? If not, what other clarification should be provided?

4. If a company prohibits some, but not all, of the categories of transactions described in the proposed amendment, in order to fully describe what hedging transactions are permitted and by whom, is it necessary to require disclosure, as proposed, of both the categories of transactions that are permitted and the categories of transactions that are prohibited? If not, please explain why not. Does proposed Instruction 3 to Item 407(i) provide a way for companies that permit or prohibit only certain covered transactions to disclose this information in a clear and effective manner? Alternatively, should the company simply be required to describe its policy, if any, without further elaboration?

5. A company that permits hedging transactions would be required to disclose sufficient detail to explain the scope of such permitted transactions. For example, a company may permit hedging transactions only if pre-approved, or only after the company's stock ownership guidelines have been met. Should proposed Instruction 4 be more specific about the types of details, such as a pre-approval requirement, that the company must disclose?

6. Does our proposal to define the term "equity securities" as equity securities of the company or any of its parents, subsidiaries or subsidiaries of its parents

that are registered under Exchange Act Section 12 appropriately capture the disclosure that shareholders would find useful? Should the Commission limit the term "equity securities" to only equity securities of the company? If so, please explain why and the costs and benefits that would result. How often are directors and employees compensated through equity securities of an affiliated company that are not registered under Section 12(b) of the Exchange Act? If the definition of equity securities includes only equity securities registered under Section 12(b) of the Exchange Act, would that affect either compensation structure or corporate structure? Do companies typically have policies addressing hedging of equity securities of their parents, subsidiaries or subsidiaries of their parents? What would be the costs and benefits of disclosing whether hedging the equity securities of these affiliates is permitted or prohibited? Would any on-going compliance efforts be different? If so, please explain why and the costs and benefits that would result.

7. Should the proposed definition be broadened to include equity securities that are not registered under Exchange Act Section 12 or narrowed to only include equity securities registered under Section 12(b) of the Exchange Act? If so, explain why and the costs and benefits that would result. Alternatively, should the proposed definition be revised to exclude equity securities that do not trade in an established public market? If so, how would "established public market" be defined? To the extent the amendment applies to equity

securities that do not trade on an established public market, should we provide guidance about how to interpret "market value" for purposes of the proposed amendment? In either case, please explain why, and what costs and benefits would result from the recommended change.

8. Should we define "parent" and "subsidiary" specifically for purposes of this disclosure requirement? The definition of "parent" of a person in the Exchange Act Rules is an affiliate controlling such person directly, or indirectly through one or more intermediaries.[38] Similarly, the Exchange Act Rules definition of "subsidiary" of a person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.[39] Will these definitions, in the context of hedging disclosure, present any implementation challenges in determining what needs to be disclosed? Should we consider an alternative term, or alternative definition of "parent" for this disclosure requirement, such as an affiliate that owns a majority of the voting securities in the company? Similarly, with respect to subsidiaries, should we consider an alternative term, or alternative definition of "subsidiary" for this disclosure requirement, such as a majority-owned subsidiary, wholly-owned subsidiary, consolidated subsidiary or significant subsidiary? In each case, please

[38] Exchange Act Rule 12b-2 [17 CFR 240.12b-2].

[39] Exchange Act Rule 12b-2 [17 CFR 240.12b-2].

explain why, and what costs and benefits would result from the recommended change.

9. Section 14(j) does not define the circumstances in which equity securities are "held, directly or indirectly" by an employee or director. Is the concept of "held, directly or indirectly" unclear, such that we should provide more certainty about what is meant by the phrase? If so, how should we clarify it? Section 14(j) also does not define who is a "designee," nor is this term otherwise defined in the rules under the Securities Act or the Exchange Act. One commenter has recommended that the Commission define the term "designee."[40] Should the proposed amendment include an instruction clarifying who is a "designee"? If so, please explain how this term should be defined, and the costs and benefits that would result.

10. Section 14(j) is directed to "any employee" and we interpret that to mean anyone employed by the issuer. Should we limit the definition of "employee" to the subset of employees that participate in making or shaping key operating or strategic decisions that influence the company's stock price?[41] Why or why not? If so, how would that distinction be defined for practical purposes?

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[40] See Letter from Compensia, Inc. (Oct. 4, 2010). To facilitate public input on the Act, the Commission has provided a series of email links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. The public comments we have received on Section 955 of the Act are available on our website at http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml.

[41] See Section IV.C.1.

Alternatively, should we add an express materiality condition to the definition, as is the case under CD&A, to permit each issuer to determine whether disclosure about all its employees would be material information for its investors? Why or why not?

11. Should the amendment define "hedge"? If so, what concepts other than the statutory reference to "offset[ting] any decrease in the market value of equity securities" would be necessary to define this term?

12. One commenter has recommended that the Commission "should not only require disclosure of whether hedging is permitted, but should also require disclosure of any hedging that has occurred – both in promptly filed Form 4 filings and in the annual proxy statement."[42] Should the Commission require such disclosure in the final rule for those already subject to Form 4 reporting requirements?

D. Implementation

1. Manner and Location of Disclosure

Section 14(j) calls for disclosure in any proxy or consent solicitation material for an annual meeting of the shareholders. Shareholder annual meetings are typically the venue in which directors are elected.[43] Although the language of Section 14(j) refers to disclosure in

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[42] See letter from Brian Foley & Company, Inc. (Sept. 22, 2010).

[43] The Commission has previously recognized that directors ordinarily are elected at annual meetings. See, e.g., Rule 14a-6(a) [17 CFR 240.14a-6(a)], which acknowledges that registrants soliciting proxies in the context of an election of directors at an annual meeting may be eligible to rely on the exclusion from the requirement to

any proxy or consent solicitation material for an annual meeting of the shareholders, this language, construed strictly, would result in the disclosure appearing in different instances than we currently require other corporate governance related disclosure. In particular, under our current rules, if a company solicits proxies[44] with respect to the election of directors, its proxy statement must include specified corporate governance information required by Item 407 of Regulation S-K, whether or not the election takes place at an annual meeting.[45] We believe that Item 407(i) disclosure would be relevant information for shareholders evaluating the governance practices of the company and the election of directors. By providing the disclosure in a proxy statement if action is to be taken with respect to the election of directors, shareholders will be able to consider the proposed disclosure at the same time as

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file a proxy statement in preliminary form. Rule 14a-3(b) [17 CFR 240.14a-3(b)] requires proxy statements used in connection with the election of directors at an annual meeting to be preceded or accompanied by an annual report containing audited financial statements. The requirement for registrants to hold an annual meeting at which directors are to be elected, however, is imposed by a source of legal authority other than the federal securities laws. In Delaware, for example, where more than 50% of the publicly traded issuers are incorporated according to the State of Delaware's official website, Delaware General Corporation Law, Section 211(b) is viewed as requiring an annual meeting for the election of directors. See Delaware Law of Corporations & Business Organizations, Third Edition by R. Franklin Balotti, Jesse A. Finkelstein at §7.1, Folk on the Delaware General Corporate Law, 2013 Edition by Edward P. Welch, Andrew J. Turezyn, and Robert S. Saunders at § 211.2, and the text of DGCL Section 211(b), which reads in relevant part, "unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws." See also Corporations and Other Business Associations, Seventh Edition by Charles R.T. O'Kelley and Robert B. Thompson at page 167 (explaining that the "paramount shareholder function is the election of directors" and that "[m]ost corporation codes protect this right by specifying immutably that directors shall be elected at an annually held meeting of shareholders."), California Corporations Code, Section 600(b), and 1984 Model Business Corporation Act (as amended through 2006), Section 7.01(a) (each requiring an annual meeting of shareholders for the election of directors).

[44] Rule 14a-1(f) [17 CFR 240.14a-1(f)] defines the term "proxy" to include every proxy, consent or authorization within the meaning of Section 14(a) of the Exchange Act. A solicitation of consents therefore constitutes a solicitation of proxies subject to Section 14(a) and Regulation 14A.

[45] See Items 7(b)-(d) and 8(a) of Schedule 14A.

they are considering the company's other corporate governance disclosures and voting for the election of directors, without regard to whether at an annual or special meeting of shareholders or in connection with an action authorized by written consent.[46] We therefore propose to implement Section 14(j) by amending Items 7 and 22 of Schedule 14A to call for new Item 407(i) information to be provided if action is to be taken with respect to the election of directors. In addition to including the new disclosure requirement, the proposal would amend Item 7 of Schedule 14A to streamline its current provisions by more succinctly cross-referencing disclosure Items.[47]

The information required under proposed Item 407(i) would need to be included in proxy or consent solicitation materials and information statements with respect to the election of directors. Section 14(j) specifically calls for the disclosure to be made in the proxy solicitation materials, and we believe the information would be most relevant to shareholders if action is to be taken with respect to the election of directors. We therefore do not propose to require Item 407(i) disclosure in Securities Act or Exchange Act registration statements or in the Form 10-K Part III Item 407 disclosure,[48] even if that disclosure is incorporated by reference from the company's definitive proxy statement or information statement filed with

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[46] We note that an annual meeting, the meeting at which companies generally provide for the election of directors, could theoretically not include an election of directors. For reasons explained above, an annual meeting ordinarily involves an election of directors. In the unlikely event that a company is not conducting a solicitation for the election of directors but is otherwise soliciting proxies at an annual meeting, the proposed amendment would not require the proposed disclosure in the proxy statement.

[47] Proposed amended Item 7(b) and Instruction to Item 7 of Schedule 14A.

[48] This approach is consistent with the disclosure requirements for registration statements under the Securities Act and for annual reports on Form 10-K, which include only selected provisions of Item 407. See Item 11(l) and 11(o) on Form S-1 and Items 10, 11 and 13 of Form 10-K.

the Commission not later than 120 days after the end of the fiscal year covered by the Form 10-K.[49]

2. Disclosure on Schedule 14C

The statutory language of Section 14(j) expressly calls for proxy or consent solicitation materials for an annual meeting of the shareholders of the issuer to include the disclosure contemplated by the proposed amendments. These solicitation materials are required by our proxy rules to be filed under cover of Schedule 14A.[50] As provided in Item 1 of Schedule 14C, however, an information statement filed on Schedule 14C must include the information called for by all of the items of Schedule 14A to the extent each item would be applicable to any matter to be acted upon at a meeting if proxies were to be solicited, with only limited exceptions.[51] An information statement filed on Schedule 14C in connection with an election of directors therefore already is required to include the information required

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[49] As permitted by General Instruction G to Form 10-K. Proposed Instruction 5 to Item 407(i) would provide that information disclosed pursuant to Item 407(i) would not be deemed incorporated by reference into any filing under the Securities Act, the Exchange Act or the Investment Company Act. As proposed, the disclosure also would not be subject to forward incorporation by reference under Item 12(b) of Securities Act Form S-3 [17 CFR 239.13].

[50] As stated above, Exchange Act Rule 14a-1(f) [17 CFR 240.14a-1(f)] defines the term "proxy" to include every proxy, consent or authorization within the meaning of section 14(a) of the [Exchange] Act. Exchange Act Rule 14a-3(a) [17 CFR 240.14a-3(a)] prohibits any proxy solicitation unless each person solicited is currently or has been previously furnished with a publicly-filed preliminary or definitive proxy statement containing the information specified in Schedule 14A [17 CFR 240.14a-101], and Exchange Act Rule 14a-6(m) [17 CFR 240.14a-6(m) requires proxy materials to be filed under cover of Schedule 14A.

[51] Specifically, Item 1 of Schedule 14C permits the exclusion of information called for by Schedule 14A Items 1(c) (Rule 14a-5(e) information re shareholder proposals), 2 (revocability of proxy), 4 (persons making the solicitation), and 5 (interest of certain persons in matters to be acted upon). Other Items of Schedule 14C prescribe the information to be provided with regard to such of these topics that are relevant to information statements. Specifically, Item 3 addresses the interest of certain persons in or opposition to matters to be acted upon, and Item 4 addresses proposals by security holders. In addition, Notes A, C, D and E to Schedule 14A are applicable to Schedule 14C [17 CFR 240.14c-101].

by Item 7 of Schedule 14A. Absent an amendment to Schedule 14C to exclude proposed Item 407(i) from the requirements for the information statement, the disclosure contemplated by the amendments would be required in Schedule 14C pursuant to existing Item 1 of Schedule 14C.

We are not proposing to exclude Item 407(i) disclosure from Schedule 14C.[52] Applying the proposed disclosure obligation to Schedule 14C filings would have the effect of expanding the requirement to comply with Item 407(i) to companies that do not solicit proxies from any or all security holders but are otherwise authorized by security holders to take an action with respect to the election of directors.

We believe that doing so would retain consistency in the corporate governance disclosure provided in proxy statements and information statements with respect to the election of directors. Exchange Act Section 14(c) was enacted to apply to companies not soliciting proxies or consents from some or all holders of a class of securities registered under Section 12 of the Exchange Act entitled to vote at a meeting or authorize a corporate action by execution of a written consent.[53] It creates disclosure obligations for a company

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[52] Because our proposal would not add a new exclusion for information called for by the proposed amendment to Item 7 of Schedule 14A, the effect of the proposal will be to require Item 407(i) disclosure in Schedule 14C.

[53] Section 14(c) of the Exchange Act was enacted to "reinforce [ ] fundamental disclosure principles [for companies] subject to the proxy rules which did not solicit proxies…" By enacting Section 14(c), Congress was advised that these companies "would be required to furnish shareholders with information equivalent to that contained in a proxy statement….[and that such legislation was needed] [b]ecause evasion of the disclosures required by the proxy rules is made possible by the simple device of not soliciting proxies…" Statement of William L. Cary, Chairman, Securities and Exchange Commission, Part I. K. Other Amendments Proposed by S. 1642, Hearings before a Subcommittee of the Committee on Banking and Currency for the U.S. Senate, Eighty-Eighth Congress, First Session on S. 1642, June 18-21 and 24-25, 1963.

that chooses not to, or otherwise does not, solicit proxies, consents, or other authorizations from some or all of its security holders entitled to vote. An example of when such a situation could occur is in the case of a controlled company[54] not listed on the New York Stock Exchange, NYSE Market or NASDAQ. In instances where management and/or a shareholder affiliate may control sufficient shares to assure a quorum and a favorable voting outcome, as in the case of a majority-owned subsidiary, or where a solicitation of proxies, consents or authorization is made of only certain security holders in connection with an election of directors, Section 14(c) would operate to ensure that security holders not solicited would receive disclosure substantially equivalent to that which would have been included in a proxy statement had a solicitation of all security holders been made.[55] In light of this purpose, we believe requiring Item 407(i) disclosure in information statements filed pursuant

[54] A controlled company is generally understood to be a company in which more than 50% of the voting power is held by an individual, a group or another issuer. See e.g., Exchange Act Section 10C(g)(2) [15 U.S.C. 78jC(g)(2)].

[55] At the time Section 14(c) was being considered by Congress as an amendment to the Exchange Act, the Securities and Exchange Commission provided an official statement that reported findings associated with a study that examined the proxy solicitation practices of 556 industrial and other companies. "Twenty-nine percent of these companies did not solicit proxies and 24 percent did not even send shareholders a notice of meeting." Statement of the Securities and Exchange Commission with respect to Proposed Amendments to Sections 12, 13, 14, 15, 16, 20(c), and 32(b) of the Securities Exchange Act of 1934 and Section 4(1) of the Securities Act of 1933, at 2. Existing Disclosures by Over-the-Counter Companies, Hearings before a Subcommittee of the Committee on Banking and Currency for the U.S. Senate, Eighty-Eighth Congress, First Session on S. 1642, June 18-21 and 24-25, 1963. Simply extending the coverage of the proxy rules to reach over-the-counter issuers was not viewed as a solution, and was believed to have been a decision that would have accentuated the problem of non-solicitation "because of management's relatively larger holdings." Statement of William L. Cary, Chairman, U.S. Securities and Exchange Commission, cited in n. [51] above.

to Section 14(c) furthers the regulatory objective of Section 14(j) of the Exchange Act and would mitigate the regulatory disparity that otherwise might result.[56]

3. Relationship to Existing CD&A Obligations

One of the non-exclusive examples currently listed in the Item 402(b) requirement for CD&A calls, in part, for disclosure of any registrant policies regarding hedging the economic risk of company securities ownership,[57] to the extent material. CD&A applies only to named executive officers and is part of the Item 402 executive compensation disclosure that is required in Securities Act and Exchange Act registration statements, and Exchange Act annual reports on Form 10-K, as well as proxy and information statements relating to the election of directors.[58] Smaller reporting companies, emerging growth companies, registered

[56] Of the approximately 6845 operating companies with at least one class of securities registered under Section 12 of the Exchange Act, 4018 have a class of securities listed on an exchange. Based on our review of and experience with NASDAQ, the New York Stock Exchange or NYSE Market, collectively referred to here as primary market exchanges, companies with a class of common or voting preferred stock (or their equivalents) listed on these exchanges are generally required to solicit proxies from shareholders for all meetings of shareholders, including those to elect directors. See, e.g., NYSE Listed Company Manual Section 402.04, and NASDAQ Rule IM-5620 – Meetings of Shareholders or Partners. Operating companies with a class of voting stock listed on a primary exchange that comply with the listing exchange's requirements, therefore, will be providing the proposed disclosure in proposed amended Item 7 of Schedule 14A and proposed Item 407(i) of Regulation S-K for each election of directors. By contrast, the approximately 2827 non-exchange listed companies with a class of securities registered under Section 12 may not be subject to compulsory requirements analogous to the primary market exchange rules that impose an affirmative obligation to solicit shareholders. Consequently, these non-exchange listed companies, if not subject to a compulsory requirement to solicit proxies, could avoid the proposed disclosures if the new requirement were limited to only companies soliciting proxies or consents pursuant to Section 14(a), especially given that companies with a class of securities registered only under Exchange Act Section 12(g) may be able to effectuate a corporate action (as referenced in Exchange Act Rule 14c-2) without soliciting security holder approval and thus would need only comply with Section 14(c) and Regulation 14C.

[57] Item 402(b)(2)(xiii) of Regulation S-K.

[58] As required by Item 8 of Schedule14A.

investment companies and foreign private issuers, however, are not required to provide CD&A disclosure.

By requiring proxy statement disclosure of whether employees generally are permitted to hedge equity securities that they receive as compensation or otherwise hold, the disclosure mandated by Section 14(j) includes within its scope hedging policies applicable to named executive officers.[59] To reduce potentially duplicative disclosure in proxy and information statements, we propose to amend Item 402(b) of Regulation S-K to add an instruction providing that a company may satisfy its CD&A obligation to disclose material policies on hedging by named executive officers by cross referencing the information disclosed pursuant to proposed Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.[60] This instruction, like the Item 407(i) disclosure requirement, would apply to a company's proxy statement or information statement with respect to the election of directors. We believe that amending Item 402(b) to add this instruction will, in certain circumstances, make it easier for companies that are subject to both Item 407(i) and Item 402(b) to prepare their proxy and information statements by avoiding the potential for duplicative disclosure.[61] In addition, we believe that locating all

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[59] See Section III, above.

[60] Proposed Instruction 6 to Item 402(b).

[61] Exchange Act Rule 14a-21(a) [17 CFR 240.14a-21(a)] provides that shareholder advisory say-on-pay votes apply to executive compensation disclosure pursuant to Item 402 of Regulation S-K, which includes CD&A. Because Item 407(i) disclosure will not be subject to these votes except to the extent made part of CD&A pursuant to the proposed cross-reference instruction, the proposal will not effect any change in the scope of disclosure currently subject to say-on-pay votes. We also note that the cross-reference is optional and issuers

the responsive disclosure in one place in the proxy or information statement will make it easier for investors to find.

4. Issuers Subject to the Proposed Amendments

In proposing amendments to implement Section 14(j), we have considered whether certain categories of issuers should be exempted from the proposed Item 407(i) disclosure requirements, or, alternatively, whether they should be subject to a delayed implementation schedule.[62] In making these determinations, we have been guided by what we understand to be the statutory purpose behind Section 14(j), namely, to provide transparency to shareholders, if action is to be taken with respect to the election of directors, about whether employees or directors are permitted to engage in transactions that mitigate or avoid the incentive alignment associated with equity ownership.

a. Registered Investment Companies

We are proposing to require closed-end investment companies that have shares that are listed and registered on a national securities exchange ("listed closed-end funds") to provide the proposed disclosure. Investment companies registered under the Investment Company Act of 1940 ("funds" or "registered investment companies") that are not listed

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may, if they prefer, avoid making the Item 407(i) disclosure part of CD&A by not cross-referencing the disclosure.

[62] Section 36(a) of the Exchange Act permits the Commission, by rule, regulation, or order, to conditionally or unconditionally exempt any person security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

closed-end funds would be excluded from these requirements, as discussed in more detail below.[63]

Funds generally have a management structure and regulatory regime that differs in various respects from issuers that are operating companies, which we believe makes the proposed disclosure less useful for investors in funds that are not listed closed-end funds. Nearly all funds, unlike other issuers, are externally managed and have few, if any, employees who are compensated by the fund.[64] Rather, personnel who operate the fund and manage its portfolio generally are employed and compensated by the fund's investment adviser.[65] Although fund directors may hold shares of the funds they serve,[66] fund compensation practices can be distinguished from those of operating companies. We believe that the granting of shares as a component of incentive-based compensation is uncommon (and in some cases is prohibited[67]) for funds. Concerns about avoiding restrictions on long-

[63] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64]. As proposed, business development companies would be treated in the same manner as all issuers (other than certain funds as discussed in this section) and therefore would be subject to the requirements of proposed Item 407(i). We believe that this would be consistent with the Commission's treatment of business development companies regarding other disclosure requirements. See the 2006 Executive Compensation Disclosure Release, at Section II.D.3.

[64] Some funds do have employees, who might also hold fund shares. See also footnote 36 and accompanying text (explaining that the parenthetical "(including officers)" in proposed Item 407(i) is intended to include officers employed by an issuer).

[65] Funds also typically will contract with other service providers in addition to the investment adviser.

[66] *See* Saitz, Greg, "Here Are Two Choices: Buy Fund Shares or Buy Fund Shares," July 30, 2013, available at http://www.boardiq.com/c/556021/60971/here_choices_fund_shares_fund_shares.

[67] Registered open-end and closed-end investment companies are generally prohibited from issuing their securities for services. See Sections 22(g) (open-end funds) and 23(a) (closed-end funds) of the Investment Company Act. Recognizing that "effective fund governance can be enhanced when funds align the interests of

term compensation, which we understand to be one of the reasons Congress mandated this disclosure, may therefore be less likely to be raised with respect to funds.

In addition, most funds, other than listed closed-end funds as discussed below, also are generally not required to hold annual meetings of shareholders.[68] Exchange-traded funds ("ETFs"), although traded on an exchange, also do not generally hold annual meetings of shareholders, and some ETFs do not have boards of directors.[69]

Open-end funds differ from operating companies in the way that their shares are purchased and sold. For example, mutual funds sell shares that are redeemable, meaning

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their directors with the interests of their shareholders," our staff has provided guidance concerning the circumstances under which funds may compensate fund directors with fund shares consistent with sections 22(g) and 23(a). See Interpretive Matters Concerning Independent Directors of Investment Companies, Investment Company Act Release No. 24083 (Oct. 14, 1999). With respect to registered closed-end funds, some of which would be subject to the proposed amendments, our staff stated that "[c]losed-end funds also may wish to institute policies that encourage or require their directors to use the compensation that they receive from the funds to purchase fund shares in the secondary market on the same basis as other fund shareholders." See id. at n.73. The staff also stated that it "would not recommend enforcement action to the Commission under Section 23(a) if closed-end funds directly compensate their directors with fund shares, provided that the directors' services are assigned a fixed dollar value prior to the time that the compensation is payable," while noting that "any closed-end fund that compensates its directors by issuing fund shares would generally be required to issue those shares at net asset value, even if the shares are trading at a discount to their net asset value." See id. at n.74.

[68] The requirement to hold an annual meeting of shareholders at which directors are to be elected generally is imposed by a source of authority other than the federal securities laws. See footnote 43 above. Funds are typically organized under state law as a form of trust or corporation that is not required to hold an annual meeting. See Robert A. Robertson, Fund Governance: Legal Duties of Investment Company Directors § 2.-6[5]. Funds may, however, hold shareholder meetings from time to time under certain circumstances, including where less than a majority of the directors of the fund were elected by the holders of the fund's outstanding voting securities. See Section 16(a) of the Investment Company Act. See also footnote 73 and accompanying text.

[69] ETFs are organized either as open-end funds or unit investment trusts ("UITs"). A UIT does not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust, and does not actively trade its investment portfolio. See Section 4(2) of the Investment Company Act ("Unit investment trust" means an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities, but does not include a voting trust.").

generally that shareholders are able to present the shares to the fund at the shareholder's discretion and receive the net asset value ("NAV") per share determined at the end of each day.[70] For funds like mutual funds whose shares do not trade on an exchange, it may be less efficient or not possible to engage in certain hedging transactions with respect to the fund's shares. And although ETF shares trade on exchanges, they often trade on the secondary market at prices close to the NAV of the shares, rather than at discounts or premiums to NAV.

Based on these considerations, the proposed amendments would not require funds, other than listed closed-end funds, to provide the proposed disclosure.

We are, however, proposing to require listed closed-end funds to provide Item 407(i) disclosure. Although listed closed-end funds are similar to other funds in certain respects, including with respect to their management structure and regulatory regime, there are several features of listed closed-end funds that may make requiring the Item 407(i) disclosure appropriate. Shares of listed closed-end funds, unlike mutual fund shares, trade at negotiated market prices on a national securities exchange and are not redeemable from the funds. The shares thus may, and often do, trade at a "discount," or a price below the NAV per share.[71] Requiring listed closed-end funds to provide the proposed disclosure would allow shareholders to know if a listed closed-end fund permits its directors and employees (if any)

[70] The term "redeemable," as used with respect to fund shares, refers to shares that are redeemable at the discretion of the investor holding the shares. See Section 2(a)(32) of the Investment Company Act (defining the term "redeemable security"). Closed-end fund shares, in contrast, generally are not redeemable, and these shares trade at negotiated market prices, including on national securities exchanges.

[71] Based on staff review of information available from Morningstar Direct and filings with the Commission.

to hedge the value of the fund's securities held by these persons and thus whether they, like the fund's other shareholders, would receive that discounted price upon a sale of the shares without an offset from any hedging transactions. This information may be important to the voting decision of an investor when evaluating the extent to which a fund director or employee's interest is aligned with that of the fund's other shareholders, including in considering whether the director or employee may be more or less incentivized as a result of holding shares in the fund to seek to decrease the discount. It also may be more efficient to engage in certain hedging transactions with respect to shares of a listed closed-end fund as compared to certain other types of funds. Market participants can and do sell these types of fund shares short, for example.[72] Hedging transactions might thus be more likely with respect to shares of listed closed-end funds, and thus potentially of greater interest to those funds' shareholders.

Finally, unlike other types of funds as discussed above, listed closed-end funds generally are required to hold annual meetings of shareholders.[73] Listed closed-end funds thus more closely resemble operating companies that would be subject to the proposed disclosure requirements in this respect.[74] We also note that officers and directors of listed

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[72] Based on staff review of market data available from the Bloomberg Professional service.

[73] See, e.g., Section 302.00 of the New York Stock Exchange's Corporate Governance Standards ("Listed companies are required to hold an annual shareholders' meeting during each fiscal year.").

[74] Listed closed-end funds also are similar to operating company issuers in other respects. For example, listed closed-end funds, like operating companies, do not issue redeemable securities (i.e., at the option of the holder); rather, they issue securities in traditional underwritings, which are subsequently listed on an exchange or traded in the over-the-counter markets. In addition, listed closed-end funds and operating companies each may be able

closed-end funds, like officers and directors of emerging growth companies and smaller reporting companies which would be subject to the proposed disclosure requirements as discussed below, are subject to the requirement in Section 16(a) of the Exchange Act to report hedging transactions.[75]

For all of these reasons and those discussed in Section IV below, we propose to require listed closed-end funds to provide Item 407(i) disclosure and to exclude all other registered investment companies from these requirements. We request comment below on this proposed approach and, more generally, on the application of the proposed disclosure requirements to funds, including whether these requirements should apply to additional specific types of funds, such as ETFs. We seek input and data on the prevalence of hedging by employees and directors for all registered investment companies.

b. Emerging Growth Companies and Smaller Reporting Companies

We do not propose to exempt smaller reporting companies or emerging growth companies from Item 407(i) disclosure. We are not aware of any reason why information about whether a company has policies affecting the alignment of shareholder interests with those of employees and directors would be less relevant to shareholders of an emerging

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to issue preferred shares and are not restricted in the amount of illiquid assets they may hold, although the assets of an operating company are generally more illiquid than the securities held by a listed closed-end fund.

[75] See Section 30(h) of the Investment Company Act ("Every person who is . . . an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of [a registered closed-end fund] shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities.").

growth company or a smaller reporting company than to shareholders of any other company. In this regard, we believe it is consistent with the statutory purpose of Section 14(j) to require these companies to provide disclosure about their hedging policies. Moreover, given its narrow focus, the proposed disclosure is not expected to impose a significant compliance burden on companies. For these reasons, the proposed disclosure would apply to smaller reporting companies and emerging growth companies to the same extent as other companies subject to the federal proxy rules.

We acknowledge that the JOBS Act excludes emerging growth companies from some, but not all, of the provisions of Title IX of the Act, of which Section 955 is a part,[76] and that emerging growth companies and smaller reporting companies are in many instances subject to scaled disclosure requirements, including with respect to executive compensation.[77] We believe that it would be more consistent with our historical approach to corporate governance related disclosures,[78] as well as the statutory objectives of Section 14(j), not to exempt these companies from the proposed disclosure requirement. We

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[76] Section 102 of the JOBS Act exempts emerging growth companies from: the say-on-pay, say-on-frequency, and say-on-golden parachutes advisory votes required by Exchange Act Sections 14A(a) and (b), enacted in Section 951 of the Act; the "pay versus performance" proxy disclosure requirements of Exchange Act Section 14(i), enacted in Section 953(a) of the Act; and the pay ratio disclosure requirements of Section 953(b) of the Act.

[77] See Section 102(c) of the JOBS Act and Item 402(l) of Regulation S-K.

[78] See Item 407(a), (b), (c), (d), (e)(1)-(3), (f) and (h) of Regulation S-K; but see Item 407(g) of Regulation S-K that provides a phase-in period for smaller reporting companies from the disclosure required by Item 407(d)(5) of Regulation S-K and does not require smaller reporting companies to provide the disclosures required by Item 407(e)(4) and (5) of Regulation S-K. In addition, as noted above, officers and directors at smaller reporting companies and emerging growth companies are subject to the obligation under Exchange Act Section 16(a) to report transactions involving derivative securities.

recognize that, since emerging growth companies and smaller reporting companies are not required to provide CD&A disclosure required by Item 402(b) and therefore may not have had the occasion to consider a hedging policy, these companies may have a greater initial cost than companies that already have a policy or already disclose one. Further, these companies would also have on-going costs implementing and administering their policies. On balance, however, we believe the proposed rule would not constitute a substantial, incremental burden for smaller reporting companies or emerging growth companies.

In light of what we believe to be the minimal burden imposed by proposed Item 407(i) in terms of additional disclosure and the time necessary to prepare it, we are not proposing a delayed implementation schedule for smaller reporting companies and emerging growth companies. We are requesting comment, however, on the need for either an exemption for smaller reporting companies or emerging growth companies or a delayed implementation schedule for these companies.

c. Foreign Private Issuers

As noted above, Section 14(j) calls for disclosure in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer. Because securities registered by a foreign private issuer are not subject to the proxy statement requirements of Exchange Act Section 14,[79] foreign private issuers would not be required to provide Item 407(i) disclosure.

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[79] Exchange Act Rule 3a12-3(b) [17 CFR 240.3a12-3(b)] specifically exempts securities registered by a foreign private issuer from Exchange Act Sections 14(a) and 14(c).

Request for Comment

13. Should Item 407(i) disclosure be required whenever action is taken with respect to the election of directors, as proposed? Instead, should we require disclosure in any proxy or information statement relating to an annual meeting of shareholders, irrespective of whether directors are to be elected at that meeting? Should the disclosure be limited only to annual meetings, and not special meetings, even if directors are to be elected at a special meeting?

14. Should proposed Item 407(i) disclosure also be required in Securities Act and Exchange Act registration statements? Should it be required in Exchange Act annual reports on Form 10-K? Would such information be material to investors in any of those contexts?

15. To retain consistency in the corporate governance disclosure provided in proxy statements and information statements with respect to the election of directors, Item 407(i) disclosure as proposed would apply to Schedule 14C as well as Schedule 14A. Is there any reason that the proposed Item 407(i) disclosure should be limited to issuers that are soliciting proxies? Why or why not?

16. In addition to including the new disclosure requirement, the proposed amendment to Item 7 of Schedule 14A would amend this Item to more succinctly organize its current provisions without changing the substance. As so revised, would the requirements of Item 7 be easier to understand?

Alternatively, should we retain the current structure of Item 7, with the addition of the Item 407(i) disclosure?

17. We propose to amend the CD&A requirement of Item 402(b) of Regulation S-K to add an instruction providing that the obligation under that item requirement to disclose material policies on hedging by named executive officers in a proxy or information statement with respect to the election of directors may be satisfied by a cross reference to the Item 407(i) disclosure in that document to the extent that the information disclosed there satisfies this CD&A disclosure requirement. Is there an alternative way to avoid possibly duplicative hedging disclosure in these proxy and information statements?

18. Is there a better way to align the requirements of Item 402(b) of Regulation S-K and proposed Item 407(i) of Regulation S-K? Are there circumstances in which the current CD&A requirement in Item 402(b) of Regulation S-K would result in more complete disclosure about the company's hedging policies than what would be required under proposed Item 407(i)? For example, although Section 14(j) addresses only hedging of equity securities, would disclosure of employees' and directors' ability to hedge other securities further the statutory purpose? In this regard, should we expand the proposed disclosure in Item 407(i) to include debt securities?

19. We request comment on all aspects of the proposed disclosure requirements as applied to funds, including whether all funds or additional types of funds other

than listed closed-end funds should be required to provide the proposed disclosure. Should we require all funds, including mutual funds and ETFs, to provide the proposed disclosure? Should we, instead, require different specific types of funds to provide the proposed disclosure? For example, should we require ETFs to provide the proposed disclosure? Would shareholders in mutual funds, ETFs, or other types of funds benefit from the information provided by the proposed disclosure?

20. If we were to require additional types of funds to provide the proposed disclosure, why and how, if at all, should we modify the disclosure requirements for such funds? As noted above, some ETFs are organized as UITs, which do not have boards of directors, and ETFs generally do not hold annual meetings of shareholders. How should any disclosure under Section 14(j) accommodate these or other characteristics of ETFs if we were to require ETFs to provide the proposed disclosure?

21. Are there additional characteristics of funds that we should consider in determining which funds should be required to provide the proposed disclosure or whether the disclosure requirements should be modified for funds or particular types of funds? If we were to require some or all funds to provide the proposed disclosure, including listed closed-end funds as proposed, what are the benefits and costs expected to result?

22. Should we modify the Item 407(i) disclosure requirements for listed closed-end funds? Would this information be material to an investor in contexts other than those relating to voting decisions, such as an investment decision? Should we also require the disclosure in listed closed-end funds' other disclosure documents, such as an annual report or shareholder report next following a meeting of shareholders, for example? If we were to require all funds or a broader group of funds to provide Item 407(i) disclosure, should we also require the disclosure in other disclosure documents, such as the funds' Statements of Additional Information?

23. As proposed, listed closed-end funds would be required to provide proposed Item 407(i) disclosure. Should we not require listed closed-end funds to provide this disclosure? If so, please explain why, and the benefits and costs that would result.

24. Do funds generally have policies concerning their employees and directors engaging in hedging transactions of securities issued by their respective funds, or policies that prohibit such hedging transactions? To what extent do employees or directors of listed closed-end funds receive shares of such funds as a form of compensation? Do employees or directors of listed closed-end funds currently effect hedging transactions with respect to the shares of those funds and, if so, what kinds of transactions do they effect?

25. How could employees or directors effect hedging transactions with respect to shares of funds other than listed-closed end funds, in particular mutual funds? How prevalent are these hedging transactions?

26. As proposed, listed closed-end funds, like the other issuers covered by the proposed amendments, would be required to provide disclosure concerning hedging of the equity securities issued by the fund or any of the fund's parents, subsidiaries or subsidiaries of the fund's parents that are registered under Section 12 of the Exchange Act.[80] Should we instead require listed closed-end funds to provide disclosure only about hedging transactions concerning the funds' shares? Would investors in listed closed-end funds benefit from receiving information about the funds' directors' and employees' holdings of the funds' parents, subsidiaries or subsidiaries of the fund's parents?

27. As proposed, business development companies would be required to provide proposed Item 407(i) disclosure. Should we modify the disclosure requirements for business development companies? Should we not require business development companies to provide this disclosure? If so, please explain why, and the benefits and costs that would result. Should we only

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[80] Item 22 of Schedule 14A defines terms used in that Item, including the terms parent and subsidiary. Item 22(a)(1)(ix) defines the term "parent" to mean "the affiliated person of a specified person who controls the specified person directly or indirectly through one or more intermediaries." Item 22(a)(1)(xii) defines the term "subsidiary" to mean "an affiliated person of a specified person who is controlled by the specified person directly, or indirectly through one or more intermediaries."

require a business development company to provide the proposed disclosure if the business development company's shares are listed on a national securities exchange?

28. Should smaller reporting companies or emerging growth companies be exempted from proposed Item 407(i) or subject to a delayed implementation schedule? If so, please explain why and the benefits and costs that would result. As discussed below, a component of the disclosure costs (especially initial costs) may be fixed, which may have a greater impact on smaller reporting companies and emerging growth companies. Do the proposed disclosure requirements also impose other potential costs on smaller reporting companies or emerging growth companies that are different in kind or degree from those imposed on other companies?) Would the proposed disclosure requirements be as meaningful for investors in smaller reporting companies and emerging growth companies as for those in other companies? Do investors in smaller reporting companies and emerging growth companies place more, less, or the same value on corporate governance disclosures of the type proposed here than do investors in larger, more established companies, either alone or in relation to other disclosures?

29. Should foreign private issuers be required to provide the disclosure? If so, please explain why and specify the filing(s) in which the disclosure should be required?

30. Are there any other categories of issuers that should be exempt from the requirement to provide Item 407(i) disclosure? If so, please explain why, and the benefits and costs that would result.

General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposed amendments, and any suggestion for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. ECONOMIC ANALYSIS

A. Background

Section 955 of the Act added Section 14(j) to the Exchange Act, which directs the Commission to adopt rules requiring an issuer to disclose in any proxy or consent solicitation material for an annual meeting of its shareholders whether any employee or director of the issuer, or any designee of an employee or director, is permitted to engage in transactions to hedge or offset any decrease in the market value of equity securities granted to the employee or director as compensation, or held directly or indirectly by the employee or director.

To implement the mandate of Section 14(j), we are proposing new paragraph (i) of Item 407 of Regulation S-K and amendments to Schedule 14A under the Exchange Act. Further, to reduce potentially duplicative disclosure, we propose to allow a company to satisfy its obligation to disclose material policies on hedging by named executive officers in the CD&A by cross reference to the information disclosed under proposed Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.

We are mindful that our proposed amendments can both impose costs and confer benefits. Exchange Act Section 3(f) requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The discussion below addresses the economic effects of the proposed amendments, including likely benefits and costs, as well as the likely effect of the proposal on efficiency, competition and capital formation. We request comment throughout this release on alternative means of meeting the statutory mandate of Section 14(j) and on all aspects of the costs and benefits of our proposals and possible alternatives. We also request comment on any effect the proposed disclosure requirements may have on efficiency, competition and capital formation. We appreciate comments on costs and benefits that are attributed to the statute itself and, to the extent that they are separable, the costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements, as well as any data or analysis that helps quantify the potential costs and the benefits identified.

B. Baseline

The proposed amendments affect all issuers registered under Section 12 of the Exchange Act, including smaller reporting companies ("SRCs"), emerging growth companies ("EGCs"), and listed closed-end funds, but excluding foreign private issuers ("FPIs"), and other types of registered investment companies, including non-listed closed-end funds, open-end funds, and unit investment trusts. We estimate that approximately 7,447 companies would be subject to the proposed amendments, including 4,620 listed Exchange Act Section 12(b) registrants and 2,827 non-listed Exchange Act Section 12(g) registrants. Among the Section 12(b) registrants subject to the proposed amendments, we estimate that 602 are listed closed-end funds, 916 are SRCs or EGCs, and the remaining 3,102 are other operating companies. Among the Section 12(g) registrants subject to the proposed amendments, 2,220 are SRCs or EGCs, and the remaining 607 are operating companies that are not SRCs or EGCs.[81] Other affected parties include these issuers' employees (including officers) and directors who hold equity securities of these issuers, and investors in general.

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[81] We estimate the number of operating companies subject to the proposed amendments by analyzing companies that filed annual reports on Form 10-K in calendar year 2012 with the Commission. This set excludes ABS issuers (SIC 6189), registered investment companies, issuers that have filed registration statements but have yet to file Forms 10-K with the Commission, and foreign issuers filing on Forms 20-F and 40-F. We identify the companies that have securities registered under Section 12(b) or Section 12(g) from Form 10-K. We also determine from Form 10-K whether a company is a SRC. We determine whether a company is an EGC by reviewing both its Form 10-K and any registration statement. We estimate the number of listed closed-end funds based upon data from the 2014 Investment Company Fact Book, page 170 (available at http://www.ici.org/pdf/2014_factbook.pdf).

Because almost all listed closed-end funds are externally managed by investment advisers and only a small number of listed closed-end funds are internally managed where the portfolio managers are employees of the closed-end funds, the proposed amendments will generally affect the funds' employees and directors; employees of the funds' investment advisers (e.g., portfolio managers) will not be affected by the amendments.[82] Equity securities covered by the proposed amendments include equity securities issued by the company, any parent of the company, any subsidiary of the company or any subsidiary of any parent of the company that are registered under Section 12 of the Exchange Act.[83]

To assess the economic impact of the proposed amendments, we use as our baseline the state of the market as it exists at the time of this release. For Section 12 registrants (other than SRCs, EGCs, and listed closed-end funds) that are subject to the proposed amendments, the regulatory baseline is the current CD&A disclosure requirement in Item 402(b)(2)(xiii) of Regulation S-K. Item 402(b)(2)(xiii) calls for disclosure of "any registrant policies regarding hedging the economic risk" of security ownership by named executive officers as one of the "non-exclusive" examples of information includable in CD&A, if material. To the extent that a registrant does not have a policy regarding hedging by named executive officers, there

[82] Among the approximately 602 listed closed-end funds in 2012, Commission staff has identified only 4 internally-managed closed-end funds from a review of filings with the Commission.

[83] In some instances, equity of a company's subsidiary may be granted as compensation for that company's officers (He et al. 2009). Stock holdings in a company's subsidiary provide officers with an incentive to make decisions to improve the subsidiary's performance, which in turn may positively affect the economic prospects of the parent company. As discussed later, it is important for shareholders (of both the company and its subsidiary) to better understand whether incentives can be reduced by hedging. See He W., M. K. Tarun, and P. Wei, 2009, "Agency Problems in Tracking Stock and Minority Carve-out Decisions: Explaining the Discrepancy in Short- and Long-term Performances" Journal of Economics and Finance 33(1): 27-42.

is no obligation to disclose. For SRCs, EGCs, and listed closed-end funds, CD&A disclosure pursuant to Item 402(b)(2)(xiii) is not currently required.

Additionally, officers and directors of companies with a class of equity securities registered under Section 12, including SRCs and EGCs, are currently required to report their hedging transactions involving the company's equity securities pursuant to Exchange Act Section 16(a). Further, Section 30(h) of Investment Company Act specifies that officers and directors of closed-end funds are subject to the same duties and liabilities as those imposed by Section 16 of the Exchange Act.

Table 1 below draws a comparison between the current requirements for CD&A disclosure and Section 16 reporting, where applicable, and the proposed disclosure requirement for the registrants that would be affected by the proposed amendments.

Table 1 - Comparison of Disclosure Requirements

Covered Company (1)	*Covered Persons* (2)	*Current Company Reporting Requirement* (3)	*Current Officer & Director Reporting Requirement* (4)	*Company Reporting Requirement Under the Proposed Amendments* (5)
12(b) companies other than SRCs, EGCs, and listed closed-end funds [Number = 3,102]	NEOs	Item 402(b)	Section 16(a)	
	Other employees	None	Section 16(a), if an officer	
	Directors	None	Section 16(a)	
12(g) companies			Section 16(a)	

other than SRCs and EGCs [Number = 607]	NEOs	Item 402(b)		Item 407(i)[84]
	Other employees	None	Section 16(a), if an officer	
	Directors	None	Section 16(a)	
SRCs & EGCs under 12(b) [Number = 916]	Employees (including NEOs) & Directors	None	Section 16(a), if an officer or director	
SRCs & EGCs under 12(g) [Number = 2,220]	Employees (including NEOs) & Directors	None	Section 16(a), if an officer or director	
Listed closed-end funds [Number = 602]	Employees & Directors	None	Section 30(h) of the Investment Company Act	

As illustrated in Table 1, disclosure requirements will increase for all companies subject to the proposed amendments, although the extent of the increase may vary for different categories of registrants.

[84] As proposed, companies would be required to make disclosure under proposed Item 407(i) when they file proxy or information statements with respect to the election of directors. Proxy statement disclosure obligations only arise under Section 14(a), however, when an issuer with a class of securities registered under Section 12 chooses to solicit proxies (including consents). Since the federal securities laws do not require the solicitation of proxies, the application of Section 14(a) is not automatic. Whether or not an issuer has to solicit therefore depends upon any requirement under its charter and/or bylaws, or otherwise imposed by law in the state of incorporation and/or by the relevant stock exchange (if listed). For example, NYSE, NYSE Market, and NASDAQ generally require solicitation of proxies for all meetings of shareholders. If a listed company then chooses to hold a meeting at which directors are to be elected and solicit proxies, Section 14(a) would then apply and compel the disclosure identified in Item 407(i). Section 12(g)-registered companies also can make the decision to solicit proxies and thus similarly will have to comply with Section 14(a), to the same extent Section 12(b)-registered companies. When Section 12 registrants that do not solicit proxies from any or all security holders are nevertheless authorized by security holders to take an action with respect to the election of directors, disclosure obligations also arise under proposed Item 407(i) due to the requirement to file and disseminate an information statement under Section 14(c).

To establish the baseline practices for Section 12 companies subject to Item 402(b)(2)(xiii), we reviewed the disclosures of "policies regarding hedging" by named executive officers from two samples of exchange-listed companies. The first sample included all S&P 500 companies that filed proxy statements during the calendar year 2012, totaling 484 companies.[85] Our analysis revealed that disclosures are not uniform across companies. Out of the 484 proxy statements, 158 companies (33%) did not disclose hedging policies for named executive officers, six companies (1%) disclosed that the company did not have a policy regarding hedging by named executive officers, 284 companies (59%) disclosed that named executive officers were prohibited from hedging, and 36 companies (7%) disclosed that they permitted hedging by named executive officers under certain circumstances.

The second sample included 100 randomly selected companies from the 494 S&P Smallcap 600 index companies that filed proxy statements during the calendar year 2012. These companies are significantly smaller and less widely followed than S&P 500 companies, and, as a result, may have significantly different disclosure practices. These companies are all exchange-listed, and none are SRCs or EGCs. We found that 71 companies (71%) did not disclose hedging policies for named executive officers, four companies (4%) disclosed that the company did not have a policy regarding hedging by

[85] To be included in the S&P 500 index, the companies must be publicly listed on either the NYSE (NYSE Arca or NYSE MKT) or NASDAQ (NASDAQ Global Select Market, NASDAQ Select Market or the NASDAQ Capital Market). Because this index includes foreign companies, there were fewer than 500 proxy statements filed.

named executive officers, 23 companies (23%) disclosed that named executive officers were prohibited from hedging, and two companies (2%) disclosed that they permitted hedging by named executive officers under certain circumstances.

Our analysis of the two samples revealed that a significant percentage (34%) of S&P 500 companies, and an even larger percentage of the subset of S&P Smallcap 600 companies (75%) either did not make a disclosure or reported that they did not have a policy for named executive officers. This baseline analysis suggests that smaller companies will likely have a greater initial disclosure burden under the proposed amendments than larger companies.

As mentioned above, SRCs, EGCs, and listed closed-end funds are not required to make Item 402(b) disclosure and, consequently, are not currently required to disclose any policies regarding hedging by named executive officers. However, officers and directors at SRCs and EGCs with a class of equity securities registered under Section 12 are currently required to report their hedging transactions involving the companies' equity securities pursuant to Section 16(a), and officers and directors of registered closed-end funds are required to make similar reports by Section 30(h) of the Investment Company Act. Notwithstanding these reports, investors' ability to use reported insider hedging transactions, if any, to infer these companies' policies regarding hedging by officers and directors is imperfect at best. First, an investor must track all the accumulated insider trades reported to assess whether there is hedging. Disclosures of particular hedging transactions by officers and directors could indicate that the company permits that particular type of transaction, that the company has no hedging policy, or that a company policy was violated but the transaction was reported in accordance with current rules. The absence of reported hedging transactions could indicate that the company prohibits hedging, that the company permits hedging but the officers and directors do not engage in hedging transactions, or that officers and directors engage in hedging transactions but are not complying with Section 16(a) reporting requirements.

C. Discussion of Benefits and Costs, and Anticipated Effects on Efficiency, Competition and Capital Formation

1. Introduction

From an economic theory perspective, an executive officer's ownership in the employer company ties his or her financial wealth to shareholder wealth, and hence can provide the executive officer with an incentive to improve the company's performance, as measured by stock price.[86] Permitting executive officers to hedge can be perceived by shareholders as a problematic practice[87] because hedging can have the economic effect of taking a short position on the employer's stock, which is counter to the interests of other shareholders.

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[86] The literature in economics and finance typically refers to a principal-agent model to describe the employment relationship between shareholders and executive officers (managers) at a company. The principal (shareholders) hires an agent (manager) to operate the company. However, because shareholders cannot perfectly observe managerial actions, this information asymmetry gives rise to a moral hazard problem: managers may act in their own self-interest and not always in the interest of shareholders. This potential misalignment of incentives is ameliorated when managers are also owners of the company, and thus must internalize the cost of any actions that harm shareholders or do not otherwise maximize the value of the company. See, e.g., Jensen, M. C. and W. H. Meckling, 1976. "Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure" Journal of Financial Economics 3: 305-360; Holmstrom, B., 1979. "Moral Hazard and Observability" Bell Journal of Economics 10: 324-340; Holmstrom, B. and Ricart I Costa, J., 1986 "Managerial Incentives and Capital Management", Quarterly Journal of Economics 101, 835-860.

[87] See, e.g., Institutional Shareholder Services Inc., "2013 Corporate Governance Policy Updates and Process: Executive Summary", Nov. 16, 2012 at http://www.issgovernance.com/file/files/2013ExecutiveSummary.pdf.

Alternatively, permitting executive officers to hedge, under certain circumstances, could align officers' and shareholders' preferences more closely and thereby promote more efficient corporate investment. Compared with well-diversified shareholders, executive officers are likely to be disproportionately invested in their company and thus inherently undiversified.[88] The concentrated financial exposure, together with executive officers' concerns about job security in the event of a stock price decline, could lead them to take on fewer risky projects (i.e., projects with uncertain future cash flows) that are potentially value enhancing than would be in the interest of well-diversified shareholders, resulting in underinvestment.[89] This underinvestment concern can be addressed by providing downside price protection to executive officers' equity holdings, in case high-risk projects—that are in the interest of shareholders at the time of the investment decision—do not turn out to be successful and thereby cause a decline in the stock price.[90] One way to do so is to permit

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[88] Meulbroek (2005) points out that employees may be even more undiversified than their equity holdings suggest: "their continued employment and its relation to the fortunes of the firm, outstanding deferred compensation owed to the employee, and any firm specific human capital exacerbate employees' firm-specific risk exposure." See Meulbroek, L. 2005, "Company Stock in Pension Plans: How Costly Is It?" Journal of Law and Economics, vol. XLVIII: 443-474; Hall, B., and K. Murphy. 2002. "Stock options for undiversified executives" Journal of Accounting and Economics 33: 3–42. Moral hazard and adverse selection issues cause boards of directors to compel executive officers to maintain large personal investment in their companies. Executive officers may not be able to diversify this exposure because of explicit stock ownership guidelines for executives and directors, contractual restrictions on trading equity grants within the vesting periods, and retention plans that prohibit the sale of unrestricted stock for some time after vesting.

[89] This underinvestment concern has been studied in a long strand of academic literature. See e.g., Rappaport, A. 1978, "Executive Incentives vs. Corporate Growth" Harvard Business Review 57: 81-88; Smith, C., and R. Stulz. 1985. "The Determinants of Firms' Hedging Policies", Journal of Financial and Quantitative Analysis 20: 391–405; Kaplan, R., 1982, "Advanced Management Accounting" Englewood Cliffs, N. J.: Prentice-Hall; and Lambert, R., 1986, "Executive Effort and the Selection of Risky Projects" Rand Journal of Economics 17, 77-88.

[90] See Hemmer, T., O., Kim, and R. Verrecchia, 1999, "Introducing Convexity into Optimal Compensation Contracts" Journal of Accounting and Economics 28: 307-327.

executive officers to seek downside price protection by hedging their equity holdings. However, the value of hedging to address potential underinvestment depends on the availability and cost-effectiveness of other solutions to the underinvestment concern.[91]

The theories of equity incentives described above for executive officers may also apply to critical employees (e.g., key research scientists), because these individuals' actions and decisions can also impact company stock price. These theories can also apply to directors, who typically receive equity-based compensation to align their interests with those of the shareholders they represent. However, directors may have less incentive to hedge because their financial wealth is typically better diversified than executive officers', and is therefore less sensitive to company stock price. Nevertheless, directors' compensation, particularly in the form of equity compensation, grew significantly during the 2000s, contributing to a significant increase in directors' equity incentives.[92] The increased level of

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[91] For example, requiring executive officers to hold stock options can also provide them with incentives to take on risky ~~but~~ ~~value-enhancing~~ investment projects. Such risk-taking incentives depend on option moneyness: the incentives are the strongest when options are near the money, but quickly diminish when options go deep in the money. If a company experiences a sharp stock price increase, which causes executive officers' option holdings to become deep in-the-money, such holdings likely would not provide effective risk-taking incentives. In this situation, permitting executives to hedge may be a better solution to the underinvestment concern than for the company to grant new at-the-money options, because the latter may cause the company to overpay the executives. Hedging of corporate operations, as opposed to personal hedging by executive officers, could also increase the executives' incentives to take higher risk but value-enhancing corporate projects, but corporate hedging can be costly. See Smith C. and R. Stulz, 1985, "The Determinants of Firms' Hedging Policies" Journal of Financial and Quantitative Analysis 20(4): 392-405).

[92] For S&P 1500 companies, median total compensation per outside director rose from $57,514 in 1998 to $112,745 in 2004 (a 51% increase), far greater than the rate of increase of 24% in CEO compensation over the same period. The proportion of director pay provided by equity increased from around 45% in 1998 to over 60% in 2004. Yermack (2004) show that, in Fortune 500 companies, some directors near the top of the distribution receive very significant equity awards that can provide ex-post performance rewards exceeding those of some CEOs. Altogether, equity holdings, turnover, and opportunities to obtain new board seats provide outside directors serving in their fifth year with wealth increases of approximately 11 cents per $1,000 rise in

directors' equity incentives suggests that equity incentives could be playing an increasingly important role in influencing directors' actions on corporate decisions.

These theories of equity incentives may not apply to employees who do not participate in making and shaping key operating or strategic decisions that influence stock price. While some of these employees may also receive equity grants as part of the companies' broad-based equity plans, their equity ownership on average is much lower than that of executive officers. Equity ownership for these employees mainly serves the purpose of recruitment and job retention, and on an individual employee basis, is unlikely to have a notable impact on the company's equity market value.[93] In other words, for employees below the executive level who typically do not make decisions that influence stock price, information about their equity incentives and hedging of their equity holdings may be less relevant for investors.

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firm value. Although typically smaller than incentives for CEOs, director incentives can be significant given that many directors serve on multiple boards. See Yermack, D. 2004, "Remuneration, Retention, and Reputation Incentives for Outside Directors", The Journal of Finance LIX: 2281-2308; Farrell K., G. Friesen, and P. Hersch, 2008, "How Do Firms Adjust Director Compensation?", Journal of Corporate Finance 14: 153-162; J. Linck, J. Netter, and T. Yang, 2009, "The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand for Directors", The Review of Financial Studies 22: 3287-3328; and Fedaseyeu V., J. Linck, and H. Wagner, 2014, "The Determinants of Director Compensation" Bocconi University and Southern Methodist University working paper (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335584). Note that these studies used samples prior to 2011; however, we have no reason to believe that director incentives and compensation have declined significantly in more recent years.

[93] See Oyer, P. 2002, "Stock Options – It's Not Just About Motivation", Stanford Institute for Economic Policy Research (available at http://web.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/briefs/policybrief_oct02.pdf); Oyer, P. and S. Schaefer, 2005, "Why Do Some Firms Give Stock Options to All Employees?: An Empirical Examination of Alternative Theories", Journal of Financial Economics 76 (1): 99–133.

Like operating companies, listed closed-end funds also confront a principal-agent relationship between shareholders and the fund's directors and employees, if any. The connection between managerial incentives and firm performance is, however, less direct in listed closed-end funds than it is in operating companies because almost all of these funds are externally managed by investment advisers.

Fund directors oversee the many service providers that will typically serve a listed closed-end fund, including the investment adviser. Holding equity shares in the fund can align directors' interests with those of the shareholders.[94] Some listed closed-end funds do require or encourage directors to hold fund shares.[95] The proposed disclosure thus would allow the shareholders of a listed closed-end fund whose shares, for example, are trading at a discount to know if the listed closed-end fund permits its directors to hedge the value of the fund's equity securities. The proposed disclosure would thereby show whether the fund's directors, like the fund's other shareholders, would receive that discounted price upon a sale of the shares without an offset from any hedging transactions.

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[94] We have previously published the Commission staff's view that "[f]und directors who own shares in the funds that they oversee have a clear economic incentive to protect the interests of fund shareholders," and that fund policies that encourage or require independent directors to invest the compensation that they receive from the funds in shares of the funds "gives the independent directors a direct and tangible stake in the financial performance of the funds that they oversee, and can help more closely align the interests of independent directors and fund shareholders." See Interpretive Matters Concerning Independent Directors of Investment Companies, Investment Company Act Release No. 24083 (Oct. 14, 1999).

[95] Zhao (2007) studies 316 closed-end funds in 2002. She finds that 200, or 62.3%, report positive director ownership. The average (median) director ownership is at $105,493 ($30,001). See Zhao, L., 2007, "Director Ownership and Fund Value: Evidence from Open-End and Closed-End Funds", Columbia University working paper (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=963047).

In an operating company, shareholdings also affect the incentives of employees, including managers who are making the company's decisions. In contrast, almost all listed closed-end funds have few (if any) employees. Fund portfolios are almost always managed by portfolio managers who are employed by external investment advisers. Because listed closed-end fund shares are not redeemable and often trade at a discount to NAV, shareholders of those funds may place importance on the degree of incentive alignment between funds' key decision makers and shareholders when making voting decisions.[96]

The proposed amendments apply only to employees and directors of the fund itself, however. As a result, these amendments would not directly affect outside portfolio managers' asset choices. However, fund directors may influence the investment adviser's management of the fund's portfolio indirectly, through the directors' oversight of the investment adviser, which is responsible for managing the fund's portfolio consistent with the fund's disclosed strategy and investment objectives.

In summary, information on the company's policies regarding hedging by employees and directors may help investors better understand the employees' and directors' incentives in creating shareholder wealth. For example, in operating companies, because executive officers' and directors' reported equity holdings in proxy statements may not reflect their actual economic exposure to the company's performance, there may in certain cases exist an information asymmetry between insiders and other investors regarding the executive officers'

[96] See Wu, Y., R. Wermers, and J. Zechner, 2013, "Managerial Rents vs. Shareholder Value in Delegated Portfolio Management: The Case of Closed-End Funds" working paper. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179125&download=yes.

and directors' equity incentives. The mandated disclosures can help mitigate this information asymmetry.

2. New Disclosure Requirements Across Covered Companies

Before considering the economic effects from proposed Item 407(i), we first discuss the new disclosures that would be required for different covered companies, and the new information from these disclosures. The potential economic effects would likely vary across companies depending on the nature and amount of new information from the disclosures, the degree of investment opportunities available to the company, and the likelihood that employees and directors engage in hedging transactions (discussed in detail later).

Section 12 registrants, with the exception of SRCs, EGCs, and registered investment companies (which include listed closed-end funds), are currently required under Item 402(b) to disclose their hedging policies for named executive officers, if material. Companies are not otherwise currently required to provide information about whether they have a policy on hedging. They may not be providing such disclosures, possibly because their hedging policies are not material, or because they do not have a policy. Table 2 divides covered companies, which includes both operating companies and listed closed-end funds, into four categories. The first three categories include operating companies. The last category includes listed closed-end funds.

Table 2 – Four Categories of Covered Companies

Section 12 Companies Subject to the Proposed Amendments
(1) Companies that are subject to Item 402(b) and make disclosures for named executive officers
(2) Companies that are subject to Item 402(b) but make no disclosures

(3) SRCs and EGCs that are not currently required to make Item 402(b) disclosures but must disclose under Item 407(i)
(4) Listed closed-end funds that are not currently required to make Item 402(b) disclosures but must disclose under Item 407(i)

Category 1 refers to the subset of companies subject to Item 402(b) that currently provide disclosure about hedging policies for named executive officers. These companies may be unlikely to change such policies as a result of the proposed amendments. For these companies, the new disclosures required under proposed Item 407(i) are whether employees (other than named executive officers) and directors are permitted to hedge.

Category 2 refers to companies subject to Item 402(b) that do not currently disclose information about whether hedging by their named executive officers is permitted.[97] New disclosures under the proposed amendments would confirm for shareholders whether hedging is permitted. Given that shareholders are likely to view a policy prohibiting hedging by named executive officers as shareholder friendly,[98] the requirement to disclose may prompt some of these companies to adopt new policies or change their current policies or practices.

[97] For example, as discussed above, we collected data on the baseline practice of some Section 12(b) registrants other than SRCs and EGCs. The proxy statements filed during calendar year 2012 indicated that most of the S&P 500 companies disclosed their hedging policies for named executive officers: 59% of companies prohibited hedging, while 7% permitted hedging. The rest either made no disclosure of hedging policy (33% of companies) or disclosed that they did not have a policy regarding hedging by named executive officers (1% of companies); we include such companies in category 2. The incidence of no disclosure tended to be higher among smaller companies.

[98] See, e.g., Institutional Shareholder Services Inc., "2013 Corporate Governance Policy Updates and Process: Executive Summary", Nov. 16, 2012 at http://www.issgovernance.com/file/files/2013ExecutiveSummary.pdf ("Stock-based compensation or open market purchases of company stock are intended to align executives' or directors' interests with those of shareholders. Therefore, hedging of company stock through covered call, collar, or other derivative transactions severs the ultimate alignment with shareholders' interests. Any amount hedged will be considered a problematic practice warranting a negative voting recommendation on the election of directors.").

In light of the required say-on-pay vote on executive compensation, we believe that companies prohibiting hedging by named executive officers would already have an incentive to disclose such a policy. Some shareholders may believe it is reasonable to infer that a company that is subject to Item 402(b) but does not disclose a hedging policy in effect may permit named executive officers to hedge. As a result, because shareholders either know through affirmative disclosure under Item 402(b)(2)(xiii) or may believe it is reasonable to infer from the absence of disclosure that named executive officers are permitted to hedge, the proposed amendments may not have much effect in reducing uncertainty as it relates to named executive officers. For Section 12 registrants other than SRCs, EGCs and listed closed-end funds, the new information provided by disclosures under the proposed amendments relates primarily to whether employees (other than named executive officers) and directors are permitted to hedge.

Category 3 refers to SRCs and EGCs, which are currently exempt from Item 402(b). The new information available to investors under proposed Item 407(i) would require disclosure, for the first time, about whether employees (including named executive officers) and directors are permitted to hedge.

Category 4 refers to listed closed-end funds. Since these funds are not currently subject to Item 402(b), the new information that would be available to shareholders is comparable in type to that of SRCs and EGCs. However, the new information about listed closed-end funds may in fact be less substantial than that of SRCs and EGCs for most funds because almost all listed closed-end funds are externally managed, as discussed above. Only a small number of internally-managed listed closed-end funds have employees, which include funds' portfolio managers.

3. Benefits and Costs

Investors can benefit from the disclosures under the proposed amendments in the following ways.[99] First, as discussed above, officers', directors', and non-officer critical employees' equity incentives tend to align their interests with those of the shareholders. Under the proposed amendments, investors would benefit from new disclosures that provide more clarity and transparency about these incentives, thereby reducing the information asymmetry between corporate insiders and shareholders regarding such incentives. Better information about equity incentives could be useful for investors' evaluation of companies, enabling investors to make more informed investment and voting decisions, thereby encouraging more efficient capital allocation decisions.

Second, the proposed amendments may reduce the costs for investors in researching and analyzing equity-based incentives. Knowledge that employees and directors are not permitted to hedge could confirm for investors that the reported equity holdings of officers and directors in proxy statements and annual reports on Form 10-K represent their actual incentives.[100] While Section 16(a) reports provide transaction-level information on officer

[99] Our discussion focuses on officers and non-officer critical employees, not on employees who do not participate in making and shaping key operating or strategic decisions that influence stock price. As discussed earlier, information about these other employees' equity incentives and hedging of their equity holdings is less relevant for investors.

[100] Between 1996 and 2006, in firms where insiders hedged their equity ownership, insiders on average used collars, forwards or swaps to cover about 30% of their ownership and placed about 9% of their ownership into

and director hedging activity, Forms 3, 4, and 5 may be costly to search; investors also may incur costs in analyzing whether a reported transaction is indeed a hedge. Moreover, hedging activity disclosed on a Form 3, 4, or 5 does not indicate whether a transaction was conducted in accordance with the company's hedging policy, and therefore may lead to improper inferences about the company's hedging policy.

Third, the proposed amendments could also benefit investors if the public nature of the required disclosures results in changes in hedging policies that improve incentive alignment between shareholders and executive officers or directors.[101] Companies that currently already disclose whether named executive officers are permitted to hedge may be unlikely to substantially change their policies as a result of the proposed amendments. However, this could be different for companies that do not currently make disclosures on hedging policies for all employees or directors.[102] Without disclosed hedging policies, these companies may in fact implicitly permit hedging. However, permitting hedging may not necessarily promote efficient investment decisions. Employees and directors often demand a premium for receiving equity compensation in lieu of cash. However, through hedging they

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the exchange funds. See Bettis, C., J. Bizjak, and S. Kalpathy, 2013, "Why Do Insiders Hedge Their Ownership? An Empirical Examination" working paper (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364810). There is limited research on hedging transactions by corporate insiders. Hedging transactions studied in this paper included those by 10% owners. In addition, the sample period was 1996-2006, and thus the findings may not reflect the current situation.

[101] Alternatively, as discussed later, if the change in hedging policies reduces incentive alignment, such change can reduce shareholder wealth.

[102] Such companies include any company that currently does not disclose a hedging policy for any category of employees (including named executive officers) and directors, so could fall under any of the last three categories of companies in Table 2.

may be able to convert the value of that premium into cash. This causes the company to overpay relative to its opportunity cost.[103] If, in light of the disclosure requirement under Item 407(i), the company later chooses to prohibit hedging, this change could increase shareholder wealth to the extent that the change better aligns incentives and hence induces officers and directors to make corporate decisions that are more beneficial to all shareholders. However, to the extent that changes in hedging policies reduce incentive alignment between shareholders and officers or directors, and results in underinvesting in potentially value-enhancing projects, the opposite effect could result.

The benefits discussed above are relevant for investors of all companies affected by proposed Item 407(i), including listed closed-end funds.[104] Among operating companies (the first three categories in Table 2), the new information elicited from the required disclosures increases, so we expect the benefits from the new disclosures also to increase similarly. Further, we expect the potential benefits to be higher for EGCs and SRCs (category 3) than for non-EGCs and non-SRCs (categories 1 and 2), because EGCs and SRCs potentially face greater risk of a stock price decline than non-EGCs and non-SRCs. EGCs are typically younger firms with high growth options but fewer financial resources and are more likely to face financial distress since firm age is among the most important determinants of probability

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[103] See Larcker D. and B. Tayan, 2010,"Pledge (and Hedge) Allegiance to the Company", Stanford Closer Look Series, available at http://ssrn.com/abstract=1690746.

[104] Because listed closed-end funds exhibit salient differences in organizational structure, and hence incentive compensation mechanisms, from operating companies, we do not compare the economic effects of the proposed amendments between listed closed-end funds and operating companies.

of failure.[105] Because employees and directors of EGCs and SRCs potentially face greater downside price risk than those of non-EGCs and non-SRCs, the former have likely stronger incentives to hedge, thus making information about permissible hedging activities more relevant for shareholders of these companies.[106]

The benefits to investors also depend on the likelihood that officers and directors engage in hedging transactions. Officers and directors can hedge by, for example, entering into exchange-traded or over-the-counter derivative contracts. In either case, however, when the underlying stock is illiquid, the price of the derivatives contracts likely reflects the higher risk and cost that would be required to dynamically replicate the exposure of the derivatives contracts by trading in the underlying stock. As a result, it is likely more costly to hedge the risk of more illiquid stock. Though undiversified officers and directors have strong incentives to diversify (e.g., through hedging), they may not engage in hedging transactions if the cost is too high. In companies whose officers and directors are less likely to hedge due to high hedging cost, the potential benefits to investors from the required disclosures under the proposed amendments might be more limited. In the first three categories of companies,

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[105] See Lane, S., Schary, M.,1991,"Understanding the Business Failure Rate", Contemporary Economic Policy 9: 93–105; Kapadia, N. 2011. "Tracking Down Distress Risk," Journal of Financial Economics 102: 167-182

[106] Though no study to our knowledge directly examines whether insiders of smaller firms tend to hedge more, indirect evidence suggests that this is likely the case. For example, Bettis et al. (2001) find a total of 87 zero-cost collar transactions by searching Forms 3, 4 and 5 filed between January 1996 and December 1998. Firms in this sample have total assets with a mean (median) value of $3.4 billion ($401 million). These firms are much smaller than S&P 500 companies over the same time period, whose total assets have mean (median) of $16.15 billion ($3.84 billion) based on our calculation. This comparison indicates that hedging by zero-cost collars is disproportionally more frequent in smaller firms. See Bettis, J., J. Bizjak, and M. Lemmon. 2001. "Managerial Ownership, Incentive Contracting, and the Use of Zero-cost Collars and Equity Swaps by Corporate Insiders" Journal of Financial and Quantitative Analysis 36 (3): 345-370.

each category includes both exchange-listed and non-exchange-listed companies. Since stocks of exchange-listed companies are typically more liquid than stocks of non-exchange-listed companies, the potential benefits of the new disclosure to investors of non-exchange-listed companies may be lower than for exchange-listed ones. It is possible that stocks of smaller companies are less liquid, and hence these companies may be subject to the same effect.

The expected potential benefits from proposed Item 407(i) would not be achieved without costs. All covered companies would incur costs to comply with the proposed amendments. Such costs include both disclosure costs, which stem directly from complying with the proposed amendments, and potential costs incurred to implement, administer, or revise a hedging policy.

We first focus on disclosure costs, which should increase with the amount of new disclosures required under proposed Item 407(i). As discussed above, for operating companies (i.e., the three first categories in Table 2), the new required disclosures are higher in categories 2 and 3 than in category 1, so disclosure costs should also be higher in categories 2 and 3. Specifically, category 1 companies would incur costs to determine whether employees (other than named executive officers) and directors are permitted to engage in hedging transactions, and incur costs to provide the required disclosure.

Category 2 companies are subject to Item 402(b) but do not currently disclose any information about whether hedging by their named executive officers is permitted. To the extent that these companies permit hedging and that required disclosures under the proposed amendments do not change this practice, this category of companies would incur small additional costs to disclose their hedging policies for named executive officers. If these companies instead decide to prohibit hedging by named executive officers, they would incur a small additional cost to disclose the revised hedging policies, but they could incur other costs that could be more significant, which we discuss separately below. Similar to category 1, these companies would also incur costs to determine and disclose whether directors and employees other than named executive officers are permitted to hedge.

Category 3 companies, i.e., SRCs and EGCs, are not currently subject to Item 402(b). They may be less likely than companies subject to Item 402(b) to have policies, or to have articulated their practices, on whether hedging is permitted for employees (including named executive officers) and directors. Some SRCs and EGCs may incur costs in formulating policies for the first time, which will likely involve obtaining the advice of legal counsel and may also involve retaining compensation consultants. These companies would also incur costs in presenting the required disclosures in proxy or information statements.

In Category 4, listed closed-end funds, similar to SRCs and EGCs, would incur costs to disclose, and possibly to formulate, policies regarding hedging by employees and directors. As noted above, the vast majority of listed closed-end funds is externally-managed and thus would incur costs to disclose whether hedging by employees (if any) and directors is permitted. The limited number of listed closed-end funds that are internally managed also would incur costs to disclose if employees and directors are permitted to hedge with the difference, relative to externally-managed listed closed-end funds, that these funds will have portfolio managers and others as employees.

We expect the above disclosure costs to be minimal for these four categories of companies. A component of these costs (especially initial costs) may be fixed, which may have a greater impact on the smaller companies in category 3. While we cannot quantify these disclosure costs with precision, many of the costs reflect the burden associated with collection and reporting of information that we estimate for purposes of the Paperwork Reduction Act ("PRA"). For purposes of the PRA, we estimate the total annual increase in paperwork burden for all covered companies to be approximately 19,283 hours of in-house personnel time and approximately $2,571,200 for the services of outside professionals.[107]

These disclosure costs, however, do not include costs incurred to implement, administer, or revise a hedging policy. For example, under the proposed amendments, a company that prohibits hedging by directors may incur additional costs to implement this policy, e.g., by analyzing whether transactions by a director have the effect of hedging.[108] If a company revises its hedging policy as a result of the proposed amendments, additional costs may also arise. Such costs could involve obtaining the advice of compensation consultants and legal counsel.

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[107] See Section V of the release.

[108] Such costs are only incremental to the extent that the company does not already have procedures in place to administer and make such determination for named executive officers.

Perhaps most importantly, disclosing whether employees and directors are permitted to hedge might lead to changes in hedging policies that reduce incentive alignment between shareholders and officers or directors, if the current compensation arrangement is already in shareholders' interest. Specifically, a company may currently permit hedging by executive officers to promote efficient investments in risky projects. As discussed above, companies in category 1 currently disclose hedging policy for named executive officers, and may be unlikely to substantially change their policies under proposed Item 407(i). However, companies in categories 2 and 3, which do not disclose their hedging policies for named executive officers, may currently permit hedging by named executive officers but could switch to prohibiting hedging as a result of public disclosure under proposed Item 407(i). Such a change in policy, in certain instances, could limit executives' ability to arrive at optimal levels of economic exposure to the company – i.e., one that leads executives to undertake the optimal level of risk in corporate investment decisions for the company's shareholders.[109] To the extent that compensation incentives materially affect a firm's value, such changes could result in a reduction in shareholder wealth.

We expect this cost from distorted investment incentives to be greater for companies in categories 2 and 3 than those in 1, as the latter may be unlikely to substantially change their hedging policies. However, between categories 2 and 3, it is not clear whether category 3 (EGCs and SRCs) would incur a higher cost than category 2. On one hand, EGCs and

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[109] As discussed above, hedging by officers and directors is one of the solutions to the underinvestment concern, and the significance of such a problem depends on the availability and cost-effectiveness of other solutions.

SRCs likely have higher growth options than non-EGCs and non-SRCs. Since the use of equity incentives to induce officers and directors to make proper corporate investment decisions is more important for companies with higher growth options, the cost from distorting investment incentives could be higher for EGCs and SRCs. On the other hand, as discussed above, such cost is limited by the availability of other cost-effective solutions to the underinvestment concern, e.g., requiring an officer to hold stock options. Without adequate data, it is difficult to determine whether and when hedging would be more prevalent than stock options in providing incentives for officers at EGCs and SRCs as compared to non-EGCs and non-SRCs. Evidence from academic studies shows that reported hedging transactions by officers and directors are infrequent; however, officers' option holdings are much more prevalent, and the magnitude of CEO options holdings is greater in higher-growth firms to provide risk-taking incentives.[110] Taken together, it is not clear whether costs to EGCs and SRCs are higher than to companies in category 2.

The extent of the cost resulting from distorted investment incentives not only depends on a company' growth opportunities, but also depends on the likelihood that officers and directors engage in hedging transactions. As discussed above, we expect officers and directors are less likely to hedge when the equity security is more illiquid, because hedging cost is higher. As a result, in these companies, hedging by officers and directors is less likely to be used as a way to address the underinvestment concern in the first place. Thus, the cost

[110] See Guay, W., 1999, "The Sensitivity of CEO Wealth to Equity Risk: An Analysis of the Magnitude and Determinants", Journal of Financial Economics 53, 43-71.

to these companies from prohibiting hedging when it would otherwise be economically beneficial would also likely to be more limited. In company categories 1, 2, and 3, each category includes both exchange-listed and non-exchange-listed companies; we expect such cost to be lower for non-exchange-listed companies than exchange-listed companies, because equity securities of the former typically are more liquid than equity securities of non-exchange-listed companies. Finally, to the extent that equity securities of smaller companies are less liquid, these companies may be subject to the same effect.

The effects resulting from distorted incentives are likely to be different between externally-managed listed closed-end funds and internally-managed listed closed-end funds. As discussed above, portfolio managers for these externally managed funds are employees of the funds' investment advisers and thus are not covered by proposed Item 407(i). Policies on whether portfolio managers are permitted to hedge, if any, therefore are unlikely to change as a result of listed closed-end funds complying with proposed Item 407(i). Since these portfolio managers directly make investment decisions, their incentives to make portfolio selections are unlikely to be changed by the proposed amendments. Directors of listed closed-end funds are covered by proposed 407(i), however, and so directors' equity incentives could be affected. To the extent that directors do not influence portfolio managers' investment decisions, we do not expect listed closed-end funds to incur any cost from possible distortion of director incentives by the required disclosure under Item 407(i). However, directors oversee the fund's investment adviser (and other service providers), which employs the portfolio managers for the funds. If directors exert some influence over portfolio managers' investment decisions through their oversight of the investment adviser, closed-end funds may incur cost from distorted director incentives. Out of all listed closed-end funds, we estimate only 4 are internally managed, so their portfolio managers are covered by proposed 407(i). These four closed-end funds may incur cost resulting from distortion to both portfolio managers' and directors' incentives by the required disclosure under Item 407(i).

A revision in hedging policy also could impose costs on employees and directors. For example, if the company currently allows hedging for named executive officers but decides to prohibit all hedging transactions as a result of the new proposed disclosure requirements, named executive officers may incur costs stemming from the loss of their ability to hedge their current and future equity compensation awards or holdings.[111]

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[111] Such loss does not necessarily need to be compensated through other forms of compensation. Consider the following three alternative scenarios. First, under efficient contracting where hedging by officers promotes efficient investment decisions, officers are paid their opportunity wage to the extent that their labor market is competitive. If hedging is later prohibited as a result of public disclosure under the proposed amendments, these companies would resort to other, possibly more costly, compensation mechanisms to promote efficient investment decisions. While this change represents a cost to the company, officers still would receive their opportunity wage, so they are not better or worse off than before. Note that the dollar amount of the compensation may vary due to a potential change in riskiness of compensation. Prohibiting hedging may affect the riskiness of officers' compensation, but the riskiness also depends on the use of new types of compensation mechanism to promote efficient investments decisions, so the direction of the net change is not clear. The change in the dollar amount of compensation, if any, reflects the change in the riskiness of the compensation, and is not a compensation for a loss in hedging opportunity. Second, if the labor market is not competitive, officers may be paid above their opportunity wage. If hedging is used to promote efficient investment decisions, prohibiting it as a result of public disclosure under the proposed amendments may shift the balance of power between the board and officers. While the loss of hedging opportunity is a cost to the officers, they may not be compensated for it as long as their compensation is still above their opportunity wage. Third, if hedging by officers is not in shareholders' interests, a change from permitting to prohibiting hedging better aligns incentives. Officers may incur a cost from the loss of ability to hedge, but such cost merely represents the loss in the rents extracted by officers, and the officers should not be compensated for it.

These costs incurred to implement a hedging policy or to revise a hedging policy are difficult to quantify. For example, in the absence of data on a company's investment opportunities, the magnitude of the inefficiency in choosing investment projects as a result of a change in hedging policy is difficult to estimate.

The proposed amendments would also require Item 407(i) disclosure in Schedule 14C, in addition to Schedule 14A. This would extend the disclosure requirements and potential benefits described above to the Section 12(g) companies that do not file proxy statements with respect to the election of directors, thereby facilitating better understanding of companies' corporate governance policies and practices, without regard to whether proxies or consents are solicited or otherwise obtained for such an action. At the same time, requiring the disclosure specified in proposed Item 407(i) to be included in information statements on Schedule 14C would impose costs on companies that file Schedule 14C. However, consistency of the disclosure requirements applicable to both Schedules 14A and 14C in the context of an action with respect to the election of directors would facilitate better understanding of how companies address hedging, without regard to whether proxies or consents are solicited or otherwise obtained in connection with such action.

The proposed amendment to Item 402(b) would add an instruction providing that a company may satisfy its CD&A obligation to disclose any material policies on hedging by named executive officers under that requirement by cross referencing to the information disclosed pursuant to proposed Item 407(i) to the extent that the information disclosed there would satisfy this CD&A disclosure requirement. This approach would reduce potentially duplicative disclosure in complying with the existing CD&A requirements under Item 402(b) and the proposed requirements of Item 407(i), thereby reducing issuers' cost of compliance. Locating all the responsive disclosure in one place also would make it easier for investors to find it.

4. Anticipated Effects on Efficiency, Competition, and Capital Formation

As discussed above, the proposed amendments may improve capital allocation efficiency by enabling investors to make more informed voting decisions. The disclosure costs incurred by Section 12 registrants to comply with the proposed amendments would be minimal, and hence unlikely to put any company at a competitive disadvantage. However, as discussed above, additional costs could arise if companies revise their hedging policies from permitting hedging to prohibiting hedging by officers and directors. Such a change could aggravate the underinvestment concern and result in shareholder wealth reduction. However, such costs would be limited by the availability and cost-effectiveness of other means to promote investments in high risk but value-enhancing projects.[112] The proposed amendments are unlikely to have a notable impact on the competition either among U.S. companies or between U.S. companies and FPIs. We also do not expect the proposed amendments to affect the attractiveness of employment opportunities at the company to employees and directors, and hence impact the competitiveness of the labor market of employees and directors. The proposed amendments would impose new costs on companies seeking to

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[112] See footnote 91.

become public, but such costs, taken alone, are unlikely to be a significant hurdle to companies seeking to become public.

D. Alternatives

1. Changing the Scope of Disclosure Obligations

The proposed amendments would extend reporting requirements to information statements on Schedule 14C. This extension primarily affects those Section 12(g) registrants that do not file proxy statements given that Section 12(b) registrants are generally required to solicit proxies. We have considered alternatives to this extension. One alternative would be to require proposed Item 407(i) disclosure in proxy statements only, i.e., not in information statements. This would reduce the disclosure burden on companies that do not solicit proxies from any or all security holders but are otherwise authorized by security holders to take an action with respect to the election of directors. However, providing Item 407(i) disclosure in information statements provides consistency in disclosures in proxy statements and information statements, so that the disclosure could be made to all shareholders when a company does not solicit proxies from any or all security holders but are otherwise authorized by security holders to take a corporate action with respect to the election of directors. Excluding the Item 407(i) disclosure from information statements, as under this alternative, would reduce such benefits.

We also considered extending the proposed disclosure requirement to Form 10-K filings of Section 12 companies in order to impose consistent disclosure obligations upon all registrants with a class of securities registered under Section 12. This extension would have increased the proposed disclosure obligations especially for Section 12(g) companies that did not solicit proxies as they then would be required to provide the required disclosure in annual Form 10-K filings. Moreover, extending the disclosure requirement to all Section 12(g) companies may provide limited benefits to shareholders, as non-exchange listed companies can have infrequently traded stock, making it more costly and thus less likely that employees and directors would pursue hedging opportunities.

2. Issuers Subject to the Proposed Amendments

The proposed amendments apply to all Section 12 registrants, including EGCs, SRCs, and listed closed-end funds. We have considered the following alternatives about the scope of the proposed amendments.

The first alternative would be to either exempt or delay the application of the proposed amendments to EGCs and SRCs. Doing so would reduce costs for these entities, but the potential benefits would be eliminated or delayed as well. As discussed above, we expect the potential benefits from the required disclosures under proposed Item 407(i) to be higher for shareholders of EGCs and SRCs (i.e., category 3 in Table 2) than for shareholders of other operating companies (i.e., categories 1 and 2). While EGCs and SRCs likely also incur a higher cost from distorted incentives than companies in category 1, it is not clear whether such cost is higher than that for companies in category 2.

Not exempting EGCs and SRCs from the proposed amendment is also consistent with officers and directors at these companies not being exempt from the obligation under Exchange Act Section 16(a) to disclose hedging transactions involving derivative securities.

The second alternative is to include all funds, including mutual funds and ETFs, or a broader group of funds than listed closed-end funds, as proposed. Requiring all funds to provide the proposed disclosure would impose costs on the funds. The disclosure also could provide benefits, however, although the benefits to investors in funds other than listed closed-end funds may not be as significant where fund shares do not trade on an exchange. As discussed above, exchange-listed fund shares likely are more liquid than non-exchange-listed fund shares. Due to increased cost to hedge less liquid shares, directors and employees of non-exchange-listed funds may be less likely to engage in hedging transactions than those at exchange-listed funds.[113]

Further, the benefits that would result from applying the proposed amendments to ETFs are likely lower than the benefits from applying the proposed amendments to listed closed-end funds as proposed. Employees (if any) and directors of ETFs may not have as strong an incentive to hedge their personal fund shareholdings as those at listed closed-end funds. First, listed closed-end funds likely are more volatile than ETFs. While the shares of many ETFs often trade on the secondary market at prices close to NAV of the shares, one study finds that closed-end funds' monthly return on average is 64% more volatile than that of the underlying NAV.[114] The difference in volatility between ETF and closed-end fund returns is not driven by the difference in NAV between the two types of funds, and the listed

[113] The scope for hedging may be even more limited for mutual funds, as investors purchase mutual fund shares from or sell them to the fund daily at NAV.

[114] See Pontiff, J., 1997, "Excess Volatility and Closed-End Funds" American Economic Review 87 (1): 155-169. Day et al. (2011) find similar evidence in a much more recent sample. See Day T., G. Li, and Y. Xu, 2011, "Dividend Distributions and Closed-end Fund Discounts" Journal of Financial Economics 100: 579-593.

closed-end funds' "excess" volatility is largely idiosyncratic, and cannot be explained by market risk or risks that affect other closed-end funds.[115] Employees and directors of listed closed-end funds may therefore have more incentive to hedge their fund shareholdings due to the "excess" volatility. Second, the non-redeemability of listed closed-end fund shares allows the funds to take more illiquid positions, or positions that may not be possible to sell quickly and at short notice without incurring a substantial loss in value. Due to the potentially heightened liquidity risk in the funds' portfolios, fund directors and employees may prefer not to expose their personal portfolios to the volatility resulting from liquidity risk and thus may hedge their personal fund share holdings. To the extent that listed closed-end funds have greater ability than ETFs to invest in illiquid assets, it is possible that employees and directors of listed closed-end funds would have more incentives to hedge their personal holdings.

Another alternative is not to require any funds to provide the proposed disclosure. Doing so would not impose costs related to the proposed rule on the funds. However, fund investors, including investors in listed closed-end funds, also would not derive any benefits, including a better understanding of policies that may affect incentives provided by fund shareholdings of employees and directors.

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[115] Id.

E. Request for Comments

1. We request information including data that would help quantify the costs and the value of the benefits of the proposed amendments described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of the proposed amendment. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.
2. We are interested in any studies or analysis on the number and characteristics of companies that have made disclosures of their "policies regarding hedging" under the existing requirement of Item 402(b)(2)(xiii) or otherwise. In particular, among the companies subject to the reporting requirement of Item 402(b)(2)(xiii), how many have hedging policies that they do not disclose because they do not deem them material? Among companies that disclose hedging policies, what are the types of the "policies" disclosed?
3. Among companies currently subject to Item 402(b), some make no disclosure of a hedging policy for named executive officers. We believe that it may be reasonable to construe the absence of a disclosure of hedging policy to mean that the company does not prevent named executive officers from hedging. Is there evidence to the contrary? Are we correct in thinking that investors may draw the same inference?

4. To our knowledge, hedging transactions typically involve derivative contracts, and fixed price derivative contracts are subject to reporting under Section 16(a). Are there any types of hedging transactions that are not currently subject to reporting by officers and directors under Section 16(a)? If yes, please provide details.
5. Would the proposed disclosure increase the transparency to investors about the incentives provided by employees' and directors' equity holdings? Are there alternative ways to make the disclosures that would be more useful to investors in evaluating employees' and directors' incentive alignment with shareholders while still satisfying the mandate of Section 14(j)?
6. What impact would the proposed amendments have on the incentives of employees and directors? Would the proposed amendments likely change the behavior of issuers, investors, or other market participants?
7. Would the proposed disclosure requirements be likely to cause companies to change their policies on whether hedging is permitted for employees and directors? Why and how? If so, what costs would be incurred? What effect, if any, may the proxy voting policies of institutional investors and proxy advisory firms have on a company's decision to change its policy? Have institutional investors and proxy advisory firms already established hedging policy positions that have been guiding voting decisions and vote recommendations? Have institutional investors and proxy advisory firm

recommendations regarding such policies encouraged companies to provide transparency into hedging transactions that are permitted at the companies? How would the transparency into hedging transactions as a result of this disclosure impact investor communication with companies about such policies? What effect will this proposed disclosure requirement have on voting decisions? Would the proposed disclosure requirements be likely to cause companies to change their compensation policies for employees (including officers) or directors? Why or why not, and if so, how?

8. If a company revises its hedging policy, would this revision influence other corporate decisions, for example, by encouraging or discouraging more risky but value-enhancing corporate investments? Please explain and provide data.
9. Relative to other operating companies, would the proposed amendments have differential economic effects on EGCs and SRCs that we do not currently discuss in the release? If so, what are these differential economic effects? Would the impact of the proxy voting policies of institutional investors and proxy advisory firms, if any, be different for EGCs and SRCs than for other operating companies? In the absence of disclosure of hedging policies by EGCs and SRCs, to what extent have hedging policy positions of institutional investors and proxy advisory firms already been guiding voting decisions and vote recommendations for EGCs and SRCs?

10. Are the costs and benefits of disclosing information about whether non-officer employees are permitted or prohibited to hedge different from the costs and benefits of disclosing information about officers and directors? If so, should the rule be modified to take those differences into account?

11. What impact would the proposed amendments have on competition? Would the proposed amendments put registrants subject to the new disclosure requirements, or particular types of registrants subject to the new disclosure requirements, at a competitive advantage or disadvantage?

12. What impact would the proposed amendments have on efficiency? Have we overlooked any positive or negative effects on efficiency?

13. What impact would the proposed amendments have on capital formation? Would there be any positive or negative effects on capital formation that we may have overlooked?

14. Are listed closed-end funds subject to an incentive alignment concern due to shareholders' inability to redeem their shares from the fund (or often to sell them in secondary transactions at or close to the funds' NAV per share) that would relate to hedging considerations? What are the characteristics of listed closed-end funds' incentive structure with respect to employees and directors that would inform this consideration?

15. We note above that shares of listed closed-end funds are not redeemable, and they may trade at a discount to NAV. Will this create heightened incentives

for these funds' employees and directors to hedge personal holdings in listed closed-end funds as compared to employees and directors of other types of funds? Are there features of ETFs that would make the disclosures under the proposed amendments particularly useful for their investors even though ETF shares often trade on the secondary market at prices close to NAV of the shares? Are there features of mutual funds or other types of funds that would make the disclosures under the proposed amendments particularly useful for their investors?

16. The potential cost to companies from distorting investment incentives as a result of required disclosures under proposed Item 407(i) is lower for companies with fewer investment choices. How, if at all, does the range of available investment choices for listed closed-end funds differ from that for operating companies?

V. PAPERWORK REDUCTION ACT

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[116] The titles for the collection of information are:

[116] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

(1) "Regulation 14A and Schedule 14A" (OMB Control No. 3235-0059);

(2) "Regulation 14C and Schedule 14C" (OMB Control No. 3235-0057);

(3) "Regulation S-K" (OMB Control No. 3235-0071); [117] and

(4) "Rule 20a-1 under the Investment Company Act of 1940, Solicitation of Proxies, Consents, and Authorizations" (OMB Control No. 3235-0158).

Regulation S-K was adopted under the Securities Act and Exchange Act; Regulations 14A and 14C and the related schedules were adopted under the Exchange Act; and Rule 20a-1 was adopted under the Investment Company Act. The regulations and schedule set forth the disclosure requirements for proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending the schedule constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the proposed amendment would be mandatory. Responses to the information collection would not be kept confidential, and there would be no mandatory retention period for the information disclosed.

[117] The paperwork burden from Regulation S-K is imposed through the forms that are subject to the disclosure requirements in Regulation S-K and is reflected in the analysis of these forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burden imposed by Regulation S-K to be a total of one hour.

B. Summary of the Proposed Amendments

We are proposing to add new paragraph (i) to Item 407 of Regulation S-K that would implement Section 14(j) of the Exchange Act, as added by Section 955 of the Act. As discussed in more detail above, proposed Item 407(i) would require disclosure of whether employees and directors of the company, or their designees, are permitted to hedge or offset any decrease in the market value of equity securities that are granted to them by the company as part of their compensation, or that are held, directly or indirectly, by them. Pursuant to the proposed amendment to Item 7 of Schedule 14A, and for listed closed-end funds, the proposed amendment to Item 22 of Schedule 14A, this new disclosure would be required in proxy or consent solicitation materials with respect to the election of directors, or an information statement in the case of such corporate action authorized by the written consent of security holders.

In addition, to reduce potentially duplicative disclosure between proposed Item 407(i) and the existing requirement for CD&A under Item 402(b) of Regulation S-K, we propose to amend Item 402(b) to add an instruction providing that a company may satisfy its obligation to disclose material policies on hedging by named executive officers in the CD&A by cross referencing the information disclosed pursuant to proposed Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.[118] This instruction,

[118] Proposed Instruction 6 to Item 402(b).

like the Item 407(i) disclosure requirement, would apply to the company's proxy or information statement with respect to the election of directors.

C. Burden and Cost Estimates Related to the Proposed Amendments

If adopted, proposed Item 407(i) would require additional disclosure in proxy statements filed on Schedule 14A with respect to the election of directors and information statements filed on Schedule 14C where such corporate action is taken by the written consents or authorizations of security holders, and would thus increase the burden hour and cost estimates for each of those forms. For purposes of the PRA, we estimate the total annual increase in the paperwork burden for all affected issuers to comply with our proposed collection of information requirements, averaged over the first three years, to be approximately 19,238 hours of in-house personnel time and approximately $2,565,200 for the services of outside professionals (see Table 3).[119] These estimates include the time and cost of collecting and analyzing the information, preparing and reviewing disclosure, and filing the documents.

In deriving our estimates, we assumed that the information that proposed Item 407(i) would require to be disclosed would be readily available to the management of a company because it only requires disclosure of policies they already have but does not direct them to have a policy or dictate the content of the policy. Nevertheless, we used burden estimates similar to those used in the 2006 Executive Compensation Disclosure Release for updating

[119] Our estimates represent the average burden for all companies, both large and small.

Schedules 14A and 14C, which we believe were more extensive.[120] Since the first year of compliance with the proposed amendment is likely to be the most burdensome because companies are not likely to have compiled this information in this manner previously, we assumed it would take five total hours per form the first year and two total hours per form in all subsequent years.

Based on our assumptions, we estimated that the proposed amendments would increase the burden hour and cost estimates per company by an average of three total hours per year over the first three years the amendments are in effect for each Schedule 14A or Schedule 14C with respect to the election of directors.

We recognize that the burdens may vary among individual companies based on a number of factors, including the size and complexity of their organizations, and whether or not they prohibit or restrict hedging transactions by employees, directors and their designees and if they do, the specificity and complexity of such restrictions.

The table below shows the three-year average annual compliance burden, in hours and in costs, of the collection of information pursuant to proposed Item 407(i) of Regulation S-K.[121] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a company to prepare and review the proposed disclosure requirements. The portion of the burden carried by outside

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[120] See the 2006 Executive Compensation Disclosure Release.

[121] For convenience, the estimated hour and cost burdens in the table have been rounded to the nearest whole number.

professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. For purposes of the PRA, we estimate that 75% of the burden of preparation of Schedules 14A and 14C is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. There is no change to the estimated burden of the collections of information under Regulation S-K because the burdens that this regulation imposes are reflected in our burden estimates for Schedule 14A and 14C.

Table 3. Incremental Paperwork Burden under the proposed amendments affecting Schedules 14A and 14C - Three-Year Average Costs.

	Number of responses (A) 122	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	Internal company time (D)=(C)*0.75	External professional time (E)=(C)*0.25	External Professional costs (F)=(E)*$400
Sch. 14A	7,300	3	21,900	16,425	5,475	$2,190,000
Sch. 14C	680	3	2,040	1,530	510	$ 204,000
Rule 20a-1	590	3	1,770	1,328	443	$177,200
Total	8,570		25,710	19,283	6,428	$2,571,200

The proposed amendment to the CD&A requirement under Item 402(b) would not be applicable to smaller reporting companies or emerging growth companies because under current CD&A reporting requirements these companies are not required to provide CD&A in

122 For Schedules 14A and 14C, the number of responses reflected in the table equals the three-year average of the number of schedules filed with the Commission and currently reported by the Commission to OMB. For Rule 20a-1, the number of responses reflected in the table is based on an average of three years' of data from 2012-2014 in the 2014 ICI Fact book.

their Commission filings. For all other issuers, we do not expect this amendment would materially affect the disclosure burden associated with their Commission filings.

D. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- evaluate the accuracy of our assumptions and estimates of the burden of the proposed collection of information;
- determine whether there are ways to enhance the quality, utility and clarity of the information to be collected;
- evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- evaluate whether the proposed amendments will have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC

20503, and send a copy to, Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-01-15. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-01-15 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

VI. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[123] we solicit data to determine whether the rule proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

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[123] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

Commentators should provide empirical data on: (1) the potential annual effect on the economy; (2) any increase in costs or prices for consumers or individual industries; and (3) any potential effect on competition, investment or innovation.

VII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[124] This analysis involves a proposal to require, in proxy or consent solicitation materials, or in an information statement, with respect to the election of directors disclosure of whether employees (including officers), directors or their designees are permitted to engage in transactions to hedge or offset any decrease in the market value of equity securities granted to them as compensation, or directly or indirectly held by them.

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are designed to implement Section 14(j), which was added to the Exchange Act by Section 955 of the Act. Specifically, the proposed amendments would require disclosure, in any proxy or information statement with respect to the election of directors, of whether any employee or director of the company or any designee of such employee or director, is permitted to purchase any financial instruments (including but not limited to prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities, that are granted to the

[124] 5 U.S.C. 603.

employee or director by the company as compensation, or held, directly or indirectly, by the employee or director. The covered equity securities would be equity securities issued by the company, any parent of the company, any subsidiary of the company or any subsidiary of any parent of the company that are registered under Exchange Act Section 12.

B. Legal Basis

We are proposing the amendments pursuant to Section 955 of the Act, Sections 14, 23(a) and 36(a) of the Exchange Act, as amended, and Sections 6, 20(a) and 38 of the Investment Company Act, as amended.

C. Small Entities Subject to the Proposed Amendments

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[125] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Exchange Act Rule 0-10(a)[126] defines a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 428 issuers that may be considered small entities. The proposed amendments would affect small entities that have a class of securities

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[125] 5 U.S.C. 601(6).

[126] 17 CFR 240.0-10(a).

that are registered under Section 12 of the Exchange Act. An investment company, including a business development company, is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[127] We believe that the proposal would affect some small entities that are investment companies. We estimate that there are approximately 29 investment companies that would be subject to the proposed rule that may be considered small entities.

D. Reporting, Recordkeeping and other Compliance Requirements

The proposed amendments would add to the proxy disclosure requirements of companies, including small entities, that file proxy or information statements with respect to the election of directors, by requiring them to provide the disclosure called for by the proposed amendment. Specifically, proposed Item 407(i) would require disclosure of whether any employee or director of the company or any designee of such employee or director, is permitted to purchase any financial instruments (including but not limited to prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities, that are granted to the employee or director by the company as compensation, or held, directly or indirectly, by the employee or director.

[127] 17 CFR 270.0-10(a).

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap or conflict with other federal rules. The proposal would reduce potentially duplicative disclosure by adding an instruction permitting a company to satisfy any obligation under Item 402(b) of Regulation S-K to disclose in the CD&A material policies on hedging by named executive officers by cross referencing to the new disclosure required by proposed Item 407(i) to the extent that the information disclosed there satisfies this CD&A disclosure requirement.[128] However, as described above, the CD&A disclosure obligation does not apply to small entities that are emerging growth companies, smaller reporting companies or registered investment companies.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;

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[128] Proposed Instruction 6 to Item 402(b).

- use of performance rather than design standards; and
- exempting small entities from all or part of the proposed requirements.

We believe that the proposed amendments would require clear and straightforward disclosure of whether employees or directors are permitted to engage in transactions to hedge or offset any decrease in the market value of equity securities granted to them as compensation, or directly or indirectly held by them. Given the straightforward nature of the proposed disclosure, we do not believe that it is necessary to simplify or consolidate the disclosure requirement for small entities. We have used performance standards in connection with the proposed amendments by proposing to use a principles-based approach to identify transactions that would hedge or offset any decrease in the market value of equity securities. Additionally, the amendments do not specify any specific procedures or arrangements a company must develop to comply with the standards, or require a company to have or develop a policy regarding employee and director hedging activities.

We considered, but have not proposed, different compliance requirements or an exemption for small entities. We believe that mandating uniform and comparable disclosures across all issuers subject to our proxy rules will promote informed shareholder voting. The proposed rule amendments are intended to provide transparency regarding whether employees, directors, or their designees are allowed to engage in hedging transactions that will permit them to receive compensation without regard to company performance, or will permit them to mitigate or avoid the risks associated with long-term equity security ownership.[129] We believe this transparency would be just as beneficial to shareholders of small companies as to shareholders of larger companies. By increasing transparency regarding these matters, the proposed amendments are designed to improve the quality of information available to all shareholders, thereby promoting informed voting decisions. Different compliance requirements or an exemption for small entities may interfere with the goal of enhancing the information provided by all issuers. We also note that the disclosure is expected to result in minimal additional compliance costs for issuers although there could be indirect costs for some small entities, depending on their current hedging policies. Thus, we believe that our proposed amendments will promote consistent disclosure among all issuers, without creating a significant new burden for small entities.

Although we preliminarily believe that an exemption for small entities from coverage of the proposed amendments would not be appropriate, we solicit comment on whether we should exempt small entities. At this time, we do not believe that different compliance methods or timetables for small entities would be necessary given the relatively straightforward nature of the disclosure involved. Nevertheless, we solicit comment on whether different compliance requirements or timetables for small entities would be appropriate and consistent with the purposes of Section 14(j).

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[129] See Senate Report 111-176.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- how the proposed amendments can achieve their objective while lowering the burden on small entities;
- the number of small entities that may be affected by the proposed amendments;
- whether small entities should be exempt from the proposed amendments;
- the existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- how to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact of the proposed amendments on small entities and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENTS

The amendments contained in this release are being proposed under the authority set forth in Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 14, 23(a) and 36(a) of the Securities Exchange Act of 1934, as amended, and Sections 6, 20(a) and 38 of the Investment Company Act, as amended.

List of Subjects in 17 CFR Parts 229 and 240

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out in the preamble, the Commission proposed to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

1. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq; and 18 U.S.C. 1350, unless otherwise noted.

2. Amend § 229.402 by adding Instruction 6 to Item 402(b), to read as follows:

§229.402 (Item 402) Executive compensation.

* * * * *

(b) * * *

Instructions to Item 402(b). * * *

6. If the information disclosed pursuant to Item 407(i) would satisfy the registrant hedging policy disclosure requirements of paragraph (b)(2)(xiii) of this Item, a registrant may satisfy

this Item in its proxy or information statement by referring to the information disclosed pursuant to Item 407(i).

* * * * *

3. Amend § 229.407 by adding paragraph (i) before the Instructions to Item 407, to read as follows:

§229.407 (Item 407) Corporate governance.

* * * * *

(i) Employee, officer and director hedging. In proxy or information statements with respect to the election of directors, disclose whether the registrant permits any employees (including officers) or directors of the registrant, or any of their designees, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities—

(1) Granted to the employee or director by the registrant as part of the compensation of the employee or director; or

(2) Held, directly or indirectly, by the employee or director.

Instructions to Item 407(i).

1. For purposes of this Item 407(i), "equity securities" (as defined in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and § 240.3a11-1 of this chapter) shall mean only those equity securities issued by the registrant or any parent of the

registrant, any subsidiary of the registrant or any subsidiary of any parent of the registrant that are registered under Section 12 of the Exchange Act (15 U.S.C. 78l).

2. A registrant that permits hedging transactions by some, but not all, of the categories of persons covered by this Item 407(i) shall disclose the categories of persons who are permitted to engage in hedging transactions and those who are not.

3. A registrant shall disclose the categories of hedging transactions it permits and those it prohibits. In disclosing these categories, a registrant may, if true, disclose that it prohibits or permits particular categories and permits or prohibits, respectively, all other hedging transactions. If a registrant does not permit any hedging transactions, or permits all hedging transactions, it shall so state and need not describe them by category.

4. A registrant that permits hedging transactions shall disclose sufficient detail to explain the scope of such permitted transactions.

5. The information required by this Item 407(i) will not be deemed to be incorporated by reference into any filing under the Securities Act, the Exchange Act or the Investment Company Act, except to the extent that the registrant specifically incorporates it by reference.

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7210 et seq.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5521(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

5. Amend § 240.14a-101 by:

a. revising paragraph (b) of Item 7;

b. removing paragraphs (c) and (d) of Item 7;

c. redesignating paragraph (e) as paragraph (c) of Item 7;

d. removing the Instruction to Item 7(e) of Item 7;

e. redesignating paragraph (f) as paragraph (d) of Item 7;

f. redesignating Instruction to Item 7(f) as Instruction to Item 7 and revising newly redesignated Instruction to Item 7;

g. redesignating paragraph (g) as paragraph (e) of Item 7; and

h. adding paragraph (20) to Item 22(b).

The revisions and addition read as follows:

§240.14a-101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

Item 7. Directors and Executive Officers. * * *

(b) The information required by Items 401, 404(a) and (b), 405 and 407 of Regulation S-K (§§ 229.401, 229.404(a) and (b), 229.405 and 229.407 of this chapter), other than the information required by:

(i) Paragraph (c)(3) of Item 407 of Regulation S-K (§ 229.407(c)(3) of this chapter); and

(ii) Paragraphs (e)(4) and (e)(5) of Item 407 of Regulation S-K (§§ 229.407(e)(4) and 229.407(e)(5) of this chapter) (which are required by Item 8 of this Schedule 14A).

* * *

Instruction to Item 7. The information disclosed pursuant to paragraphs (c) and (d) of this Item 7 will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

* * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(20) In the case of a Fund that is a closed-end investment company that is listed and registered on a national securities exchange, provide the information required by Item 407(i) of Regulation S-K (§ 229.407(i) of this chapter).

* * * * *

By the Commission.

Brent J. Fields
Secretary

February 9, 2015

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74233 / February 9, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3633 / February 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-13722

In the Matter of Mark V. Sever, CPA	ORDER GRANTING APPLICATION FOR REINSTATEMENT TO APPEAR AND PRACTICE BEFORE THE COMMISSION AS AN ACCOUNTANT

On December 17, 2009, Mark V. Sever, CPA ("Sever") was denied the privilege of appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against Sever pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[1] This order is issued in response to Sever's application for reinstatement to practice before the Commission as an accountant.

From 1997 through the third quarter of 2001, Sever was a Professional Practice Director in Ernst & Young LLP's ("E&Y") National Office, and served as the Independent Review Partner for E&Y's audits of Bally Total Fitness Holding Corporation's ("Bally") financial statements. Then, as the National Director of Area Professional Practice, Sever remained involved with Bally's 2001-2003 audits. In connection with Bally's 2001-2003 financial statements, Bally engaged in fraudulent financial accounting and, further, made false and misleading disclosures regarding a $55 million special charge in its 2002 Form 10-K. During the relevant period, the Commission found that Sever knew or should have known that E&Y's unqualified audit opinions regarding Bally's 2001-2003 financial statements, which stated that E&Y had conducted its audits in accordance with auditing standards generally accepted in the United States ("GAAS") and that Bally's financial statements were presented in conformity with accounting principles generally accepted in the United States ("GAAP"), were false because E&Y's audits of Bally's financial statements were not performed in accordance with GAAS and

[1] *See* Accounting and Auditing Enforcement Release No. 3084 dated December 17, 2009. Sever was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

Bally's financial statements were not presented in conformity with GAAP. As a result of Sever's conduct relating to the false and misleading audit opinions, the Commission found that Sever was a cause of Bally's violations of Sections 17(a)(2) and (3) of the Securities Act of 1933 and was a cause of and willfully aided and abetted Bally's violations of Sections 13(a) and 13(b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. The Commission further found that Sever was a cause of E&Y's violation of Section 10A(b) of the Exchange Act.

Sever has met all of the conditions set forth in the original order and, in his capacity as an independent accountant, has stated that he will comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards. In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Sever attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of the information supplied, representations made, and undertakings agreed to by Sever, it appears that he has complied with the terms of the December 17, 2009 order denying him the privilege of appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Sever, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, and that Sever, by undertaking to comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards, in his practice before the Commission as an independent accountant has shown good cause for reinstatement. Therefore, it is accordingly,

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[2] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Mark V. Sever, CPA is hereby reinstated to appear and practice before the Commission as an accountant.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74234 / February 9, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3634 / February 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-13127

In the Matter of Jeffrey P. Jorissen, CPA	: ORDER GRANTING APPLICATION FOR : REINSTATEMENT TO APPEAR AND PRACTICE : BEFORE THE COMMISSION AS AN ACCOUNTANT : RESPONSIBLE FOR THE PREPARATION OR : REVIEW OF FINANCIAL STATEMENTS REQUIRED : TO BE FILED WITH THE COMMISSION

On August 12, 2008, Jeffrey P. Jorissen, CPA ("Jorissen") was suspended from appearing or practicing before the Commission as an accountant as a result of settled public administrative proceedings instituted by the Commission against Jorissen pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1] This order is issued in response to Jorissen's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that Jorissen had been permanently enjoined by a United States District Court from future violations of Rule 13b2-1 under the Securities Exchange Act of 1934 ("Exchange Act") and from aiding and abetting violations of Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. In a complaint filed on February, 22, 2006 the Commission alleged, among other things, that from the first quarter of 2000 through the third quarter of 2002, Sun Communities, Inc. ("Sun") engaged in false financial record-keeping and reporting. The complaint alleged that Sun's financial statements failed to properly account for losses resulting from Sun's investment in a joint venture involved in the development of manufactured housing communities. The Commission alleged that contrary to generally accepted accounting principles, Sun failed to account for any of the joint venture's losses during seven quarters and underreported Sun's share of the losses in four additional quarters. The complaint also alleged that Sun maintained an improper "cookie jar reserve" and improperly smoothed earnings, and that Sun's false financial statements were incorporated in documents filed with the SEC, including

[1] *See* Accounting and Auditing Enforcement Release No. 2862 dated August 12, 2008. Jorissen was permitted, pursuant to the order, to apply for reinstatement after two years upon making certain showings.

quarterly reports, annual reports, and non-periodic filings. The complaint alleged that Jorissen, in his position as Chief Financial Officer, initiated and directed Sun's false record-keeping and reporting.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Jorissen attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Jorissen is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Jorissen's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Jorissen, it appears that he has complied with the terms of the August 12, 2008 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Jorissen, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

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[2] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Jeffrey P. Jorissen, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74235 / February 9, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3635 / February 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-13248

In the Matter of Kevin Morano, CPA	: ORDER GRANTING APPLICATION FOR : REINSTATEMENT TO APPEAR AND PRACTICE : BEFORE THE COMMISSION AS AN ACCOUNTANT : RESPONSIBLE FOR THE PREPARATION OR : REVIEW OF FINANCIAL STATEMENTS REQUIRED : TO BE FILED WITH THE COMMISSION

On September 29, 2008, Kevin Morano, CPA ("Morano") was suspended from appearing or practicing before the Commission as an accountant as a result of settled public administrative proceedings instituted by the Commission against Morano pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1] This order is issued in response to Morano's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that Morano had been permanently enjoined by a United States District Court from future violations of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting violations of Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-11 and 13a-13 thereunder. In its complaint in the injunctive action, the Commission alleged, among other things, that Morano, while serving as its Chief Financial Officer, permitted Lumenis Ltd. to recognize revenue in a number of transactions despite red flag warnings that should have prevented such recognition. As a result, Morano made materially false and misleading statements in periodic reports filed with the Commission in 2002 and 2003, including by certifying the accuracy of financial statements contained in those reports.

[1] *See* Accounting and Auditing Enforcement Release No. 2892 dated September 29, 2008. Morano was permitted, pursuant to the order, to apply for reinstatement after five years upon making certain showings.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Morano attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Morano is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Morano's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Morano, it appears that he has complied with the terms of the September 29, 2008 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Morano, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Kevin Morano, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

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[2] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

SECURITIES AND EXCHANGE COMMISSION

Release No. 34-74239; File No. S7-02-2015

CONTRACT STANDARD FOR CONTRACTOR WORKFORCE INCLUSION AND REQUEST FOR PUBLIC COMMENT

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed contract standard; notice of proposed information collection; and request for public comment.

SUMMARY: To implement section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or "the Act"), the Securities and Exchange Commission (the "Commission") is proposing to include in its service contracts a standard concerning workforce inclusion of minorities and women.

DATE: Comments should be received on or before: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7-02-2015 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow instructions for submitting comments.

Paper Comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File No. S7-02-2015. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet web site (http://www.sec.gov/rules/other.shtml). Comments will also be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Pamela A. Gibbs, Director, Office of Minority and Women Inclusion, or Audrey B. Little, Senior Counsel, Office of Minority and Women Inclusion at (202) 551-6046, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

Section 342(a)(1)(A) of the Dodd-Frank Act provides for certain agencies, including the Securities and Exchange Commission, to establish an Office of Minority and Women Inclusion ("OMWI").[1] Section 342(c)(1) provides that the OMWI Director shall develop and implement standards and procedures to ensure the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency, including in procurement, insurance, and all types of contracts. Section 342(c)(2) requires that the OMWI Director include in the procedures for evaluating contract proposals and hiring service providers a component that gives consideration to the diversity of an applicant, to the

[1] 12 U.S.C. 5452.

extent consistent with applicable laws. In addition, section 342(c)(2) requires that such procedures include a written statement, in the form and content prescribed by the OMWI Director, that a contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors.

Further, section 342(c)(3)(A) requires the OMWI Director to establish standards and procedures for determining whether an agency contractor or subcontractor "has failed to make a good faith effort to include minorities and women" in its workforce. Section 342(c)(3)(B)(i) provides that if the OMWI Director determines that a contractor has failed to make good faith efforts, the Director shall recommend to the agency administrator that the contract be terminated. Upon receipt of such a recommendation, section 342(c)(3)(B)(ii) provides that the agency administrator may terminate the contract, make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor, or take other appropriate action.

Under section 342(c)(3)(A) of the Dodd-Frank Act, the OMWI Director is required to determine whether a contractor or subcontractor has made good faith efforts to include minorities and women in its workforce. The proposed Contract Standard would require that a Commission contractor, upon request from the OMWI Director, provide documentation of the actions undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) that demonstrate its good faith efforts to ensure the fair inclusion of minorities and women in its workforce. The documentation requested may include, but is not limited to: 1) the total number of employees in the contractor's workforce, and the number of employees by race, ethnicity, gender, and job title or EEO-1 job category (e.g., EEO-1 Report(s)); 2) a list of covered subcontract awards under the contract that includes the dollar amount of each subcontract, date of award, and the subcontractor's race, ethnicity, and/or gender ownership status; 3) the contractor's plan to ensure the fair inclusion of minorities and women in its workforce, including outreach efforts; and 4) for each covered subcontractor, the information requested in items 1 and 3 above. The OMWI Director will consider the information submitted in evaluating whether the contractor or subcontractor has complied with its contractual obligation to make good faith efforts to ensure the fair inclusion of minorities and women in its workforce.

The Commission's proposes to satisfy section 342(c)(2) through the inclusion of a contract standard concerning workforce inclusion of minorities and women (the "Contract Standard") in solicitations and resulting contracts for services with a dollar value of $100,000 or more. The proposed Contract Standard is similar to the contract clauses adopted by OMWIs of other federal financial regulatory agencies.[2] The Contract Standard requires the service contractor, upon entering into a contract with the Commission, to confirm that it will ensure, to the maximum extent possible and consistent with applicable law, the fair inclusion of minorities and women in its workforce. In addition, the proposed Contract Standard requires the contractor to include the substance of the Contract Standard in all subcontracts for services awarded under the contract with a dollar value of $100,000 or more. Accordingly, the requirements of the proposed Contract Standard will apply to covered subcontractors, as prescribed in section 342(c)(2) of the Dodd-Frank Act.

The proposed Contract Standard requires a contractor to provide documentation, upon the request of the OMWI Director, to demonstrate that it has made good faith efforts to ensure the fair inclusion of minorities and women in its workforce and, as applicable, to demonstrate that its covered subcontractors have made such good faith efforts. "Good faith efforts" are interpreted to

[2] See Department of the Treasury Acquisition Regulations; Contract Clause on Minority and Women Inclusion in Contractor Workforce, 79 Fed. Reg. 15551, at http://www.gpo.gov/fdsys/pkg/FR-2014-03-20/pdf/2014-05846.pdf.

include actions by a contractor (and, as applicable, actions by each covered subcontractor) to ensure the fair inclusion of women and minorities in its workforce, while at the same time identifying, and if present, removing barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting to ensure that applicant pools include minorities and women, providing job-related training, or other activity that could lead to removing such barriers.

Section 342 of the Dodd-Frank Act applies to "all contracts of [the Commission] for services of any kind," but the section does not define the term "contract." FAR 37.101 defines "service contract" as a "contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." Pursuant to the FAR definition, this proposed Contract Standard will be included in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more, and in all subcontracts under the related prime contract for services with a dollar value of $100,000 or more.

Public Comment

The proposed Contract Standard is being published for public comment pursuant to 41 U.S.C. 1707, which applies to the publication of a covered federal procurement policy, regulation, procedure or form. Section 1707 provides that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) is to be published for public comment in the Federal Register if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors.

Here, the proposed Contract Standard relates to the expenditure of appropriated funds of the Commission, because it will be incorporated in certain Commission service contracts paid for with appropriated funds. The Contract Standard may have a significant effect beyond the internal operating procedures of the agency, as it implements requirements of the Dodd-Frank Act designed to address minority and women inclusion by federal contractors and implements the new contract termination authority contained in section 342(c)(3). The proposed Contract Standard may also have a cost or administrative impact on contractors or offerors, but we believe these effects would be insignificant as a result of the overlap with existing EEO laws. The consequence for non-compliance could have a cost or administrative impact on the covered service contractors, although they again overlap with existing remedies.

PAPERWORK REDUCTION ACT

The proposed Contract Standard contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[3] The title for the proposed collection of information is:

- Contract Standard for Contractor Workforce Inclusion

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We intend to submit these requirements to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA and its implementing regulations.[4] If approved, the

[3] 44 U.S.C. 3501 et seq.
[4] 44 U.S.C. 3507(c); 5 CFR 1320.10.

responses to the new collection of information would be mandatory. For collections of information not contained in a proposed rule, the PRA requires federal agencies to publish a notice in the Federal Register concerning each proposed collection of information and to allow 60 days for public comment.[5] To comply with this requirement, we are publishing this notice.

A. Overview of Information Collection

1. Description of the Need for the Information and Proposed Use.

Under section 342(c)(3)(A) of the Dodd-Frank Act, the OMWI Director is required to determine whether a contractor or subcontractor has made good faith efforts to include minorities and women in its workforce. The proposed Contract Standard would require that a Commission contractor, upon request from the OMWI Director, provide documentation of the actions undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) that demonstrate its good faith efforts to ensure the fair inclusion of minorities and women in its workforce. The documentation requested may include, but is not limited to: 1) the total number of employees in the contractor's workforce, and the number of employees by race, ethnicity, gender, and job title or EEO-1 job category (e.g., EEO-1 Report(s)); 2) a list of covered subcontract awards under the contract that includes the dollar amount of each subcontract, date of award, and the subcontractor's race, ethnicity, and/or gender ownership status; 3) the contractor's plan to ensure the fair inclusion of minorities and women in its workforce, including outreach efforts; and 4) for each covered subcontractor, the information requested in items 1 and 3 above. The OMWI Director will consider the information submitted in evaluating whether the contractor or subcontractor has complied with its contractual obligation to make good faith efforts to ensure the fair inclusion of minorities and women in its workforce.

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[5] 44 U.S.C. 3506(c)(2).

2. Respondents and Estimate of Recordkeeping and Reporting Burdens.

The proposed Contract Standard will be included in Commission contracts and subcontracts for services with a dollar value of $100,000 or more. Based on the data showing the dollar value of service contracts and subcontracts awarded in FY 2012 and FY 2013, we estimate that 170 contractors[6] would be subject to the proposed Contract Standard. Approximately 120 of these contractors have 50 or more employees, while about 50 contractors have fewer than 50 employees.

a. Recordkeeping Burden

The information collection under the proposed Contract Standard would impose no new recordkeeping burdens on the estimated 120 contractors that have 50 or more employees. Such contractors are generally subject to recordkeeping and reporting requirements under the regulations implementing Title VII of the Civil Rights Act[7] and Executive Order 11246 ("EO 11246")[8]. Their contracts and subcontracts must include the clause implementing EO 11246 -- FAR 52.222-26, Equal Opportunity. In addition, contractors that have 50 or more employees (and a contract or subcontract of $50,000 or more) are required to maintain records on the race, ethnicity, gender, and EEO-1 job category of each employee under Department of Labor regulations implementing EO 11246.[9] The regulations implementing EO 11246 also require contractors that have 50 or more employees (and a contract or subcontract of $50,000 or more) to demonstrate that they have made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results,[10] and to develop and maintain a

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[6] Unless otherwise specified, the term "contractors" refers to contractors and subcontractors.
[7] 42 U.S.C. 2000e, et seq.
[8] Executive Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).
[9] See 41 CFR 60-1.7.
[10] See 41 CFR 60-2.17(c).

written program, which describes the policies, practices, and procedures that the contractor uses to ensure that applicants and employees receive equal opportunities for employment and advancement.[11] In lieu of developing a separate workforce inclusion plan, a contractor would be permitted to submit its existing written program prescribed by the EO 11246 regulations as part of the documentation that demonstrates the contractor's good faith efforts to ensure the fair inclusion of minorities and women in its workforce. Thus, approximately 120 contractors are already required to maintain the information that may be requested under the proposed Contract Standard.

The estimated 50 contractors that employ fewer than 50 employees are required under the regulations implementing EO 11246 to maintain records showing the race, ethnicity and gender of each employee. We believe that these contractors also keep job title information during the normal course of business. However, contractors that have fewer than 50 employees may not have the written program prescribed by the EO 11246 regulations or similar plan that could be submitted as part of the documentation to demonstrate their good faith efforts to ensure the fair inclusion of minorities and women in their workforces. Accordingly, contractors with fewer than 50 employees may have to create a plan to ensure workforce inclusion of minorities and women.

In order to estimate the burden on contractors associated with creating a workforce inclusion plan, we considered the burden estimates for developing the written programs required under the regulations implementing EO 11246.[12] As there is no regulatory blueprint for a

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[11] See 41 CFR part 60-2.

[12] According to the Supporting Statement for the OFCCP Recordkeeping and Requirements-Supply Service, OMB Control No. 1250-003 ("Supporting Statement"), it takes approximately 73 burden hours for contractors with 1-100 employees to develop the initial written program required under the regulations implementing EO 11246. We understand the quantitative analyses prescribed by the Executive Order regulations at 41 CFR part 60-2 are a time-

workforce inclusion plan, and contractors creating a workforce inclusion plan are not required to perform the same types of analyses required for the written programs prescribed by the EO 11246 regulations, we believe that to develop a workforce inclusion plan contractors with fewer than 50 employees would require approximately a third of the hours that contractors of similar size spend on developing the written programs required under the EO 11246 regulations. Accordingly, we estimate that contractors would spend about 24 hours of employee resources to develop a workforce inclusion plan. This would be a one-time total burden of 1,200 hours. After the initial development, we estimate that each contractor with fewer than 50 employees would spend approximately 10 hours each year updating and maintaining its workforce inclusion plan for a total annual burden of 500 hours. To account for this expected diminishing burden, we use a three-year average of the expected burden during the first year with the expected ongoing burden during the next two years to estimate the annual recordkeeping burden on contractors with fewer than 50 employees. Thus, we estimate that the total annual recordkeeping burden for such contractors to be about 740 hours [(1,200+500+500) / 3 years, rounded up].

The proposed contract standard also would require contractors to maintain information about covered subcontractors' ownership status, workforce demographics, and workforce inclusion plans. Contractors would request this information from their covered subcontractors, who would have an obligation to keep workforce demographic data and maintain workforce inclusion plans because the substance of the proposed Contract Standard would be included in their subcontracts. Based on data describing recent Commission subcontractor activity, we

consuming aspect of the written program development. As there is no requirement to perform these types of quantitative analyses in connection with a workforce inclusion plan under the proposed Contract Standard, we believe the workforce inclusion plan will take substantially fewer hours to develop. The Supporting Statement is available at reginfo.gov.

believe that very few subcontractors will have subcontracts under Commission service contracts with a dollar value of $100,000 or more.[13] These subcontractors may already be subject to similar recordkeeping requirements as principal contractors. Consequently, we believe that any additional requirements imposed on subcontractors would not significantly add to the burden estimates discussed above.

b. Reporting Burden

With respect to the reporting burden, we estimate that it would take all contractors on average approximately one hour to retrieve and submit to the OMWI Director the documentation specified in the proposed Contract Standard. We expect to request documentation from up to 100 contractors each year and therefore we estimate the total annual reporting burden to be 100 hours.

B. Solicitation of Public Comment

We request comments on the proposed collection of information in order to: (a) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of the Commission's estimate of the burden (including hours and cost) of the proposed collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

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[13] A search of subcontract awards on the usaspending.gov website showed that four subcontractors in FY 2012 and three subcontractors in FY 2013 had subcontracts of $100K or more. See data on subcontract awards available at http://usaspending.gov.

Persons who desire to submit comments on the collection of information may use any of the methods shown in the ADDRESSES section of this notice. Comments should be received on or before: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Text of Proposed Contract Standard for Contractor Workforce Inclusion

NOTE: The Text of this Proposed Contract Standard will not appear in the Code of Federal Regulations.

CONTRACTOR WORKFORCE INCLUSION

Authority: 12 U.S.C. 5452; Sec. 342, Pub. L. 111-203.

Scope.

The agency will include the Contractor Workforce Inclusion contract standard in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more.

Contract Standard.

The following contract standard shall be included in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more.

CONTRACTOR WORKFORCE INCLUSION

The Contractor confirms its commitment to equal opportunity in employment and contracting, and that it shall ensure, to the maximum extent possible and consistent with applicable law, the fair inclusion of minorities and women in its workforce.

The Contractor shall insert the substance of this contract standard in each subcontract for services awarded for performance of this contract with a dollar value of $100,000 or more.

Within ten (10) business days of a written request from the Director of the Commission's Office of Minority and Women Inclusion (OMWI Director) or designee, or such longer time as the OMWI Director or designee determines, and without any additional consideration, action or authorization required from the OMWI Director, the Contractor shall provide documentation, satisfactory to the OMWI Director, of the actions it has undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) to demonstrate its good faith efforts to comply with the aforementioned provisions.

For purposes of this contract, "good faith efforts" shall include actions by the Contractor (and as applicable, actions by each covered subcontractor under the Service Contract) to identify and, if present, remove barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting to ensure that applicant pools include minorities and women, providing job-related training, or other activity that could lead to removing such barriers.

The documentation requested by the OMWI Director or designee to demonstrate good faith efforts may include, but is not limited to, one or more of the following:

a. The total number of Contractor's employees, and the number of employees by race, ethnicity, gender, and job title or EEO-1 Report job category (e.g., EEO-1 Report(s));

b. A list of covered subcontract awards for services under the contract, and for each covered subcontract award, the dollar amount, date of award, and the subcontractor's race, ethnicity, and/or gender ownership status;

c. The contractor's plan for ensuring the fair inclusion of minorities and women in its workforce, including outreach efforts; and

d. For each covered subcontractor, the documentation specified in paragraphs a. and c. above.

Consistent with Section 342(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), 12 U.S.C. § 5452(c)(3), a Contractor's failure to demonstrate to the OMWI Director that it has made good faith efforts to include minorities and women in its workforce (and as applicable, failure to demonstrate that its subcontractor(s) has made such good faith efforts) may result in termination of the contract for default after the contractor is provided written notice and an opportunity to cure the failure in accordance with the procedures set forth in FAR 49.402-3(d), other contractual remedies, referral to the Office of Federal Contract Compliance Programs (OFCCP), or other appropriate action.

Compliance with this standard does not necessarily satisfy the requirements of EO 11246, as amended, nor does it preclude OFCCP compliance evaluations and/or enforcement actions undertaken pursuant to that Executive Order, or demonstrate compliance with other FAR clauses that may be included in this contract.

For purposes of this contract standard, the term "minority" shall have the meaning set forth in section 342(g) of the Dodd-Frank Act.

By the Commission.

Brent J. Fields
Secretary

February 10, 2015

Commissioner Piwowar Disapproved
Commissioner Gallagher Dissent as to Clawback of Slater's Bonus

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74240 / February 10, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3636 / February 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16381

In the Matter of

WILLIAM SLATER, CPA and
PETER E. WILLIAMS, III

Respondents.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against William Slater and Peter E. Williams, III ("Respondents").

II.

In anticipation of the institution of these proceedings, the Respondents have submitted Offers of Settlement (the "Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over each and over the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

1. This matter involves misstated revenues in the professional services organization at Saba Software, Inc. ("Saba" or "the Company"), a Silicon Valley-based enterprise software company. The misstatements were the result of the falsification of time records over a period of more than four years by professional services managers in multiple geographies directing consultants in Saba's Indian subsidiary (the India Consulting Group or "ICG") to falsify time records by either recording time in advance of performance of work or failing to record time for hours worked in order to achieve their quarterly revenue and margin targets.

2. As a result, Saba reported materially false financial results in its financial statements filed with the Commission over the period from October 4, 2007 through January 6, 2012. As Saba announced on August 6, 2012 and November 5, 2012, management has determined that the Company is required to restate its financial statements for fiscal years 2008 through 2011, as well as the first two quarters of fiscal 2012, as a result of misconduct. The Company expects that the restatement will change the time period during which the affected revenues are recognized, generally shifting the timing of such revenues to later periods.

3. Saba's former Chief Financial Officers, William Slater and Peter E. Williams, III, realized Saba stock-sale profits and received bonuses during the 12-month periods following the filings containing financial results that Saba is required to restate. The Commission does not allege that Slater and Williams participated in the misconduct giving rise to the restatement. Slater and Williams have not, however, reimbursed Saba for stock-sale profits and bonuses they are required to reimburse the Company under Section 304(a) of the Sarbanes-Oxley Act.

Respondents

4. **William Slater**, age 63, is a resident of San Diego, California. He served as Chief Financial Officer and Principal Accounting Officer of Saba from December 9, 2008 through October 27, 2011. He served as Chief Financial Officer, Vice President and Treasurer of another public company from November 10, 2011 to February 15, 2013. Slater was licensed as a certified public accountant in New York from 1978 to 2003, when his license became inactive.

5. **Peter E. Williams III**, age 53, is a resident of Hillsborough, California. Prior to joining Saba as General Counsel in October 1999, Williams was a partner at an international law

[1] The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

firm. Williams has been Saba's Secretary from the time of the Company's inception in April 1997. Williams served as Saba's Chief Financial Officer and Principal Accounting Officer from March 2004 to July 2007 and then again, on an interim basis, from October 27, 2011 until January 7, 2012. Since July 2007, Williams has also served as Executive Vice President, Corporate Development. Williams has been licensed to practice law in California since 1987. He has never been licensed as a certified public accountant.

6. **Saba Software, Inc.** ("Saba" or "the Company") is a Delaware corporation headquartered in Redwood Shores, California. The software company provides cloud-based enterprise learning, talent management and social networking tools to businesses and large organizations. At all relevant times, Saba's common stock has been registered pursuant to Section 12 of the Exchange Act. From its IPO in April 2000 until July 31, 2006, its common stock was registered pursuant to Section 12(g). Thereafter, until June 2013, it was registered pursuant to Section 12(b). It traded on the Nasdaq Global Market until it was suspended on April 9, 2013, and then it was delisted effective June 17, 2013 for failure to remain compliant with its SEC reporting obligations. Upon its delisting and deregistration from Section 12(b), it reverted to its previous Section 12(g) registration. Its common stock is currently registered pursuant to Section 12(g) and traded on the OTC Markets. Saba has not filed any periodic reports since January 6, 2012, when it filed its Form 10-Q for the quarter ended November 30, 2011.

Facts

A. Saba's Falsification of Time Records

7. Saba's professional services historically have accounted for about one third of its approximately $120 million in yearly revenues. Professional services have been delivered to customers worldwide by (1) customer-facing field consultants in North America and Europe ("Field Consultants") and (2) off-shore technical development services provided to the Field Consultants by the Company's India Consulting Group ("ICG Consultants"). ICG is an organization within Saba's Indian subsidiary designed to help the Company deliver professional services to its customers at a lower cost than comparable consultants in North America and Europe. By 2011, ICG employed 50-60 consultants who generated approximately 14,000 hours of billable work per quarter, which constituted about 17% of consulting revenue and 6% of total revenue per quarter.

8. Both Field Consultants and ICG Consultants were required to record time worked on customer projects in a timesheet database. Hours input into the system by Field or ICG Consultants were approved on a weekly basis by project managers in North America and Europe, and revenue for the professional services organization was then measured based on the approved number of hours in the timesheet database.

9. Saba disclosed in its public filings that it recognized revenue for both "time and materials" and "fixed fee" contracts as the services were performed. This revenue recognition treatment was consistent with GAAP only if Saba could demonstrate that (1) its customers have historically paid a consistent rate for its services (measured by Vendor Specific Objective Evidence

or "VSOE") and (2) it could accurately estimate how many hours it took to complete projects ("ability to estimate"). Therefore, Saba's finance personnel depended on accurate time records to ensure that Saba recognized revenue in accordance with GAAP.

10. From at least 2008 through the second quarter of Saba's fiscal 2012, Saba professional services employees and managers engaged in two time-keeping practices that led to its false revenue recognition. First, there were multiple incidents of ICG Consultants recording hours and billing customers for the performance of professional services in advance of performing those services in order to accelerate revenue recognition and achieve quarterly revenue targets ("pre-booking"). Second, ICG and Field Consultants regularly failed to report professional services time worked in order to conceal budget overruns from management and finance, instead recording that time to non-billable project codes or not at all ("under-booking").

11. These improper time-keeping practices precluded the time records from serving as reliable evidence under GAAP to recognize revenue in the manner that Saba did. As such, Saba management has concluded that Saba cannot demonstrate VSOE for the period from 2008 through the second quarter of fiscal 2012. Over that period, therefore, Saba was required to recognize professional services revenues on a completed contract basis, which would have required it to defer substantially all of its professional services revenue and much of its license revenue (where software licenses were bundled with professional services) until the contract was completed. Accordingly, virtually all of Saba's professional services revenue was misstated over the relevant time period because revenue was recognized earlier than it should have been under the applicable accounting principles.

12. The practices of pre-booking and under-booking were directed by and known to numerous individuals in the professional services organization and ICG, including the two most senior Saba employees overseeing the professional services organization in North America over the relevant time period. Those senior Saba employees were told on multiple occasions by the finance department that the Company's accountants and auditors needed to understand exactly how many hours were being worked and when (regardless of whether or not they were billed to the customer) in order to ensure that revenue was recognized accurately, and they understood that inaccurate time-keeping would lead to misstatements in Saba's reported professional services revenue and violate the Company's policies regarding financial reporting, including the Code of Business Conduct and the Revenue Recognition Policy.

B. Scope and Impact of the Fraud

13. Saba's professional services revenues, gross margins and income were materially overstated in its periodic filings from October 4, 2007 through January 6, 2012 as a result of the time-reporting misconduct.

14. The practices of pre-booking and under-booking, and the fundamental inaccuracy in Saba's time records revealed by these practices, have led Saba management to conclude that it can no longer rely on its calculation of VSOE of fair value for professional services. In this circumstance, ASC 985-605 (Certain Revenue Arrangements That Include Software Elements) and

ASC 605-35 (Revenue Recognition) require that the Company defer to the point where services are complete, rather than recognize over the period where services are performed, standalone services revenue and revenue on software license and cloud services agreements that contain bundled professional services. Accordingly, Saba has determined and announced that it is required to restate its financial statements for the years 2008, 2009, 2010 and 2011, and the first two quarters of 2012, due to its material non-compliance with GAAP. Although Saba has not yet filed its required restatement, the cumulative impact of this alternative revenue recognition treatment is approximately $70 million over the period from 2008 through the second fiscal quarter of 2012. The Company expects that the restatement will change the time period during which the affected revenues are recognized, generally shifting the timing of such revenues to later periods.

15. These misstatements are material. First, based on the Company's own estimates, the restated financials will reflect overstatements of gross revenue and profit of more than 5% in each year for the period 2008 through 2011. Second, the effect of the inflated revenue was that Saba met analyst expectations for EPS in certain quarters and caused at least one year (2010) to reflect net income when, but for the inflated revenue, the Company should have reported a net loss.

C. Saba's Required Restatement

16. On August 6, 2012, Saba announced that, following an internal accounting review, management had determined that its annual financial results for fiscal years 2011 and 2010, as well as the first and second quarters of fiscal year 2012, should be restated as a result of instances of improper time-recording that it had identified in the Company's professional services business. On November 5, 2012, Saba announced that management had determined that the Company's annual financial results for fiscal years 2009 and 2008 would also need to be restated.

D. Compensation of CFOs Slater and Williams

17. During the 12-month periods that followed the filing of the periodic reports requiring restatement, Slater and Williams received bonuses and realized profits from sales of Saba stock.

18. Slater and Williams have not reimbursed those amounts to Saba.

Violations

19. Section 304 of the Sarbanes-Oxley Act of 2002 requires the chief financial officer of any issuer required to prepare an accounting restatement due to material noncompliance with the securities laws as a result of misconduct to reimburse the issuer for (i) any bonus or incentive-based or equity-based compensation received by that person from the issuer during the 12-month periods following the false filings, and (ii) any profits realized from the sale of securities of the issuer during those 12-month periods. Section 304 does not require that a chief financial officer engage in misconduct to trigger the reimbursement requirement. Slater and Williams both realized Saba stock-sale profits and received bonuses during the 12-month periods following the filings

containing financial results that Saba is required to restate. They have not, to date, reimbursed the Company for those amounts. Slater and Williams have, therefore, violated Sarbanes-Oxley Section 304.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED, pursuant to Section 21C of the Exchange Act, that:

A. Respondents Slater and Williams cease and desist from committing or causing any violations and any future violations of Section 304 of the Sarbanes-Oxley Act.

B. Respondent Slater shall, within 30 days of the entry of this Order, reimburse Saba for a total of $337,375 pursuant to Section 304(a) of SOX. Respondent shall simultaneously deliver proof of satisfying this reimbursement obligation to Erin Schneider, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104.

C. Respondent Williams shall, within 30 days of the entry of this Order, reimburse Saba for a total of $141,992 pursuant to Section 304(a) of SOX. Respondent shall simultaneously deliver proof of satisfying this reimbursement obligation to Erin Schneider, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2800, San Francisco, California 94104.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74241; File No. SR-OCC-2014-812)

February 10, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Concerning Extended and Overnight Trading Sessions

On December 12, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") advance notice SR-OCC-2014-812 ("Advance Notice")[1] pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[2] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Exchange Act").[3] The Advance Notice was published for comment in the Federal Register on January 22, 2015.[4] The

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1 OCC initially filed a similar advance notice on September 17, 2014. Securities Exchange Act Release No. 73343 (October 14, 2014), 79 FR 62684 (October 20, 2014), (SR-OCC-2014-805). OCC withdrew that advance notice on October 28, 2104. Securities Exchange Act Release No. 73710 (December 1, 2014), 79 FR 72225 (December 5, 2014), (SR-OCC-2014-805).

2 12 U.S.C. 5465(e)(1). The Financial Stability Oversight Council designated OCC a systemically important financial market utility on July 18, 2012. See Financial Stability Oversight Council 2012 Annual Report, Appendix A, http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf. Therefore, OCC is required to comply with the Clearing Supervision Act and file advance notices with the Commission. See 12 U.S.C. 5465(e).

3 17 CFR 240.19b-4(n)(1)(i).

4 See Securities Exchange Act Release No. 74073 (January 15, 2015), 80 FR 3287 (January 22, 2015) (SR-OCC-2014-812). OCC also filed the proposal contained in this advance notice as a proposed rule change under Section 19(b)(1) of the Act and Rule 19b-4 thereunder, which was published for comment in the Federal Register on December 30, 2014. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4. See Securities Exchange Act Release No. 73907 (December 22, 2014), 79 FR 78543 (December 30, 2014) (SR-OCC-2014-24). The Commission did not receive any comments on the proposed rule change.

Commission did not receive any comments on the Advance Notice. This publication serves as a notice of no objection to the Advance Notice.

I. Description of the Advance Notice

Description of Change

This advance notice was filed in connection with OCC's proposed change to its operations concerning the clearance of confirmed trades executed in overnight trading sessions offered by exchanges for which OCC provides clearance and settlement services. OCC currently clears overnight trading activity for CBOE Futures Exchange, LLC ("CFE").[5] The total number of trades submitted to OCC from overnight trading sessions is nominal, typically less than 3,000 contracts per session. However, OCC has recently observed an industry trend whereby exchanges are offering overnight trading sessions beyond traditional hours. Exchanges offering overnight trading sessions have indicated to OCC that such sessions benefit market participants by providing additional price transparency and hedging opportunities for products traded in such sessions, which, in turn, promotes market stability.[6] In light of this trend, OCC proposed to implement a framework for clearing trades executed in such sessions that includes: 1) qualification criteria used to approve clearing members for overnight trading sessions, 2) systemic controls to identify trades executed during overnight trading sessions by clearing members not approved for such sessions, 3) enhancements to OCC's overnight monitoring of trades submitted by exchanges during overnight trading sessions,

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5 ELX Futures LP ("ELX") previously submitted overnight trading activity to OCC, but currently does not submit such trades. OCC will re-evaluate ELX's risk controls in the event ELX re-institutes its overnight trading sessions.

6 See CFE-2014-010 at http://cfe.cboe.com/publish/CFErulefilings/SR-CFE-2014-010.pdf.

4) enhancements to OCC's credit controls with respect to monitoring clearing members' credit risk during overnight trading sessions, including procedures for contacting an exchange offering overnight trading sessions in order to invoke use of the exchange's kill switch, and 5) taking appropriate disciplinary action against clearing members who attempt to clear during the overnight trading session without first obtaining requisite approvals. These changes (described in greater detail below) are designed to reduce and mitigate the risks associated with clearing trades executed in overnight trading sessions. In addition, the only products that will be eligible for clearing in overnight trading sessions are index options and index futures products.

OCC's framework for determining whether to provide clearing services for overnight trading sessions offered by an exchange is designed to work in conjunction with the risk controls of the exchange that offers overnight trading sessions. OCC will confirm an exchange's risk controls as well as its staffing levels as they relate to overnight trading sessions to determine if OCC may reasonably rely on such risk controls to reduce the risk presented to OCC by the exchange's overnight trading sessions. Such exchange risk controls will consist of: 1) price reasonability checks, 2) controls to prevent orders from being executed beyond a certain percentage (determined by the exchange) from the initial execution price, 3) activity based protections which focus on risk beyond price, such as a high number of trades occurring in a set period of time, and 4) kill switch capabilities, which may be initiated by the exchange and can cancel all open quotes or all orders of a particular participant. OCC believes that confirming the existence of applicable pre-trade risk controls as well as overnight staffing at the relevant exchanges is essential to mitigating risks presented to OCC from overnight trading sessions.[7] OCC believes that providing clearing services to exchanges offering such sessions is consistent with OCC's mission to provide market participants with clearing and risk management solutions that respond to changes in the marketplace.

Qualification Criteria

In order to mitigate risks associated with clearing for overnight trading sessions, clearing members that participate in such trading sessions will be required to provide contact information to OCC for operational and risk personnel available to be contacted by OCC during such sessions. In addition, OCC will require that clearing members participating in an overnight trading session post additional margin in a designated account in order to mitigate the risk that OCC cannot draft a clearing member's bank account during an overnight trading session.[8] OCC also will adopt a procedure whereby, on a quarterly basis, it confirms its record of clearing members eligible for overnight trading sessions with a similar record maintained by exchanges offering such overnight trading sessions.

With respect to providing operational and risk contacts, under OCC Rule 201, each clearing member is required to maintain facilities for conducting business with OCC

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7 Comparable controls are applied to futures and future option trades executed in overnight trading sessions currently cleared by OCC, although such controls have been implemented by clearing futures commission merchants ("clearing FCMs") pursuant to Commodity Futures Trading Commission ("CFTC") Regulation 1.73. This requires clearing FCMs to monitor for adherence to such controls during regular and overnight trading sessions. Some of these risk control measures are similar to those proposed by OCC for use in clearing securities trades in overnight trading sessions. For instance, OCC confirmed that CFE maintains kill switch capabilities.

8 Clearing members will be required to designate a firm account to ensure that OCC has a general lien on the assets in the account and can use them to satisfy any obligation of the clearing member to OCC.

and to have a representative authorized in the name of the clearing member to take all action necessary for conducting business with OCC available at the facility during such hours as may be specified from time-to-time by OCC. Similarly, OCC Rules 214(c) and (d) require clearing members to ensure that they have the appropriate number of qualified personnel and to maintain the ability to process anticipated volumes and values of transactions. OCC will use this existing authority to require clearing members trading during overnight trading sessions to maintain operational and risk staff that may be contacted by OCC during such sessions.

OCC will impose upon clearing members qualified to participate in overnight trading sessions additional margin requirement in an amount of the lesser of $10 million or 10% of the clearing member's net capital ("Additional Margin"), which will be equal to the first monitoring risk threshold (described below) and which will be collected the morning before each overnight trading sessions. Clearing members must identify the proprietary account that would be charged the Additional Margin amount. The Additional Margin requirement is intended to provide OCC with additional margin assets should a clearing member's credit risk increase during overnight trading sessions.[9] OCC proposes to adopt a process whereby each morning OCC Financial Risk Management staff will assess the Additional Margin requirement against clearing members eligible to participate in overnight trading sessions. Clearing members that do not have sufficient excess margin on deposit with OCC to meet the Additional Margin amount will be

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9 Clearing members approved for overnight trading sessions that do not meet the Additional Margin requirement for a given overnight trading session would be treated like a clearing member not approved for overnight trading sessions, as described below.

required to deposit additional funds with OCC to satisfy the Additional Margin requirement prior to participating in any future overnight trading sessions.[10] This process will be adopted under existing rule authority.

Moreover, OCC also will confirm that an exchange offering overnight trading sessions has adopted a procedure whereby such exchange would contact OCC when a trader requests trading privileges during overnight trading sessions. The purpose of this contact is to verify that the trader's clearing firm (i.e., the OCC clearing member) is approved for overnight trading sessions. If the applicable OCC clearing member is not approved for overnight trading sessions, then the clearing member must receive OCC's approval for overnight trading sessions, or the exchange will not provide the trader trading privileges during overnight trading sessions. Moreover, OCC will confirm that an exchange offering overnight trading sessions has implemented a procedure to periodically (i.e., quarterly) validate its record of approved clearing firms against OCC's record of clearing members approved for overnight trading sessions.[11] Any discrepancies between the two records will be promptly resolved by either the clearing member obtaining approval from OCC for overnight trading sessions or by the exchange revoking the clearing firm's trading privileges for overnight trading sessions.

Systemic Controls

OCC will implement system changes so that trades submitted to OCC during overnight trading sessions that have been executed by clearing members not approved for

[10] Under OCC Rule 601, OCC has the discretion to fix the margin requirement for any account at an amount that it deems necessary or appropriate under the circumstances to protect the interests of clearing members, OCC and the public.

[11] As discussed in more detail below, clearing members that attempt to participate in overnight trading sessions without the necessary approval will be subject to a minor rule violation fine.

such trading sessions will be reviewed by OCC staff after acceptance but before being processed (each such trade being a "Reviewed Trade"). OCC will contact the submitting exchange regarding each Reviewed Trade in order to determine if the trade is a valid trade. If the exchange determines that the Reviewed Trade was in error such that, as provided in Article VI, Section 7(c) of OCC's By-laws, new or revised trade information is required to properly clear the transaction, OCC expects the exchange would instruct OCC to disregard or "bust" the trade. If the exchange determines that the Reviewed Trade was not in error, then OCC will clear the Reviewed Trade and take appropriate disciplinary action against the non-approved clearing member, as described below. OCC believes that clearing the Reviewed Trade is appropriate in order to avoid potentially harming the clearing member approved for overnight trading sessions that is on the opposite side of the transaction.

Overnight Monitoring

OCC will implement additional overnight monitoring in order to better monitor clearing members' credit risk during overnight trading sessions. Such monitoring of credit risk is similar to existing OCC practices concerning futures cleared during overnight trading hours and includes automated processes within OCC's ENCORE clearing system to measure, by clearing member: (i) the aggregate mark-to-market amounts of a clearing member's positions, including positions created during overnight trading, based on current prices using OCC's Portfolio Revaluation system, (ii) the aggregate incremental margin produced by all positions resulting from transactions executed during overnight trading, and (iii) with respect to options cleared during overnight trading hours, the aggregate net trade premium positions resulting from trades executed during overnight trading (each of these measures being a "Credit Risk Number"). Hourly credit reports would be generated by ENCORE containing the Credit Risk Numbers expressed in terms of both dollars and, except for the mark-to-market position values, as a percentage of net capital for each clearing member trading during overnight trading sessions. The Credit Risk Numbers are the same information used by OCC staff to evaluate clearing member exposure during regular trading hours and, in addition to OCC's knowledge of its clearing members' businesses, are effective measures of the risk presented to OCC by each clearing member. OCC's Operations staff will review such reports as they are generated and, in the event that any of the Credit Risk Numbers for positions established by a clearing member during an overnight trading session exceed established thresholds, staff will alert OCC's Market Risk staff[12] of the exceedance in accordance with established procedures, as described below.

Market Risk staff will follow a standardized process concerning such exceedances, including escalation to OCC's management, if required by such process. Given the nominal volume of trades executed in overnight trading sessions that are presently submitted for clearance, OCC does not contemplate changes in its current staffing levels that support overnight clearing activities at this time, however, OCC will periodically assess and adjust such staffing levels as appropriate. As part of the overnight clearing activities, OCC has, however, designated an on-call Market Risk duty officer who would be responsible for reviewing issues that arise when clearing for overnight

12 OCC's Member Services staff will also receive alerts in order to contact clearing members as may be necessary.

trading session and determining what measures to be taken as well as additional escalation, if necessary.

With respect to OCC's escalation thresholds, if any Credit Risk Number of a clearing member approved for overnight trading sessions is $10 million or more, or any Credit Risk Number equals 10% or more of the clearing member's net capital, OCC's Operations staff will be required to provide e-mail notification to Market Risk and Member Services staff. If any Credit Risk Number of a clearing member not approved for overnight trading sessions is $10 million or more, or any Credit Risk Number equals 10% or more of the clearing member's net capital, OCC's Operations will also notify Market Risk and Member Services staff as well as its senior management. Such departments will take action to prevent additional trading by the non-approved clearing member, including contacting the exchange to invoke use of the exchange's kill switch.

If any Credit Risk Number of a clearing member approved for overnight trading sessions is $50 million or more, or equals 25% or more of the clearing member's net capital, Operations staff will be required to contact, by telephone: (i) Market Risk and Member Services, (ii) the applicable exchange for secondary review, and (iii) the clearing member's designated contacts. The on-call Market Risk duty officer also will consider if additional action is necessary, which may include contacting a designated executive officer in order to issue an intra-day margin call, increase the clearing member's margin requirement in order to prevent the withdrawal of a specified amount of excess margin collateral, if any, the clearing member has on deposit with OCC, or contacting the exchange in order to invoke the use of its kill switch.

If any Credit Risk Number is $75 million or more, or equals 50% or more of the clearing member's net capital, Operations staff will be required to contact, by telephone, Market Risk staff, the on-call Market Risk duty officer, and a designated executive officer. Such officer will be responsible for reviewing the situation and determining whether to implement credit controls, which are described in greater detail below and include: issuing an intra-day margin call, increasing a clearing member's margin requirement in order to prevent the withdrawal of a specified amount of excess margin collateral, if any, the clearing member has on deposit with OCC, whether further escalation is warranted in order for OCC to take protective measures pursuant to OCC Rule 305, or contact the exchange in order to invoke use of its kill switch. OCC stated that it chose the above described escalation thresholds based on its analysis of historical overnight trading activity across the futures industry. OCC believes that these thresholds strike an appropriate balance between effective risk monitoring and operational efficiency.

Credit Controls

In order to address credit risk associated with trading during overnight trading sessions, and as described above, OCC will collect Additional Margin from clearing members as well as monitor and analyze the impact that positions established during such sessions have on a clearing member's overall exposure. Should the need arise based on threshold breaches described above, and pursuant to OCC Rule 609, OCC may require the deposit of additional margin ("intra-day margin") by any clearing member that increases its incremental risk as a result of trading activity during overnight trading sessions. Accordingly, a clearing member's positions established during such sessions will be incorporated into OCC's intra-day margin process. Should a clearing member's exposure significantly increase while settlement banks are not open to process an intra-day margin call, OCC has the authority under OCC Rule 601 to increase a clearing member's margin requirement which will restrict its ability to withdraw excess margin collateral. The implementation of these measures is discussed more fully below.

In the event that a clearing member's exposure during overnight trading sessions causes a clearing member to exceed OCC's intra-day margin call threshold for overnight trading sessions, OCC will require the clearing member to deposit intra-day margin equal to the increased incremental risk presented by the clearing member. Specifically, if a clearing member has a total risk charge[13] exceeding 25% (a reduction of the usual figure of 50%), as computed overnight by OCC's STANS system, and a loss of greater than $50,000 from an overnight trading session(s), as computed by Portfolio Revaluation, OCC will initiate an intra-day margin call. OCC will know at approximately 8:30 a.m. (Central Time) if an intra-day margin call on a clearing member will be initiated based on breaches of these thresholds. This "start of business" margin call is in addition to daily margin OCC collects from clearing members pursuant to OCC Rule 605, any intra-day margin call that OCC may initiate as a result of regular trading sessions, or special margin call that OCC may initiate.

13 Total risk charge is a number derived from STANS outputs and is the sum of expected shortfall, stress test charges and any add-on charges computed by STANS. STANS is OCC's proprietary margin methodology.

In addition to, or instead of, requiring additional intra-day margin, OCC Rule 601[14] and OCC's Clearing Member Margin Call Policy will work together to authorize Market Risk staff to increase a clearing member's margin requirement which may be in an amount equal to an intra-day margin call.[15] (Any increased margin requirement will remain in effect until the next business day.) This action will immediately prevent clearing members from withdrawing any excess margin collateral (in the amount of the increased margin requirement) the clearing member has deposited with OCC. With respect to clearing trades executed in overnight trading sessions, and in the event OCC requires additional margin from a clearing member, Market Risk staff may use increased margin requirements as a means of collateralizing the increase in incremental risk a clearing member incurred during such sessions without having to wait for banks to open to process an intra-day margin call.[16] Such action may be taken by OCC instead of, or in addition to, issuing an intra-day margin call depending on the amount of excess margin a clearing member has on deposit with OCC and the amount of the incremental risk presented by such clearing member. OCC believes that the expansion of its intra-day margin call process as described in the preceding paragraph, including OCC's ability to manually increase clearing members' margin requirements, will mitigate the risk that OCC is under-collateralized as a result of overnight trading hours.

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14 In addition, OCC Rule 601 provides OCC with the authority to fix the margin requirement for any account or any class of cleared contracts at such amount as it deems necessary or appropriate under the circumstances to protect the respective interests of clearing members, OCC, and the public.

15 Clearing members frequently deposit margin at OCC in excess of requirements.

16 Clearing members will be able to substitute the locked-up collateral during normal time frames (i.e., 6:00 a.m. to 5:00 p.m. (Central Time) for equity securities).

Moreover, a designated executive officer may call an exchange offering overnight trading sessions to invoke the use of its kill switch. The kill switch prevents a clearing member (or the market participant clearing through a clearing member) from executing trades on the exchange during a given overnight trading session or, if needed, stop all trading during a given overnight trading session. Finally, pursuant to OCC Rule 305, the Executive Chairman or the President of OCC, in certain situations, has the authority to impose limitations and restrictions on the transactions, positions, and activities of a clearing member. This authority will be used, as needed, in the event a clearing member accumulates significant credit risk during overnight trading sessions, or a clearing member's activities during such trading sessions otherwise warrant OCC taking protective action.

Rule Enforcement Actions

In order to deter clearing members from attempting to participate in overnight trading sessions without authorization as well as appropriately enforce the above described processes, OCC will ensure that any attempt by a clearing member to participate in overnight trading sessions without first obtaining the necessary approval will result in the initiation of a rule enforcement action against such clearing member. As described above, clearing members not approved for overnight trading sessions that trade during such overnight sessions will have their trades reviewed by OCC staff. Clearing members that attempt to participate in overnight trading sessions but do not obtain the necessary approval to do so will be subject to a minor rule violation fine.[17] In addition, if a clearing member's operational or risk contacts for overnight trading sessions were

17 See OCC Rule 1201(b).

unavailable had OCC attempted to contact such individuals, the clearing member will be subject to a minor rule violation fine. OCC has existing processes in place to monitor for clearing member violations of OCC's rules and such processes also will apply to clearing member activity during overnight trading sessions.

Effect that OCC Anticipates on and Management of Risk

Clearing transactions executed in overnight trading sessions may increase risk presented to OCC due to the period of time between trade acceptance and settlement, the staffing levels at clearing members during such trading sessions, and the deferment of executing intra-day margin calls until banking settlement services are operational. However, OCC will expand its risk management practices in order to mitigate these risks by implementing, and expanding, the various tools discussed above. For example, OCC will enhance its monitoring practices in order to closely monitor clearing members' credit risk from trades placed during overnight trading sessions as well as implement processes so that OCC takes appropriate action when such credit risk exceeds certain limits. OCC also will use its existing authority to require adequate clearing member staffing during such trading sessions, in order to mitigate the operational risk associated with clearing members trading while they are not fully staffed. These risk management functions will work in tandem with risk controls, including the implementation of kill switch capabilities, adopted by the exchanges operating overnight trading sessions or by clearing FCMs, as applicable.

In addition to the above, OCC will adapt existing processes so that such processes can be used to mitigate risk associated with overnight trading sessions. Specifically, OCC will exercise its authority to issue margin calls and prevent the withdrawal of excess margin on deposit at OCC, as a result of activity during such trading sessions as a means of reducing risk. OCC also will implement a systemic function to identify trades executed during overnight trading sessions by clearing members not approved for such trading sessions for further review prior to allowing such trades to proceed further through OCC's clearance processing, and therefore mitigate the risk of losses from erroneous trades. Finally, OCC will be able to assess the need to take protective action pursuant to OCC Rule 305 as a result of clearing member activity during such sessions.

II. Discussion and Commission Findings

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the Commission believes that the stated purpose of the Clearing Supervision Act is instructive.[18] The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically-important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[19]

Section 805(a)(2) of the Clearing Supervision Act[20] authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator. Section

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18 See 12 U.S.C. 5461(b).

19 Id.

20 12 U.S.C. 5464(a)(2).

805(b) of the Clearing Supervision Act[21] states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act ("Clearing Agency Standards").[22] The Clearing Agency Standards became effective on January 2, 2013, and require registered clearing agencies that perform central counterparty services to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.[23] As such, it is appropriate for the Commission to review advance notices against these Clearing Agency Standards, and the objectives and principles of these risk management standards as described in Section 805(b) of the Clearing Supervision Act.[24]

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21 12 U.S.C. 5464(b).

22 17 CFR 240.17Ad-22.

23 The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors of the Federal Reserve System governing the operations of designated financial market utilities that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (August 2, 2012).

24 12 U.S.C. 5464(b).

The Commission believes that the proposal in this Advance Notice is designed to further the objectives and principles of Section 805(b) of the Clearing Supervision Act.[25] The Commission notes that clearing transactions executed in overnight trading sessions may present additional risks to OCC and the markets in general; specifically, overnight trading sessions may create risk due to the gap between trade acceptance and settlement, the staffing levels at clearing members and OCC during such trading sessions, and the inability of clearing members to transfer funds to satisfy margin during overnight hours. However, OCC's proposal is designed in a manner that should adequately monitor for the risks presented by accepting trades for clearance and settlement during these extended and overnight sessions, and should adequately mitigate these risks.

As part of that design, OCC proposed to limit to the product set eligible for overnight trading sessions to index options and index futures products and to institute qualification criteria for determining whether to provide clearing services for overnight trading sessions offered by a particular exchange. These qualification criteria include price reasonability checks, controls to prevent orders from being executed at prices beyond a certain percentage of the initial execution price, activity based protections focused on risk beyond price, such as a high number of trades occurring in a set period of time, and kill switch capabilities. Limiting the eligible product set as well as confirming risk management controls by participating exchanges also should help promote robust risk management and safety, and soundness of the clearance of overnight trades.

In addition, OCC's proposed framework also incorporates a number of mechanisms designed to further control the risks posed by overnight trading, including

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25 12 U.S.C 5464(b).

(i) clearing member qualification criteria, (ii) systemic controls to identify trades executed by clearing members not approved for overnight trading, (iii) enhancements to OCC's overnight monitoring of trades submitted by exchanges during overnight trading sessions, (iv) enhancements to OCC's credit controls with respect to monitoring clearing members' credit risk during overnight trading sessions, and (v) disciplinary actions for unapproved clearing members who attempt to clear during overnight trading sessions.

Particularly, OCC's overnight monitoring and escalation, including requiring additional intra-day margin, increasing a clearing member's margin requirement, and/or invoking an exchange's kill switch should serve to help mitigate the risks posed by the inability of clearing members to transfer funds to satisfy margin during overnight hours due to the, lack of availability of bank payment systems in the overnight hours and the period of time between trade acceptance and settlement. Moreover, requiring and enforcing adequate staffing at clearing members as well as at OCC through a designated an on-call Market Risk duty officer should help to mitigate the risks of overnight clearing. Accordingly, the Commission believes that the proposal should promote robust risk management, promote safety and soundness in the marketplace, reduce systemic risks, and support the stability of the broader financial system as it provides OCC with a range of mechanisms that help mitigate the risks posed by clearance trades from extended and overnight trading sessions.

III. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[26] that the Commission DOES NOT OBJECT to advance notice proposal (SR-OCC-2014-812) and that OCC is AUTHORIZED to implement the proposal as of the date of this notice or the date of an order by the Commission approving a proposed rule change that reflects rule changes that are consistent with this advance notice proposal (SR-OCC-2014-24), whichever is later.

By the Commission.

Brent J. Fields
Secretary

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26 12 U.S.C. 5465(e)(1)(I).

Commissioner Gallagher
Commissioner Piwowar
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

Release No. 34-74244; File No. S7-34-10

RIN 3235-AK80

Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In accordance with Section 763 and Section 766 of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the Securities and Exchange Commission ("SEC" or "Commission") is adopting Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information ("Regulation SBSR") under the Securities Exchange Act of 1934 ("Exchange Act"). Regulation SBSR provides for the reporting of security-based swap information to registered security-based swap data repositories ("registered SDRs") or the Commission, and the public dissemination of security-based swap transaction, volume, and pricing information by registered SDRs. Registered SDRs are required to establish and maintain certain policies and procedures regarding how transaction data are reported and disseminated, and participants of registered SDRs that are registered security-based swap dealers or registered major security-based swap participants are required to establish and maintain policies and procedures that are reasonably designed to ensure that they comply with applicable reporting obligations. Regulation SBSR contains provisions that address the application of the regulatory reporting and public dissemination requirements to cross-border security-based swap activity as well as provisions for permitting market participants to satisfy

these requirements through substituted compliance. Finally, Regulation SBSR will require a registered SDR to register with the Commission as a securities information processor.

DATES: Effective Date: [insert date 60 days from publication in the Federal Register]

Compliance Date: For Rules 900, 907, and 909 of Regulation SBSR, the compliance date is the effective date. For Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR, compliance dates are being proposed in a separate release, 34-74245 (February 11, 2015).

FOR FURTHER INFORMATION CONTACT: Michael Gaw, Assistant Director, at (202) 551-5602; Natasha Cowen, Special Counsel, at (202) 551-5652; Yvonne Fraticelli, Special Counsel, at (202) 551-5654; George Gilbert, Special Counsel, at (202) 551-5677; David Michehl, Special Counsel, at (202) 551-5627; Geoffrey Pemble, Special Counsel, at (202) 551-5628; Mia Zur, Special Counsel, at (202) 551-5638; all of the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission is adopting Regulation SBSR, which implements the requirements for regulatory reporting and public dissemination of security-based swap transactions set forth in Title VII of the Dodd-Frank Act.[1] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[2] The 2008 financial crisis highlighted significant issues in the over-the-counter ("OTC") derivatives markets, which experienced dramatic growth in the years leading up to the financial crisis and are capable of affecting significant sectors of the U.S. economy. Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for swaps and security-based swaps, by, among other things: (1) providing for the registration and

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1 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2 See Pub. L. No. 111-203, Preamble.

comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating recordkeeping, regulatory reporting, and public dissemination requirements for swaps and security-based swaps; and (4) enhancing the rulemaking and enforcement authorities of the Commission and the Commodity Futures Trading Commission ("CFTC").

The Commission initially proposed Regulation SBSR in November 2010.[3] In May 2013, the Commission re-proposed the entirety of Regulation SBSR as part of the Cross-Border Proposing Release[4] and re-opened the comment period for all of its other outstanding Title VII rulemakings.[5]

The Commission received 86 comments that were specifically directed to the comment file (File No. S7-34-10) for the Regulation SBSR Proposing Release, of which 38 were comments submitted in response to the re-opening of the comment period.[6] Of the comments directed to the comment file (File No. S7-02-13) for the Cross-Border Proposing Release, six referenced Regulation SBSR specifically, while many others addressed cross-border issues generally, without specifically referring to Regulation SBSR. The Commission also has considered other comments germane to regulatory reporting and/or public dissemination of

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3 See Securities Exchange Act Release No. 63346 (November 19, 2010), 75 FR 75207 (December 2, 2010) ("Regulation SBSR Proposing Release").

4 See Securities Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30967 (May 23, 2013) ("Cross-Border Proposing Release").

5 See Securities Exchange Act Release No. 69491 (May 1, 2013), 78 FR 30799 (May 23, 2013).

6 However, one comment that was specifically directed to the comment file for the Regulation SBSR Proposing Release exclusively addressed issues related to clearing "debt swaps." See Hamlet Letter. Because the subject matter of this comment letter is beyond the scope of Regulation SBSR, the Commission is not addressing this comment.

security-based swaps that were submitted in other contexts. The comments discussed in this release are listed in Appendix A.

The Commission is now adopting Regulation SBSR largely as re-proposed, with certain revisions suggested by commenters or designed to clarify the rules. In addition, in separate releases, as discussed below, the Commission also is adopting rules relating to SDR registration, duties, and core principles (the "SDR Adopting Release")[7] and is proposing certain rules, amendments, and guidance relating to Regulation SBSR ("Regulation SBSR Proposed Amendments Release").[8] The principal aspects of Regulation SBSR—which, as adopted, consists of ten rules, Rules 900 to 909 under the Exchange Act[9]—are briefly described immediately below. A detailed discussion of each rule within Regulation SBSR, as well as how these rules interact with the rules in the SDR Adopting Release, follows in the body of this release.[10]

A. Summary of Final Regulation SBSR

Rule 900, as adopted, sets forth the definitions used throughout Regulation SBSR. The defined terms are discussed in connection with the rules in which they appear.

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7 See Securities Exchange Act Release No. 74246 (February 11, 2015).

8 See Securities Exchange Act Release No. 74245 (February 11, 2015).

9 15 U.S.C. 78a et seq. All references in this release to the Exchange Act refer to the Securities Exchange Act of 1934.

10 If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Rule 901(a), as adopted, assigns the reporting obligation for all security-based swaps except for the following: (1) clearing transactions;[11] (2) security-based swap transactions executed on a platform[12] that will be submitted to clearing; (3) transactions where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side; and (4) transactions where there is no registered security-based swap dealer or registered major security-based swap participant on either side and there is a U.S. person on only one side. For purposes of this release, the Commission uses the term "covered transactions" to refer to all security-based swaps other than those listed in the four categories above; all covered transactions shall be reported in the manner set forth in Regulation SBSR, as adopted. For covered transactions, Rule 901(a) assigns the duty to report to one side of the transaction (the "reporting side"). The "reporting hierarchy" established in Rule 901(a) is based, where possible, on the registration status (e.g., registration as a security-based swap dealer or major security-based swap participant) of the direct and indirect counterparties to the transaction. In the Regulation SBSR Proposed Amendments Release, the Commission is proposing amendments to Rule 901(a) that would impose reporting obligations for security-based swaps in categories one and two above (i.e., clearing transactions and security-based swap transactions executed on a platform and that will be submitted to clearing).

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11 A "clearing transaction" is defined as "a security-based swap that has a registered clearing agency as a direct counterparty." See Rule 900(g).

12 A "platform" is defined as a "national securities exchange or security-based swap execution facility that is registered or exempt from registration." See Rule 900(v); infra note 199 and accompanying text (discussing the definition of "platform").

Rule 901(b), as adopted, provides that if there is no registered security-based swap data repository ("SDR") that will accept the report, the reporting side must report the transaction to the Commission.[13]

Rule 901(c) sets forth the primary trade information and Rule 901(d) sets forth the secondary trade information that must be reported. For most transactions, the Rule 901(c) information will be publicly disseminated. Information reported pursuant to Rule 901(d) is for regulatory purposes only and will not be publicly disseminated.

Rule 901(e) requires the reporting of life cycle events to the entity to which the original transaction was reported.

Rule 901(i) requires reporting, to the extent the information is available, of security-based swaps entered into before the date of enactment of the Dodd-Frank Act ("pre-enactment security-based swaps") and security-based swaps entered into after the date of enactment but before Rule 901 becomes fully operative ("transitional security-based swaps").

B. Role of Registered SDRs

Rule 902(a) requires a registered SDR to publicly disseminate a transaction report immediately upon receipt of information about a security-based swap, except in certain limited circumstances. Pursuant to Rule 902(a), the published transaction report must consist of all the information reported pursuant to Rule 901(c), plus any condition flag contemplated by the registered SDR's policies and procedures that are required by Rule 907. Rule 901(f) requires a registered SDR to timestamp any information submitted to it pursuant to Rule 901(c), (d), (e), or

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13 A "registered security-based swap data repository" is defined as "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." See Rule 900(ff).

(i), and Rule 901(g) requires a registered SDR to assign a transaction ID to each security-based swap.

Rule 907(a) requires a registered SDR to establish and maintain written policies and procedures that detail how it will receive and publicly disseminate security-based swap transaction information. For example, Rule 907(a)(1) requires policies and procedures that enumerate the specific data elements of a security-based swap that must be reported to the registered SDR, including the data elements specified in Rules 901(c) and 901(d). Rule 907(a)(2) requires policies and procedures that specify one or more acceptable data formats, connectivity requirements, and other protocols for submitting information. Rules 907(a)(3) and 907(a)(4) require policies and procedures for assigning condition flags to the appropriate transaction reports. In addition, Rule 907(c) requires a registered SDR to make its policies and procedures available on its website.

Rule 907(e) requires a registered SDR to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to Regulation SBSR and the registered SDR's policies and procedures established thereunder.

Finally, Rule 909 requires a registered SDR also to register with the Commission as a securities information processor ("SIP").

C. Unique Identification Codes

Rule 903 requires a registered SDR to use "unique identification codes" ("UICs") to specifically identify a variety of persons and things. The following UICs are specifically required by Regulation SBSR: counterparty ID, product ID, transaction ID, broker ID, branch ID, trading desk ID, trader ID, platform ID, and ultimate parent ID.

Rule 906(b) requires each participant of a registered SDR to provide the registered SDR with information sufficient to identify the participant's ultimate parent(s) and any affiliate(s) of the participant that are also participants of the registered SDR.

Rule 903(a) provides that, if an internationally recognized standards-setting system ("IRSS") meeting certain criteria 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), that UIC must be used by all registered SDRs and their participants in carrying out duties under Regulation SBSR. If the Commission has not recognized an IRSS—or if the Commission-recognized IRSS has not assigned a UIC to a particular person or thing—the registered SDR is required to assign a UIC using its own methodology. Additionally, Rule 903(a) provides that, if the Commission has recognized such a system that assigns UICs to persons, each participant of a registered SDR 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 Rule 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. As discussed further in Section X(B)(2), infra, the Commission recognizes the Global LEI System ("GLEIS"), administered by the Regulatory Oversight Committee ("ROC"), as meeting the criteria specified in Rule 903. The Commission may, on its own initiative or upon request, evaluate other IRSSs and decide whether to recognize such other systems.

D. Public Dissemination and Block Trades

Section 13(m)(1)(B) of the Exchange Act[14] authorizes the Commission "to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery." Section 13(m)(1)(C) of the Exchange Act[15] identifies four categories of security-based swaps and authorizes the Commission "to provide by rule for the public availability of security-based swap transaction, volume, and pricing data." Section 13(m)(1)(C) further provides that, with respect to each of these four categories of security-based swaps, "the Commission shall require real-time public reporting for such transactions." Section 13(m)(1)(D) of the Exchange Act[16] provides that the Commission may require registered entities (such as registered SDRs) to publicly disseminate the security-based swap transaction and pricing data required to be reported under Section 13(m) of the Exchange Act. Finally, Section 13(n)(5)(D)(ii) of the Exchange Act[17] requires SDRs to provide security-based swap information "in such form and at such frequency as the Commission may require to comply with public reporting requirements."

Under Rule 902, as adopted, a registered SDR must, immediately upon receiving a transaction report of a security-based swap, publicly disseminate the primary trade information of that transaction, along with any condition flags.

In addition, Section 13(m)(1)(E) of the Exchange Act[18] requires the Commission rule for real-time public dissemination of cleared security-based swaps to: (1) "specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for

14 15 U.S.C. 78m(m)(1)(B).

15 15 U.S.C. 78m(m)(1)(C).

16 15 U.S.C. 78m(m)(1)(D).

17 15 U.S.C. 78m(n)(5)(D)(ii).

18 15 U.S.C. 13m(m)(1)(E).

particular markets and contracts"; and (2) "specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public." Section 13m(1)(E)(iv) of the Exchange Act[19] requires the Commission rule for real-time public dissemination of security-based swaps that are not cleared at a registered clearing agency but reported to a registered SDR to contain provisions that "take into account whether the public disclosure [of transaction and pricing data for security-based swaps] will materially reduce market liquidity."

As discussed in detail below, in response to the comments received and in light of the fact that the Commission has not yet proposed block thresholds, the Commission is adopting final rules that require all security-based swaps—regardless of their notional amount—to be reported to a registered SDR at any point up to 24 hours after the time of execution.[20] The registered SDR will be required, as with all other dissemination-eligible transactions, to publicly disseminate a report of the transaction immediately and automatically upon receipt of the information from the reporting side.

Although the Commission is adopting final rules relating to regulatory reporting and public dissemination of security-based swaps, it intends for the rules relating to public dissemination to apply only on an interim basis. This interim approach is designed to address the concerns of commenters who believed that a public dissemination regime with inappropriately small block trade thresholds could harm market liquidity, and who argued that market participants would need an extended phase-in period to achieve real-time reporting. In connection with its future rulemaking about block thresholds, the Commission anticipates

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19 15 U.S.C. 13m(m)(1)(E)(iv).

20 As discussed in more detail in Section VII(B), infra, if reporting would take place on a non-business day (i.e., a Saturday, Sunday or U.S. federal holiday), reporting would instead be required by the same time on the next business day.

seeking public comment on issues related to block trades. Given the establishment of this interim phase, the Commission is not adopting any other proposed rules relating to block trades.

E. Cross-Border Issues

Regulation SBSR, as initially proposed, included Rule 908, which addressed when Regulation SBSR would apply to cross-border security-based swaps and counterparties of security-based swaps. The Commission re-proposed Rule 908 with substantial revisions as part of the Cross-Border Proposing Release. The Commission is now adopting Rule 908 substantially as re-proposed with some modifications, as discussed in Section XV, infra.[21]

Under Rule 908, as adopted, any security-based swap involving a U.S. person, whether as a direct counterparty or as a guarantor, must be reported to a registered SDR, regardless of where the transaction is executed.[22] Furthermore, any security-based swap involving a registered security-based swap dealer or registered major security-based swap participant, whether as a direct counterparty or as a guarantor, also must be reported to a registered SDR, regardless of where the transaction is executed. In addition, any security-based swap that is accepted for clearing by a registered clearing agency having its principal place of business in the United States must be reported to a registered SDR, regardless of the registration status or U.S. person status of the counterparties and regardless of where the transaction is executed.

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21 The Commission anticipates seeking further public comment on the application of Regulation SBSR to: (1) security-based swaps where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side; and (2) transactions where there is no registered security-based swap dealer or registered major security-based swap participant on either side and there is a U.S. person on only one side.

22 See also Section II(B)(3) and note 139, infra (describing the type of guarantees that could cause a transaction to be subject to Regulation SBSR).

In the Cross-Border Proposing Release, the Commission proposed a new paragraph (c) to Rule 908, which contemplated a regime for allowing "substituted compliance" for regulatory reporting and public dissemination with respect to individual foreign jurisdictions. Under this approach, compliance with the foreign jurisdiction's rules could be substituted for compliance with the Commission's Title VII rules, in this case Regulation SBSR. Final Rule 908(c) allows interested parties to request a substituted compliance determination with respect to a foreign jurisdiction's regulatory reporting and public dissemination requirements, and sets forth the standards that the Commission would use in determining whether the foreign requirements were comparable.

F. Compliance Dates

For Rules 900, 907, and 909 of Regulation SBSR, the compliance date is the effective date of this release. For Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR, a new compliance schedule is being proposed in the Regulation SBSR Proposed Amendments Release. Accordingly, compliance with Rules 901, 902, 903, 904, 905, 906, and 908 is not required until the Commission establishes compliance dates for those rules.

Rules 910 and 911, as proposed and re-proposed, would have established compliance dates and imposed certain restrictions, respectively, during Regulation SBSR's phase-in period. For reasons discussed in the Regulation SBSR Proposed Amendments Release, the Commission has determined not to adopt Rule 910 or 911.[23]

II. Information Required To Be Reported

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23 Thus, Regulation SBSR, as adopted, consists of Rules 900 through 909 under the Exchange Act. Conforming changes have been made throughout Regulation SBSR to replace references to "§§ 242.900 through 242.911" to "§§ 242.900 through 242.909." In addition, the defined terms "registration date" and "phase-in period" which appeared in re-proposed Rules 910 and 911, respectively, are not being defined in final Rule 900.

A. Primary Trade Information—Rule 901(c)

1. Description of Re-Proposed Rule

Rule 901(c), as re-proposed, would have required the reporting of the following primary trade information in real time, which information would then be publicly disseminated: (1) the asset class of the security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based; (2) information that identifies the security-based swap instrument and the specific asset(s) or issuer(s) of any security on which the security-based swap is based; (3) the notional amount(s), and the currenc(ies) in which the notional amount(s) is (are) expressed; (4) the date and time, to the second, of execution, expressed using Coordinated Universal Time (UTC); (5) the effective date; (6) the scheduled termination date; (7) the price; (8) the terms of any fixed or floating rate payments, and the frequency of any payments; (9) whether or not the security-based swap will be cleared by a clearing agency; (10) if both counterparties to a security-based swap are registered security-based swap dealers, an indication to that effect; (11) if applicable, an indication that the transaction does not accurately reflect the market; and (12) if the security-based swap is customized to the extent that the information in items (1) through (11) above 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, an indication to that effect.

2. Discussion of Final Rule 901(c) and Response to Comments

a. General Approach to Required Information

Rules 901(c) and 901(d), as adopted, require the reporting of general categories of information, without enumerating specific data elements that must be reported, except in limited cases. The Commission has made minor revisions to the introductory language of Rule 901(c).[24]

In addition, Rule 907(a)(1), as adopted, requires each registered SDR to establish, maintain, and make publicly available policies and procedures that, among other things, specify the data elements that must be reported.[25] Commenters expressed mixed views regarding this approach. One commenter expressed the view that "any required data should be clearly established by the Commission in its rules and not decided in part by [SDRs]."[26] This commenter further asked the Commission to clarify that any additional fields provided by registered SDRs for reporting would be optional.[27] Two commenters, however, supported the Commission's approach of providing registered SDRs with the authority to define relevant fields on the basis of general guidelines as set by the SEC.[28] One of these commenters noted that it would be difficult for the Commission to specify the security-based swap data fields because

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24 The first sentence of re-proposed Rule 901(c), which would have required real-time public dissemination of certain data elements, would have stated, in relevant part, "For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side, the reporting side shall report the following information . . ." The information required to be reported pursuant to Rule 901(c) must be reported for all covered transactions, even though Rule 902(c) provides that certain security-based swap transactions are not subject to public dissemination. Accordingly, the Commission is not including in final Rule 901(c) the phrase "For any security-based swap that must be publicly disseminated pursuant to §§ 242.902 and 242.908 and for which it is the reporting side . . ." In addition, as discussed in Section VII(B)(1), infra, Rule 901(c), as adopted, provides that the reporting side shall report the information specified in Rule 901(c) within the timeframe specified by Rule 901(j).

25 See infra Section V.

26 ISDA IV at 8.

27 See id. at 9.

28 See MarkitSERV I at 10; Barnard I at 2 (also supporting the proposed categories of information that would be required to be reported for public dissemination).

security-based swaps are complex products that may require a large number of data fields to be electronically confirmed.[29] In addition, the commenter stated that electronic methods for processing existing and new security-based swaps continue to be developed; accordingly, the commenter stated that establishing a detailed list of reportable fields for each category of security-based swap would be impracticable because such a system "will be outdated with every new product launch or change in market practice," and would result in a "regulatory scheme that is continuously lagging behind the market."[30] The commenter cautioned, however, that the Commission must assure that there is consistency among the data fields collected and reported by registered SDRs in the same asset class so that it would be possible to consolidate the data.[31]

The Commission shares the commenter's concerns about the potential difficulties of consolidating data if there are multiple registered SDRs in the same asset class and each establishes different data elements for information that must be reported. Enumerating specific data elements required to be reported could help to promote consistency among the data fields if there are multiple registered SDRs in the same asset class. In addition, as discussed more fully below, such an approach would be more consistent with the approach taken by the CFTC's swap reporting rules. The Commission also acknowledges the comment that the Commission's rules, rather than the policies and procedures of a registered SDR, should specify the information required to be reported. However, the Commission believes on balance that establishing broad categories of required information will more easily accommodate new types of security-based

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29 See MarkitSERV I at 9-10. The commenter stated, for example, that the confirmation for a new "standard" credit default swap ("CDS") would contain 35 to 50 data fields, depending on the structure of the CDS, and the confirmation for other CDS products and life cycle events combined would require a total of 160 data fields. See id. at note 37.

30 MarkitSERV I at 10.

31 See MarkitSERV I at 10.

swaps and new conventions for capturing and reporting transaction data. The Commission agrees with the commenter who expressed the view that a rule that attempted to enumerate the required data elements for each category of security-based swap could become outdated with each new product, resulting in a regulatory framework that constantly lagged the market and would need to be updated.[32] The Commission believes that a standards-based approach will more easily accommodate new security-based swap reporting protocols or languages, as well as new market conventions, including new conventions for describing the data elements that must be reported.

One group of commenters noted that the CFTC provided greater specificity regarding the information to be reported.[33] Several commenters generally urged the Commission and the CFTC to establish consistent reporting obligations to reduce the cost of implementing both agencies' reporting rules.[34]

The Commission agrees that it would be beneficial to harmonize, to the extent practicable, the information required to be reported under Regulation SBSR and under the

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32 See id.

33 See ISDA/SIFMA I at 6.

34 See Better Markets I at 2; Cleary II at 3, 21 note 61 (noting that a consistent approach between the two agencies would address the reporting of mixed swaps); ISDA/SIFMA I at 6; J.P. Morgan Letter at 14; ISDA IV at 1-2 (generally urging that the Commission align, wherever possible and practical, with the CFTC reporting rules). The last commenter also noted that reporting of mixed swaps will be difficult if Regulation SBSR requires a different reporting counterparty from the CFTC's swap data reporting rules or if transaction identifiers are not conformed to the CFTC approach, see ISDA IV at 4, 11, and urged the Commission to coordinate with the CFTC on a uniform approach to the time of execution for mixed swaps, see id. at 14. A mixed swap is a swap that is subject to both the jurisdiction of the CFTC and SEC, and, absent a joint order of the CFTC and SEC with respect to the mixed swap, as described in Rule 3a67-4(c) under the Exchange Act, is subject to the applicable reporting and dissemination rules adopted by the CFTC and SEC.

CFTC's swap reporting rules. However, the Commission believes that it is possible to achieve a significant degree of consistency without including in final Rule 901 a detailed list of required data elements for each security-based swap. Rather than enumerating a comprehensive list of required data elements in the rule itself, Rule 901 identifies broad categories of information in the rule, and a registered SDR's policies and procedures are required to identify specific data elements that must be reported. The Commission believes that the flexibility afforded by Rule 901 will facilitate harmonization of reporting protocols and elements between the CFTC and SEC reporting regimes. In identifying the specific data elements that must be reported, a registered SDR could, in some instances, require reporting of the same data elements that are required to be reported pursuant to the CFTC's swap reporting rules, provided that those data elements include the information required under Rules 901(c) and 901(d). In some cases, however, the differences between the asset classes under the Commission's jurisdiction and those under the CFTC's jurisdiction will require a registered SDR's policies and procedures to specify the reporting of data elements different from those required under the CFTC's rules.

The Commission recognizes that enumerating the specific data elements required to be reported would be more consistent with the approach taken by the CFTC's swap reporting rules. Nevertheless, the Commission believes that the flexibility afforded by the category-based approach in adopted Rule 901(c) could facilitate harmonization. Accordingly, Rule 901(c), as adopted, continues to require the reporting of broad categories of security-based swap information to registered SDRs, without enumerating each data element required to be reported (with a few exceptions, described below).

b. Rule 901(c)(1)

Rule 901(c)(1), as re-proposed, would have required reporting of the asset class of a security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based. As described in detail below, the Commission is making several revisions to Rule 901(c)(1) in response to comments. Among other things, these revisions clarify the final rules and eliminate certain unnecessary elements and redundancies. Final Rule 901(c)(1), however, does not expand on the types of data elements that must be reported.

i. Elimination of the Reference to Equity Derivatives

The Commission is eliminating the reference to equity derivatives in final Rule 901(c)(1). Under Regulation SBSR, as proposed and re-proposed, it would have been necessary to identify total return swaps and other security-based swaps designed to offer risks and returns proportional to a position in an equity security or securities, because those security-based swaps would not have been eligible for a block trade exception.[35] However, because the Commission is not adopting block thresholds or other rules relating to the block trade exception at this time, it is not necessary to identify security-based swaps that are not eligible for a block trade exception during the first, interim phase of Regulation SBSR.[36] Accordingly, the Commission is not including in

35 Rule 907(b)(2)(i), as proposed and re-proposed, would have prohibited a registered SDR from designating as a block trade any security-based swap that is an equity total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based. As noted in the Regulation SBSR Proposing Release, there is no delay in the reporting of block transactions for equity securities in the United States. Re-proposed Rule 907(b)(2)(i) was designed to discourage market participants from evading post-trade transparency in the equity securities markets by using synthetic substitutes in the security-based swap market. See Regulation SBSR Proposing Release, 75 FR at 75232.

36 See infra Section VII.

final Rule 901(c)(1) any requirement to identify a security-based swap as a total return swap or a security-based swap otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based.

ii. Product ID

Final Rule 901(c)(1) requires the reporting of the product ID[37] of a security-based swap, if one is available. If the security-based swap has no product ID, or if the product ID does not include the information enumerated in Rule 901(c)(1)(i)-(v), then the information specified in subparagraphs (i)-(v) of Rule 901(c)(1) (discussed below) must be reported. Rule 901(c)(1) is designed to simplify the reporting process for security-based swaps that have a product ID by utilizing the product ID in lieu of each of the categories of data enumerated in Rule 901(c)(1)(i)-(v).

The Commission believes that the product ID will provide a standardized, abbreviated, and accurate means for identifying security-based swaps that share certain material economic terms. In addition, the reporting and public dissemination of the product ID could enhance transparency because a transaction report that used a single identifier for the product traded could be easier to read than a transaction report that identified the product traded through information provided in numerous individual data fields. For example, market observers would be able to discern quickly that transaction reports including the same product ID related to trades of the same product. Product IDs also could facilitate risk management and assist relevant authorities in analyzing systemic risk and conducting market surveillance. Furthermore, the Commission believes that the development of security-based swaps with standardized terms could facilitate the development of product IDs that would readily identify the terms of these transactions.

[37] See Rule 900(bb) (defining "product ID" as "the UIC assigned to a product").

Re-proposed Rule 901(c)(2) would have required reporting of information that identifies the security-based swap instrument and the specific asset(s) or issuer(s) of any security on which the security-based swap is based. Proposed Rule 900 defined "security-based swap instrument" to mean "each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index."[38] In the context of final Rule 901(c), the requirement to report the product ID, if one is available, replaces, among other things, the requirement in re-proposed Rule 901(c)(2) to report information that identifies the security-based swap instrument and the specific asset(s) or issuer(s) of any security on which the security-based swap is based. For a security-based swap that has no product ID, Rule 901(c)(1)(i), as adopted, requires reporting of 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. Because the information that was included in the definition of security-based swap instrument—i.e., the asset class and the underlying reference asset, issuer, or index—will be reported pursuant to adopted Rule 901(c)(1)(i) or included in the product ID, it is no longer necessary to separately define "security-based swap instrument." Thus, final Rule 900 no longer contains a definition of security-based swap instrument.

Although Rule 900, as proposed, defined the term "product ID," it did not separately propose to define the term "product."[39] Moreover, the original definition of the term "unique

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38 This definition was re-proposed in the Cross-Border Proposing Release without change as Rule 900(dd).

39 Rule 900, as proposed, defined "product ID" to mean "the UIC assigned to a security-based swap instrument." As discussed above, Rule 900, as proposed, defined "security-based swap instrument" to mean "each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index." Both of these definitions were re-proposed in the Cross-Border Proposing Release without change as Rules 900(x) and 900(dd), respectively.

identification code" included the term "product," again without defining it.[40] The Commission is now adopting a specific definition of the term "product." Final Rule 900(aa) defines "product" as "a group of security-based swap contracts each having the same material economic terms except those relating to price and size." Accordingly, the definition of "product ID" in adopted Rule 900(bb) is revised to mean "the UIC assigned to a product."

The key aspect of the term "product" is the classifying together of a group of security-based swap contracts that have the same material economic terms, other than those relating to price and size. The assignment of product IDs to groups of security-based swaps with the same material economic terms, other than those relating to price and size, is designed to facilitate more efficient and accurate transaction reporting by allowing reporting of a single product ID in place of the separate data categories contemplated by Rule 901(c)(1)(i)-(v). Product IDs also will make disseminated transaction reports easier to read, and will assist the Commission and other relevant authorities in monitoring for systemic risk and conducting market surveillance.

Although the price and size of a security-based swap are material terms of the transaction—and thus must be reported, along with many other material terms, to a registered SDR pursuant to Rules 901(c) and 901(d)—they do not help distinguish one product from another. The same product can be traded with different prices and with different notional amounts. Thus, by way of example and not of limitation, if otherwise materially similar security-based swaps have different currencies of denomination, underlying assets, or settlement terms, they are different products for purposes of Regulation SBSR and should have different product IDs. An indicium of whether two or more security-based swaps between the same direct

40 Rule 900, as proposed, defined UIC as "the unique identification code assigned to a person, unit of a person, or product . . ." (emphasis added). This definition was re-proposed in the Cross-Border Proposing Release without change as Rule 900(nn).

counterparties are the same product is whether they could be compressed or netted together to establish a new position (e.g., by a clearing agency or portfolio compression service).[41] If they cannot be compressed or netted, this suggests that there are material differences between the terms of the security-based swaps that do not permit the risks to be fully offset.

The fact that the Commission is requiring products to be distinguished for purposes of regulatory reporting and public dissemination even if a single material economic term differentiates one from another would not prevent the Commission and market participants from analyzing closely related products on a more aggregate basis. For example, products that were otherwise identical but for different currencies of denomination could still be grouped together to understand the gross amount of exposure created by these related products (factoring in exchange rates). However, a product ID system that was not granular enough to separate products based on individual material differences would make it difficult or impossible to analyze positions based solely on those individual differences. For example, if a product ID system permitted otherwise similar security-based swaps with different currencies of denomination to be considered as the same product, it would not be possible to observe risk aggregations according to their particular currencies.[42]

Similarly, the Commission believes that otherwise materially identical security-based swaps with different dates of expiration are different products and therefore must have different product IDs. Delineating products by, among other things, date of expiration will assist the Commission and other relevant authorities in developing a more precise analysis of risk exposure

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41 See TriOptima Letter at 2, 5-6 (explaining the portfolio compression process for uncleared swaps).

42 See ISDA/SIFMA at 10 (recommending that the definition of "security-based swap instrument" provide for more granular distinctions between different types of transactions within a single asset class).

over time. This feature of the "product" definition is different from the approach taken in the originally proposed definition of "security-based swap instrument," which specifically rejected distinctions based on tenor.[43]

In connection with these requirements, the Commission notes the part of the "product" definition referring to a product as "a group of security-based swap contracts" (plural). If a group of security-based swap contracts is sufficiently standardized such that they all share the same material economic terms (other than price and size), a registered SDR should treat them as the same product and assign them the same product ID. A product could be evidenced, for example, by the fact that a clearing agency makes the group of security-based swap contracts eligible for clearing and will net multiple transactions in that group of contracts into a single open position. In contrast, a security-based swap that has a combination of material economic terms unlike any other security-based swap would not be part of a product group, and the Commission believes that it would be impractical to require registered SDRs to assign a product ID to each of these unique security-based swaps. For such a security-based swap, the transaction ID would be sufficient to identify the security-based swap in the registered SDR's records and would serve the same purpose as a product ID.

The product ID is one type of UIC. As discussed more fully in Section X, infra, Rule 903(a), as adopted, requires a registered SDR to use a UIC, including a product ID, assigned by an IRSS, if an IRSS has been recognized by the Commission and issues that type of UIC. If an IRSS that can issue product IDs has not been recognized by the Commission, Rule 903(a)

43 The Commission is not expressing a view as to whether products with different tenors might or might not be considered together to constitute a class of securities required to be registered under Section 12 of the Exchange Act. See Section 12(a) of the Exchange Act, 15 U.S.C. 78l(a); Section 12(g)(1) of the Exchange Act, 15 U.S.C. 78l(g); Rule 12g-1 under the Exchange Act, 17 CFR 240.12g-1.

requires a registered SDR to assign a product ID to that product using its own methodology. Similarly, final Rule 907(a)(5) requires a registered SDR to establish and maintain written policies and procedures for assigning UICs in a manner consistent with Rule 903, which establishes standards for the use of UICs.[44]

One commenter noted that, although there likely will be global standards for identification codes for certain data fields, such as the LEI, some global identifiers will not exist.[45] The commenter believed that requiring registered SDRs to create identifiers would "result in bespoke implementation among" registered SDRs that would be of limited value absent an industry standard.[46] The commenter recommended that the Commission consider postponing a requirement to establish identifiers "until an international taxonomy exists that can be applied consistently."[47]

The Commission agrees that a system of internationally recognized product IDs would be preferable to a process under which registered SDRs assign their own product IDs to the same product. Nonetheless, the Commission believes that the use of product IDs, even product IDs created by registered SDRs rather than by an IRSS, could simplify security-based swap transaction reporting and facilitate regulatory oversight of the security-based swap market. In addition, the Commission believes that the requirement for registered SDRs to assign product

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44 See infra Section X(C) (discussing a registered SDR's policies and procedures relating to UICs).

45 See DTCC V at 14.

46 Id.

47 Id. The use of identifiers is discussed more fully in connection with Rule 903. See infra Section X.

IDs could provide additional incentive for security-based swap market participants to develop industry-wide product IDs.[48]

One commenter stated that "[i]ndustry utilities should be considered for assigning unique IDs for transactions, products, and legal entities/market participants."[49] As discussed in Section X(B)(2), infra, the Commission is recognizing the Global LEI System ("GLEIS"), an industry utility administered by the Regulatory Oversight Committee ("ROC"), as meeting the criteria specified in Rule 903, as adopted. The GLEIS and this comment are discussed in Section X(B)(2), infra.

iii. Rule 901(c)(1)(i)

Rule 901(c)(1) requires that, if a security-based swap has no product ID, or if the product ID does not include the information identified in Rule 901(c)(1)(i)-(v), the information specified in Rule 901(c)(1)(i)-(v) must be reported. Final Rule 901(c)(1)(i)-(v) incorporates, with some

48 In this regard, the Commission notes that one commenter stated that a "newly formed ISDA cross-product data working group, with representatives from sell side and buy side institutions, will look at proposed solutions and the practical implications of unique identifiers for the derivatives industry." The commenters stated, further, that "ISDA is committed to provide product identifiers for OTC derivatives products that reflect the FpML standard....In the first instance, this work will focus on product identifiers for cleared products. ISDA/FpML is currently working on a pilot project with certain derivative clearing houses to provide a normalized electronic data representation through a FpML document for each OTC product listed and/or cleared. This work will include the assignment of unique product identifiers." ISDA/SIFMA I at 8-9. In addition, the Commission notes that ISDA has issued a white paper that discusses ways of creating unique identifiers for individual products. See ISDA, "Product Representation for Standardized Derivatives" (April 14, 2011), available at http://www2.isda.org/functional-areas/technology-infrastructure/data-and-reporting/identifiers/upi-and-taxonomies/ (last visited September 22, 2014) , at 4 (stating that one goal of the white paper is to "[s]implif[y] . . . the trade processing and reporting architecture across the marketplace for the standardized products, as market participants will be able to abstract the trade economics through reference data instead of having to specify them as part of each transaction").

49 ISDA/SIFMA I at 8.

modifications, information that would have been required under paragraphs (c)(1), (2), (5), (6), (8), and (12) of re-proposed Rule 901, and re-proposed Rule 901(d)(1)(iii).

Rule 901(c)(1)(i), as adopted, generally requires the reporting of information that would have been required to be reported under re-proposed Rules 901(c)(1) and 901(c)(2). Re-proposed Rule 901(c)(1) would have required, in part, reporting of the asset class of a security-based swap.[50] Re-proposed Rule 901(c)(2) would have required the reporting of information identifying the security-based swap instrument and the specific asset(s) or issuer(s) on which the security-based swap is based. Re-proposed Rule 900(dd) would have defined "security-based swap instrument" as "each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index." Rule 901(c)(1)(i), as adopted, requires the reporting of 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. Although the defined term "security-based swap instrument" is being deleted from Regulation SBSR for the reasons discussed in Section VII(B)(3), infra, final Rule 901(c)(1)(i) retains the requirement to report the underlying reference asset(s), reference issuer(s), or reference index for the security-based swap, as well as the asset class of the security-based swap.

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50 "Asset class" is defined as "those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives." See Rule 900(b), as adopted. As proposed and re-proposed, the definition of "asset class" also would have included loan-based derivatives. However, because loan-based derivatives can be viewed as a form of credit derivative, the Commission has removed the reference to loan-based derivatives as a separate asset class and adopted the definition noted above. This revision aligns the definition of "asset class" used in Regulation SBSR with the definition used in the SDR Adopting Release.

The Commission received no comments regarding the information required to be reported in Rule 901(c)(1)(i). As stated in the Regulation SBSR Proposing Release, the Commission believes that the reporting and public dissemination of information relating to the asset class of the security-based swap would provide market participants with basic information about the type of security-based swap (e.g., credit derivative or equity derivative) being traded.[51] Similarly, the Commission believes that information identifying the specific reference asset(s), reference issuer(s), or reference index of any security on which the security-based swap is based is fundamental to understanding the transaction being reported, and that a transaction report that lacked such information would not be meaningful.[52] Accordingly, Rule 901(c)(1)(i), as adopted, includes the requirement to report this information.

iv. Rules 901(c)(1)(ii) and (iii)

Re-proposed Rules 901(c)(5) and 901(c)(6) would have required the reporting of, respectively, the effective date of the security-based swap and the scheduled termination date of the security-based swap. These requirements are incorporated into adopted Rules 901(c)(1)(ii) and (iii), which require the reporting of, respectively, the effective date of the security-based swap and the scheduled termination date of the security-based swap. The Commission received no comments regarding the reporting of this information. As stated in the Regulation SBSR Proposing Release, the Commission believes that information specifying the effective date and the scheduled termination date of the security-based swap is fundamental to understanding the transaction being reported, and that a transaction report that lacked such information would not

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51 See 75 FR at 75213.

52 See id. at 75214.

be meaningful.[53] Accordingly, final Rules 901(c)(1)(ii) and (iii) include the requirement to report the effective date and the scheduled termination date, respectively, of the security-based swap.

v. Rule 901(c)(1)(iv)

Re-proposed Rule 901(c)(8) would have required the reporting of any fixed or floating rate payments of a security-based swap, and the frequency of any payments. Re-proposed Rule 901(d)(1)(iii) would have required the reporting of the amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other. In the Regulation SBSR Proposing Release, the Commission noted that the terms of any fixed or floating rate payments and the frequency of any payments are among the terms that would be fundamental to understanding a security-based swap transaction.[54] One commenter echoed the importance of information concerning the payment streams of security-based swaps.[55]

Another commenter stated that proposed Rule 901(d)(1)(iii) was unclear about the proposed form of the description of the terms and contingencies of the payment streams, and that the requirements of proposed Rule 901(d)(1)(iii) appeared to be duplicative of proposed Rule 901(d)(1)(v), which would have required reporting of the data elements necessary for a person to

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53 See id.

54 See id.

55 See Benchmark Letter at 1 (stating that "[t]he reference data set [for a security-based swap] must include standard attributes necessary to derive cash flows and any contingent claims that can alter or terminate payments of these contracts. . . . Without these critical pieces of information, users of the trade price dissemination service will be unable to accurately assess reported values").

determine the market value of the transaction.[56] The commenter also suggested that the Commission consider the utility of requiring reporting of the terms of fixed or floating rate payments, as required by re-proposed Rule 901(c)(8).[57]

The Commission continues to believe that, for a security-based swap that provides for periodic exchange of cash flows, information concerning those payment streams is fundamental to understanding the terms of the transaction. The Commission acknowledges, however, that re-proposed Rules 901(c)(8), 901(d)(1)(iii), and 901(d)(v) contained overlapping requirements concerning the payment streams of a security-based swap. Accordingly, the Commission is revising Rules 901(c) and 901(d) to streamline and clarify the information required to be reported with respect to the payment streams of a security-based swap.

Specifically, final Rule 901(c)(1)(iv) requires the reporting of any standardized fixed or floating rate payments, and the frequency of any such payments. As discussed more fully in Section II(C)(3)(d), infra, final Rule 901(d)(3) requires the reporting of information concerning the terms of any fixed or floating rate payments, or otherwise customized or non-standardized payment streams, including the frequency and contingencies of any such payments, to the extent that this information has not been reported pursuant to Rule 901(c)(1). Thus, Rule 901(c)(1)(iv) requires the reporting of information concerning standardized payment streams, while Rule 901(d)(3) requires the reporting of information concerning customized payment streams. In addition, as discussed more fully below, final Rule 901(d)(5) requires reporting of any additional data elements included in the agreement between the counterparties that are necessary for a

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56 See DTCC II at 10. See also DTCC V at 12 (requesting additional clarity with respect to the requirement to report the contingencies of the payments streams of each direct counterparty to the other).

57 See DTCC V at 11.

person to determine the market value of the transaction, to the extent that such information has not already been reported pursuant to Rule 901(c) or other provisions of Rule 901(d). The Commission believes that these changes to Rules 901(c) and 901(d) will avoid potential redundancies in the reporting requirements and will clarify the information required to be reported with respect to the payment streams of a security-based swap.

Like other primary trade information reported pursuant to Rule 901(c), information about standardized payment streams reported pursuant to Rule 901(c)(1)(iv) will be publicly disseminated. The Commission envisions that, rather than disseminating such information as discrete elements, this information could be inherent in the product ID of a security-based swap that has a product ID. Information concerning non-standard payment streams that is reported pursuant to Rule 901(d)(3), like other secondary trade information, will be available for regulatory purposes but will not be publicly disseminated. Re-proposed Rule 901(c)(8) would have required reporting of the terms of any fixed or floating rate payments, standardized or non-standardized, and the frequency of such payments, and re-proposed Rule 902(a) would have required the public dissemination of that information. In addition, as noted above, one commenter discussed the importance of the availability of information concerning payment streams.[58] Nonetheless, the Commission believes that public dissemination of the non-standard payment terms of a customized security-based swap would be impractical, because a bespoke transaction by definition could have such unique terms that it would be difficult to reflect the full material terms using any standard dissemination protocol. In addition, it is not clear that the benefits of publicly disseminating information concerning these non-standard payment streams would justify the costs of disseminating the information. However, the Commission will have

[58] See supra note 55.

access to regulatory reports of such transactions, which should facilitate regulatory oversight and assist relevant authorities in monitoring the exposures of security-based swap market participants. Accordingly, Rule 901(d)(3), as adopted, requires the reporting of information concerning the terms of any non-standard fixed or floating rate payments, or otherwise customized or non-standardized payment streams, including the frequency and contingencies of any such payments.

One commenter expressed the view that, without further clarification, market participants could adopt different interpretations of the requirement in re-proposed Rule 901(c)(8) to report the terms of fixed or floating rate payments, resulting in inconsistent reporting to registered SDRs; the commenter recommended, therefore, limiting the reportable fields to tenor and frequency, where applicable.[59]

The Commission shares the commenter's concerns that, without guidance, market participants could adopt different interpretations of the requirement to report the terms of fixed or floating rate payments. The Commission notes, however, that final Rules 907(a)(1) and 907(a)(2) require a registered SDR to establish and maintain written policies and procedures that enumerate the specific data elements that must be reported and that specify the protocols for submitting information, respectively. The Commission believes that, read together, Rules 907(a)(1) and 907(a)(2) provide registered SDRs with flexibility to determine the appropriate conventions for reporting these data elements, including the terms of a security-based swap's fixed or floating rate payments. Thus, although Rule 901(c) itself does not specify the precise manner for reporting a security-based swap's fixed or floating rate payments, the policies and procedures of registered SDRs must do so. The Commission notes, further, that final Rule

59 See DTCC V at 11.

906(c), among other things, requires SDR participants that are registered security-based swap dealers and registered major security-based swap participants to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that they comply with any obligations to report information to a registered SDR in a manner consistent with Regulation SBSR.

vi. Rule 901(c)(1)(v)

Re-proposed Rule 901(c)(12) would have required a reporting side to indicate, if applicable, that the information reported under subparagraphs (1)-(11) of re-proposed Rule 901(c) for a customized security-based swap does not provide all of the material information necessary to identify the customized security-based swap or does not contain the data elements necessary to calculate its price. The Commission is adopting the substance of re-proposed Rule 901(c)(12) and locating it in final Rule 901(c)(1)(v). Rule 901(c)(1)(v), as adopted, provides that, if a security-based swap is customized to the extent that the information provided in paragraphs (c)(1)(i) through (c)(1)(iv) of Rule 901 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, the reporting side must include a flag to that effect. As discussed more fully in Section VI(G), infra, the registered SDRs should develop a condition flag to identify bespoke transactions because absent such a flag, users of public reports of bespoke transactions might receive a distorted impression of the market.

One commenter argued that "publicly disseminated data for trades with a non-standard feature flag activated will be of limited usefulness and could be misleading."[60] The commenter expressed the view that dissemination of information regarding highly structured transactions

60 DTCC II at 9.

should not occur until an analysis regarding the impact and potential for misleading the investing public has been conducted.[61] A second commenter, however, endorsed the approach being adopted by the Commission.[62] The Commission acknowledges the concerns that the dissemination of transaction reports for highly customized trades could be misleading or of limited usefulness. However, as discussed more fully in Section VI(D)(2)(a), infra, the Commission believes that public dissemination of the key terms of a customized security-based swap, even without all of the details of the transaction, could provide useful information to market observers, including information concerning the pricing of similar products and information relating to the relative number and aggregate notional amounts of transactions in bespoke products versus standardized products. In addition, the Commission believes that the condition flag signaling that the transaction is a customized trade, and therefore that the reported information does not provide all of the details of the transaction, will minimize the potential for confusion and help to assure that the publicly disseminated reports of these transactions are not misleading. For these reasons, the Commission is declining, at this time, to undertake the study recommended by the commenter.

A third commenter indicated that Rule 901 should go further and require reporting of additional information necessary to calculate the price of a security-based swap that is so customized that the price cannot be calculated from the reported information.[63] The Commission generally agrees that transaction reports of customized security-based swaps should be as informative and useful as possible. However, it is not clear that the benefits of publicly

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61 See id.

62 See Cleary II at 16 (recommending "public reporting of a few key terms of a customized swap . . . [with] some indication that the transaction is customized").

63 See Better Markets I at 7.

disseminating all of the detailed and potentially complex information that would be necessary to calculate the price of a highly customized security-based swap would justify the costs of disseminating that information. Accordingly, Rule 901(c)(1)(v), as adopted, does not require reporting of this information, and it will not be publicly disseminated.[64]

This commenter also expressed concern that a "composite" security-based swap composed of two swaps grafted together could be used to avoid reporting requirements; the commenter recommended that, if at least one of the transactions could be disaggregated and reported in a format so that its price could be calculated, Regulation SBSR should require that the security-based swap be disaggregated and the component parts be reported separately.[65] In considering the commenter's concern the Commission notes the following:

To begin, the Commission understands that market participants may execute so-called "package trades" that are composed of multiple components, or "legs," some of which may be

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64 The Commission notes that Rule 901(d)(5) requires the reporting of any additional data elements included in the agreement between the counterparties that is necessary to determine the market value of a transaction. Although this information will not be publicly disseminated, it will be available to the Commission and other relevant authorities. Such relevant authorities are enumerated in Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), which requires an SDR, upon request, to make available all data obtained by the SDR, including individual counterparty trade and position data, to each appropriate prudential regulator, the Financial Stability Oversight Council, the CFTC, the Department of Justice, and any other person that the Commission determines to be appropriate, including foreign financial supervisors, foreign central banks, and foreign ministries.

65 See Better Markets I at 7 ("This enhancement to the Proposed Rules is particularly important with respect to SBS comprised of two swaps grafted together. Such composite SBS can be used to avoid reporting requirements. Even worse they can be used to obfuscate the real financial implications of a transaction. Accordingly, if an SBS can be disaggregated into two or more transactions, and at least one of those disaggregated transactions can be reported in a format so that price can be calculated, then the rules should require that the SBS be disaggregated and reported in that form"); Better Markets II at 3 (stating that complex transactions must be broken down into meaningful components); Better Markets III at 4-5 (stating that the Commission should require reporting of data on disaggregated customized security-based swaps).

security-based swaps. Though such package trades are executed at a single price, each leg is separately booked and processed. In these cases, Regulation SBSR does in fact require a reporting side to separately report (and for the SDR to separately disseminate) each security-based swap component of the package trade.[66]

However, if a market participant combines the economic elements of multiple instruments into one security-based swap contract, Regulation SBSR requires a single report of the transaction. The Commission understands the commenter's concerns regarding potential attempts to evade the post-trade transparency requirements. Such efforts could undermine Regulation SBSR's goals of promoting transparency and efficiency in the security-based swap markets and impede the Commission's ability to oversee those markets. The Commission does not believe, however, that either a registered SDR or a reporting side should be required to disaggregate a customized security-based swap if it consists of a single contract incorporating elements of what otherwise might have been two or more security-based swaps. In the absence of evidence of a significant amount of such "composite" security-based swap transactions and structuring other than through package trades, the Commission does not at this time believe that devising protocols for disseminating them in a disaggregated fashion would be practical. Importantly, however, and as discussed more fully in Section VI(D)(2)(a), infra, the primary trade information of any complex or bespoke security-based swap, including "composite" security-based swaps as described by the commenter, will be publicly disseminated, as required

66 In addition, as discussed more fully in Section VI(G), infra, in developing its policies and procedures, a registered SDR should consider requiring participants to identify the individual component security-based swaps of such a trade as part of a package transaction, and should consider disseminating reports of the individual security-based swap components of the package trade with a condition flag that identifies them as part of a package trade. Absent such a flag, observers of public reports of package transactions might obtain a distorted view of the market.

by Rule 902(a), including the specific underlying reference asset(s), reference issuer(s), or reference index for the transaction, as required by Rule 901(c)(1).[67] The Commission believes that the public dissemination of the primary trade information, even without all of the material economic terms of the transaction that could affect its pricing, could provide market observers with useful information, including information concerning the pricing of similar products and the relative number and aggregate notional amounts of transactions in complex and other bespoke transactions versus transactions in standardized products. The Commission further notes that since all of the material economic terms of a "composite" security-based swap must be reported to a registered SDR, including the data elements required by Rule 901(d),[68] the Commission itself will have complete access to these details.[69]

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67 One commenter stated its view that "proprietary baskets" should qualify as non-disseminated information, and requested that Regulation SBSR specifically recognize this as an example of non-disseminated information. See ISDA IV at 17 (stating that reportable security-based swaps may include customized narrow-based baskets that a counterparty deems proprietary to its business and for which public disclosure would compromise its anonymity and negatively impact its trading activity). Rule 902(a), as adopted, requires a registered SDR to publicly disseminate, for each transaction, the primary trade information required to be reported by Rule 901(c), as adopted, which includes the specific underlying reference asset(s), reference issuer(s), or reference index. The Commission continues to believe that the primary trading terms of a security-based swap should be disseminated to help facilitate price discovery. See infra Section VI(A).

68 See infra Section II(B)(3)(e) (discussing requirement in Rule 901(d)(5) that, to the extent not provided pursuant to other provisions of Rules 901(c) and 901(d), all data elements included in the agreement between the counterparties that are necessary for a person to determine the market value of the transaction must be reported).

69 See infra Section V(B)(1) (noting that the Commission anticipates proposing for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis by the Commission of security-based swap data submitted to it by an SDR); supra Section II(A)(2)(b)(v) (explaining that the Commission will have access to regulatory reports of bespoke security-based swap transactions, which should facilitate regulatory oversight and assist relevant authorities in monitoring the exposures of security-based swap market participants).

The commenter also expressed the view that Regulation SBSR should clearly define the meaning of a security-based swap that is so customized that its price is not ascertainable.[70] The Commission does not believe that it is necessary to further define the term "customized security-based swap" for purposes of Rule 901(c)(1)(v). The condition flag required under adopted Rule 901(c)(1)(v) will notify market participants that the security-based swap being reported does not have a product ID and is customized to the extent that the information provided in Rules 901(c)(1)(i)-(iv) does not provide all of the material information necessary to identify the security-based swap or does not contain the data elements necessary to calculate the price. Thus, market participants will know that a customized security-based swap transaction was executed, and that the information reported pursuant to Rules 901(c)(1)(i)-(iv) provides basic but limited information about the transaction. The Commission believes, further, that Rule 901(c)(1)(v) provides clear guidance with respect to when a transaction is customized to the extent that the reporting side must attach a condition flag that identifies the transaction as a bespoke transaction, i.e., when the information reported pursuant to Rules 901(c)(1)(i)-(iv) does not provide all of the material information necessary to identify the security-based swap or does not contain the data elements necessary to calculate the price. Accordingly, the Commission does not believe that it is necessary, at this time, to further define what constitutes a customized security-based swap for purposes of Regulation SBSR.

c. Rule 901(c)(2)

70 See Better Markets I at 7 ("The Proposed Rules also represent a critically important opportunity to shed light on the nature of 'customized' swaps. Since the inception of the debate over disclosure and clearing in connection with financial regulation, the concept of the 'customized' or 'bespoke' transactions has figured prominently, yet these terms remain poorly understood in real world terms. The Proposed Rules should clearly define the meaning of SBS that are so customized that price is not ascertainable").

Re-proposed Rule 901(c)(4) would have required reporting of the date and time, to the second, of the execution of a security-based swap, expressed using Coordinated Universal Time ("UTC").[71] In the Regulation SBSR Proposing Release, the Commission stated that information concerning the time of execution would allow security-based swap transactions to be ordered properly, and would provide the Commission with a detailed record of when a security-based swap was executed.[72] The Commission further noted that, without the time of execution, market participants and relevant authorities would not know whether the transaction reports that they are seeing reflect the current state of the market.[73] In both the proposal and the re-proposal, the Commission defined "time of execution" to mean "the point at which the counterparties to a security-based swap become irrevocably bound under applicable law."[74]

One commenter expressed the view that time of execution should be reported at least to the second, and by finer increments where practicable.[75] A second commenter raised timestamp issues in connection with proposed Rule 901(f), which would have required a registered SDR to timestamp transaction information submitted to it under Rule 901. The commenter stated that especially for markets for which there are multiple security-based swap execution facilities and markets where automated, algorithmic trading occurs, "the sequencing of trade data for transparency and price discovery, as well as surveillance and enforcement purposes, will require

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71 UTC is defined by the International Telecommunication Union (ITU-R) and is maintained by the International Bureau of Weights and Measures (BIPM). See http://www.itu.int/net/newsroom/wrc/2012/reports/atomic_time.aspx (last visited September 22, 2014).

72 See 75 FR at 75213.

73 See id.

74 See re-proposed Rule 900(ff).

75 See Barnard I at 2.

much smaller increments of time-stamping."[76] The commenter urged the Commission to revise proposed Rule 901(f) to require a registered SDR to time stamp information that it receives in increments shorter than one second, stating that time stamps shorter than one second are technologically feasible, affordable, and in use.[77]

The Commission understands that trading in the security-based swap market does not yet occur as fast or as frequently as in the equities market, which makes recording the time of security-based swap executions in subsecond increments less necessary for surveillance purposes. While some market participants may have the capacity to record trades in subsecond intervals, others may not. Given the potential costs of requiring all market participants to utilize subsecond timestamps, the Commission believes that it is not necessary or appropriate at this time to require reporting of the time of execution in subsecond increments.[78] Accordingly, the Commission is adopting Rule 901(c)(4) as proposed and re-proposed, but renumbering it as final Rule 901(c)(2). The Commission will continue to monitor developments in the security-based swap market and could in the future reconsider whether reporting time of execution in subseconds would be appropriate.

One commenter discussed the time of execution for a voice trade in the context of proposed Rule 910(a), which addressed the reporting of pre-enactment security-based swaps.[79] The commenter noted that in the Regulation SBSR Proposing Release, the Commission stated that "proposed Rule 910(a) would not require reporting parties to report any data elements (such

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76 Better Markets I at 9.

77 See id.

78 However, a registered SDR could, in its policies and procedures, allow its participants to report using subsecond timestamps.

79 As discussed in Section I(F), supra, the Commission is not adopting Rule 910.

as the time of execution) that were not readily available. Therefore, proposed Rule 910(a) would not require reporting parties to search for or reconstruct any missing data elements."[80] The commenter disagreed with this assertion in the context of voice trades, stating that the time of entry of the voice trade into the system is typically provided, but not the actual execution time of the trade. The commenter stated that "[p]roviding the actual execution time in the case of voice trades would then prove extremely challenging and invasive for the marketplace."[81] Similarly, one commenter requested that the "Commission clarify that participants are not required to provide trade execution time information for pre-enactment security-based swap transactions and that going-forward, such information need only be provided when industry-wide time stamping practices are implemented."[82]

With respect to these concerns, the Commission notes, first, that it is not adopting Rule 910, but is proposing a new compliance schedule for Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR in the Regulation SBSR Proposed Amendments Release. The Commission emphasizes, however, that proposed Rule 910(a) would not have required market participants to report information for a pre-enactment security-based swap that was not readily available, or to reconstruct that information. Thus, Rule 910(a), as proposed, would not have required market participants to provide the time of execution for an orally negotiated pre-enactment security-based swap, unless such information was readily available. Likewise, final Rule 901(i) does not require reporting of the date and time of execution for an orally negotiated

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80 See 75 FR at 75278-79.

81 ISDA/SIFMA I at 11.

82 ISDA I at 5.

pre-enactment or transitional security-based swap, unless such information is readily available.[83] However, for all other security-based swaps, including voice trades, final Rule 901(c)(2) requires reporting of the date and time of execution, to the second, of the security-based swap. The Commission noted in the Regulation SBSR Proposing Release that trades agreed to over the phone would need to be systematized by being entered in an electronic system that assigns a time stamp to report the date and time of execution of a security-based swap.[84] The Commission continues to believe that it is consistent with Congress' intent for orally negotiated security-based swap transactions to be systematized as quickly as possible.[85] The Commission notes, further, that market participants also must report the time of execution for voice-executed trades in other securities markets (e.g., equities and corporate bonds).[86] Knowing the date and time of execution of a security-based swap is important for reconstructing trading activity and for market surveillance purposes. Accordingly, the Commission continues to believe that the regulatory interest in having information regarding the date and time of execution for all security-based swaps, including orally negotiated security-based swaps, justifies the burden on market participants of recording and reporting this information.

In addition, the Commission is adopting, as proposed and re-proposed, the requirement for all times of execution reported to and recorded by registered SDRs to be in UTC. In the

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83 For pre-enactment and transitional security-based swaps, final Rule 901(i) requires reporting of the information required under Rules 901(c) and 901(d), including the date and time of execution, only to the extent that such information is available.

84 See 75 FR at 75213.

85 See id.

86 See, e.g., FINRA Rule 6230(c)(8) (requiring transactions reported to TRACE to include the time of execution); FINRA Rule 6622(c)(5) (requiring last-sale reports for transactions in OTC Equity Securities and Restricted Securities to include the time of execution expressed in hours, minutes, and seconds).

Regulation SBSR Proposing Release, the Commission explained its reasons for proposing to require that the date and time of execution be expressed in UTC.[87] The Commission noted that security-based swaps are traded globally, and expected that many security-based swaps subject to the Commission's reporting and dissemination rules would be executed between counterparties in different time zones. In the absence of a uniform time standard, it might not be clear whether the date and time of execution were being expressed from the standpoint of the time zone of the first counterparty, the second counterparty, or the registered SDR. Mandating a common standard for expressing date and time would alleviate any potential confusion as to when the security-based swap was executed. The Commission believed that UTC was an appropriate and well known standard suitable for purposes of reporting the time of execution of security-based swaps. The Commission received no comments regarding the use of UTC for reporting the time of execution. For the reasons set out in the Regulation SBSR Proposing Release, the Commission continues to believe that UTC is appropriate for security-based swap transaction reporting. Accordingly, the Commission is adopting this requirement as proposed and re-proposed.

Finally, the Commission is adopting the definition of "time of execution" as proposed and re-proposed, and renumbering it as final Rule 900(ii). One commenter stated that the time at which a transaction becomes legally binding may not be the same for all products.[88] The commenter further noted that, in some cases primary terms are not formed until the security-based swap is confirmed, and that the full terms of a total return swap might not be formed until the end of the day "and therefore the [total return swap] is not executed and confirmed until the

87 See 75 FR at 75213.

88 See ISDA/SIFMA I at 7.

end of the day."[89] A second commenter stated that "the obligation to report should not be triggered until price, size, and other transaction terms required to be reported are available."[90] The Commission understands the concerns of these commenters and believes that the definition of "time of execution" provides sufficient flexibility to address these commenters' concerns. For example, if the key terms of a security-based swap, such as price or size, are so indefinite that they cannot be reported to a registered SDR until some time after the counterparties agree to preliminary terms, the counterparties may not have executed the security-based swap under applicable law. Alternatively, even if the counterparties determine that their preliminary agreement constitutes an execution, the reporting timeframe adopted herein, which will allow a security-based swap to be reported at any point up to 24 hours after the time of execution, should address the concerns raised by the commenters.

A third commenter urged the Commission to revise the definition to equate time of execution with "the time of execution of the confirmation."[91] The Commission declines to do so. While confirmation is an important aspect of post-trade processing, performance of the actions necessary to confirm a transaction is within the discretion of the counterparties and their agents. Defining the "time of execution" to mean the time that a confirmation is issued could create incentives for counterparties to delay confirmation and thus the reporting of the transaction. The Commission notes that Section 13(m)(1)(A) of the Exchange Act[92] defines "real-time public reporting" as reporting certain security-based swap data "as soon as technologically practicable

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89 Id.

90 Cleary II at 6. See also ISDA/SIFMA I at 15 ("for some transaction types . . . the price or size of the transaction cannot be determined at the time the swap is negotiated"); ISDA IV at 10.

91 MFA I at 5.

92 15 U.S.C. 78m(m)(1)(A).

after the time at which the security-based swap transaction has been executed." The Commission believes this provision is most appropriately implemented by linking obligations to the time at which the counterparties become bound to the terms of the transaction—i.e., the time of execution—rather than some indefinite point in the future, such as the time when the confirmation is issued.

d. Rule 901(c)(3)

Re-proposed Rule 901(c)(7) would have required the reporting of the price of a security-based swap. Re-proposed Rule 901(d)(1)(iii) would have required the reporting of the "amount(s) and curren(cies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other." Final Rule 901(c)(3) combines these elements and requires the reporting of "[t]he price, including the currency in which the price is expressed and the amount(s) and currenc(ies) of any up-front payments."[93] The Commission believes that including in final Rule 901(c)(3) the explicit requirement to report the currency in which the price is expressed will help to clarify the information required to be reported.[94] Re-proposed Rule 901(c)(3) is being re-numbered as final Rule 901(c)(4).[95]

Rule 901(c)(3), as adopted, requires the reporting of the amount(s) and currenc(ies) of any up-front payments, a requirement that was included in re-proposed Rule 901(d)(1)(iii). The Commission believes that information concerning the amount(s) and currenc(ies) of any up-front

[93] Cf. Section II(B)(3)(c), infra (describing Rule 901(d), which enumerates data elements that will not be subject to public dissemination).

[94] The addition of the reference to currency also is consistent with re-proposed Rule 901(c)(3), which would have required reporting of the notional amount(s) of the security-based swap and the currenc(ies) in which the notional amount(s) is expressed.

[95] See infra Section II(B)(2)(b)(vi)(e).

payment(s) will help regulators and market observers understand the reported price of a security-based swap, and that the public dissemination of this information will further the transparency goals of Title VII. The Commission also believes that Rule 901(c) will be simpler if all considerations relating to the price are consolidated into a single provision. Accordingly, Rule 901(c)(3), as adopted, requires the reporting and public dissemination of the amount(s) and currenc(ies) of any up-front payment(s) along with other pricing information for the security-based swap.

As discussed in the Regulation SBSR Proposing Release, the price of a security-based swap could be expressed in terms of the commercial conventions used in that asset class.[96] The Commission recognized that the price of a security-based swap generally might not be a simple number, as with stocks, but would likely be expressed in terms of the quoting conventions of the security-based swap. For example, a credit default swap could be quoted in terms of the economic spread—which is variously referred to as the "traded spread," "quote spread," or "composite spread"—expressed as a number of basis points per annum. Alternately, a credit default swap might be quoted in terms of prices representing a discount or premium over par.[97] In contrast, an equity or loan total return swap might be quoted in terms of a LIBOR-based floating rate payment, expressed as a floating rate plus a fixed number of basis points.[98] As discussed further in Section IV, infra, final Rule 907(a)(1) requires a registered SDR to establish, maintain, and make publicly available policies and procedures that specify the data elements of a

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96 See 75 FR at 75214. Final Rule 900(z) defines "price" to mean "the price of a security-based swap transaction, expressed in terms of the commercial conventions used in the asset class."

97 See id.

98 See id.

security-based swap that must be reported, including elements that constitute the price. The Commission believes that, because of the many different conventions that exist to express the price in various security-based swap markets and new conventions that might arise in the future, registered SDRs should have flexibility to select appropriate conventions for denoting the price of different security-based swap products.

One commenter expressed concern that disseminating prices of margined and unmargined transactions together could mislead the market about the intrinsic prices of the underlying contracts.[99] Noting that the CFTC proposed a field for "additional price notation" that would be used to provide information, including margin, that would help market participants evaluate the price of a swap, the commenter recommended that the Commission and the CFTC harmonize their approaches to assure that the market has an accurate picture of prices.[100] The Commission agrees that publicly disseminated transaction reports should be as informative as possible. However, the Commission believes, at this time, that it could be impractical to devise additional data fields for describing the potentially complex margin requirements governing a security-based swap. Furthermore, it could be difficult if not impossible to attribute a portion of the price to a particular margin arrangement when the overall price represents the aggregation of a number of different factors into a single variable. The Commission notes that the bespoke flag required by Rule 901(c)(1)(v) is designed to inform market observers when a security-based swap is customized to the extent that the other data elements required by Rule 901(c)(1) do not provide all of the material information necessary to identify the security-based swap or provide sufficient information to calculate the price.

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99 See CCMR I at 4.

100 See id.

Another commenter expressed concern that disseminating the terms of the floating rate payment for an equity swap, which is often comprised of a benchmark rate plus or minus a spread and thus contains information about the direction of a customer transaction (positive spreads indicate a customer long swap and negative spreads indicate a customer short swap) may harm customers by offering other market participants the opportunity to anticipate their execution strategy.[101] The commenter believes that the spread value should thus be masked for equity security-based swaps when disclosing the price or terms of the floating rate payment.[102] As noted above, the Commission believes that publicly disseminated transaction reports should be as informative as possible. The floating rate payment of an equity security-based swap, including the spread, is an important part of the price of an equity security-based swap, and as such the Commission continues to believe that it should be disseminated. Not disseminating this information would undermine one of the key aspects of public dissemination, namely price discovery. The Commission further understands that in other markets—such as the cash equity market and the bond market—similar information is publically disclosed or can be inferred from public market data, which informs on the direction of the customer transaction.[103]

e. Rule 901(c)(4)

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101 See ISDA IV at 17.

102 See id.

103 In the bond markets, the side of the customer is reported on TRACE. See http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/Announcements/P039007. In the cash equity markets, the side of the initiator of a transaction is, for many exchanges, provided as a data element on direct data feeds. It can also be inferred according to whether the trade was executed at the bid or offer.

Re-proposed Rule 901(c)(3) would have required reporting of the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed. The Commission is adopting this rule as re-proposed, but re-numbering it as Rule 901(c)(4).

The Commission received two comments regarding the reporting and public dissemination of the notional amount of a security-based swap. One commenter believed that, "in the case of some asset classes, there is not a universal definition of the notional amount of the trade. This is particularly the case where the notional amount is not confirmable information."[104] To address this issue, the commenter recommended that the Commission provide guidelines, such as those developed by the Federal Reserve Bank of New York, for reporting the notional amount of a security-based swap.[105]

As discussed below, final Rules 907(a)(1) and 907(a)(2) require a registered SDR to establish and maintain written policies and procedures that enumerate the specific data elements that must be reported and that specify the protocols for submitting information, respectively. The Commission believes that, read together, Rules 907(a)(1) and 907(a)(2) provide registered SDRs with flexibility to determine the appropriate conventions for reporting all required data elements, including the notional amount. Thus, although Rule 901(c) itself does not specify the precise manner for reporting a security-based swap's notional amount, the policies and procedures of registered SDRs must do so. The Commission believes that a registered SDR

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104 ISDA/SIFMA I at 12.

105 See id. The commenter refers to the guidelines included under "Line Item Instructions for Derivatives and Off-Balance-Sheet Item Schedule HC-L" in the Board of Governors of the Federal Reserve System's "Instructions for Preparation of Consolidated Financial Statements for Bank Holding Companies Reporting Form FR Y-9C." See ISDA/SIFMA I at 12, note 13.

could choose to incorporate the guidance noted by the commenter, or other appropriate guidance, into its policies and procedures for reporting notional amounts.

Another commenter suggested that the Commission, to mitigate adverse impacts on market liquidity, should—like the CFTC—adopt masking thresholds, rather than requiring public dissemination of the precise notional amount of a security-based swap transaction.[106] The commenter noted that FINRA's Trade Reporting and Compliance Engine ("TRACE") system[107] uses masking conventions, and suggested applying that approach to the swap and security-based swap markets by "computing how much market risk is represented by the TRACE masking thresholds and using those numbers to map the masking thresholds into other asset classes."[108]

The Commission appreciates the commenter's concerns regarding the uncertainty of the potential effects of public dissemination of security-based swap transaction reports on liquidity in the security-based swap market. As discussed further in Section VII, infra, the rules adopted in this release will allow the reporting, on an interim basis, of a security-based swap transaction at any time up to 24 hours after the time of execution (or, if 24 hours after the time of execution would fall on a day that is not a business day, by the same time on the next day that is a business day). This timeframe is designed in part to minimize potential adverse impacts of public dissemination on liquidity during the interim phase of Regulation SBSR's implementation, as market participants grow accustomed to operating in a more transparent environment.

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106 See J.P. Morgan Letter at 12. See also ISDA IV at 16 (recommending the use of a notional cap in each asset class).

107 TRACE is a FINRA facility to which FINRA member firms must report over-the-counter transactions in eligible fixed income securities. See generally http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/ (last visited September 22, 2014).

108 Id. at 13.

Accordingly, the Commission does not believe that it is necessary at this time to adopt a masking convention for purposes of reporting and publicly disseminating the notional amount of security-based swap transactions.[109]

f. Rule 901(c)(5)

Rule 901(c)(10), as proposed and re-proposed, would have required the reporting side to indicate whether both counterparties to a security-based swap are security-based swap dealers. In the Regulation SBSR Proposing Release, the Commission stated its preliminary belief that such an indication would enhance transparency and provide more accurate information about the pricing of security-based swap transactions.[110] The Commission noted, further, that prices of security-based swap transactions involving a dealer and non-dealer are typically "all-in" prices that include a mark-up or mark-down, while interdealer transactions typically do not. Thus, the Commission believed that requiring an indication of whether a security-based swap was an interdealer transaction or a transaction between a dealer and a non-dealer counterparty would enhance transparency by allowing market participants to more accurately assess the reported price of a security-based swap.[111]

Commenters expressed mixed views regarding this proposed requirement. One commenter supported a requirement to include the counterparty type in security-based swap transaction reports.[112] Another commenter, however, recommended that the Commission

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109 The Commission anticipates soliciting comment on issues relating to block trades, including the possibility of utilizing masking thresholds, at a later date. See infra Section VII.

110 See 75 FR at 75214.

111 See id.

112 See Benchmark Letter at 2. The commenter also suggested that it would be useful to include an entry for "end user," similar to the "Producer/Merchant/Producer/User"

eliminate the interdealer indication because "[e]xcluding this field from the information required to be reported to [a registered SDR] in real time will bring the scope of required data in line with existing dissemination functionality."[113] A third commenter expressed concern that disseminating information that both counterparties are security-based swap dealers would reduce the anonymity of participants, ultimately resulting in "worse pricing and reduced liquidity for end-users."[114]

The Commission believes that publicly disseminating an indication of whether both sides of a security-based swap are registered security-based swap dealers would enhance transparency in the security-based swap market by helping market participants to assess the reported price of a security-based swap. Although the Commission understands the concerns about potential burdens that could result from changes to existing dissemination practices, the required indicator should not impose significant burdens. Furthermore, the Commission believes that any potential burden created by requiring the indicator will be justified by the transparency benefits of publicly disseminating this information. The Commission notes that flagging transactions between two registered security-based swap dealers does indeed provide information to the public that the transaction involved two dealers, thus restricting the set of possible counterparties. However, since a majority of security-based swap transactions presently have a dealer as one of the counterparties, an interdealer flag is unlikely to enable market observers to identify

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designation used in agricultural futures reports. See id. The Commission does not believe, at this time, that it is necessary to require a specific end-user indication. Under final Rule 901(c)(5), a transaction involving two registered security-based swap dealers must have an indication to that effect. An observer of a transaction report without that indicator will be able to infer that the transaction involved at least one side that does not have a registered security-based swap dealer.

113 DTCC V at 11.

114 ISDA IV at 16.

counterparties to particular transactions. Also, although there is a limited group of entities that likely would be required to register as security-based swap dealers that are currently active in the security-based swap market, this number is more than two.[115] The Commission also notes that in the bond market interdealer transactions are flagged as part of TRACE's public dissemination of corporate bond trades. Therefore, the Commission does not believe that flagging transactions between two registered security-based swap dealers would ultimately result in "worse pricing and reduced liquidity for end-users."[116]

The Commission, therefore, is adopting this requirement as final Rule 901(c)(5), with one revision. The Commission has added the word "registered" before the term "security-based swap dealer." Therefore, the final rule requires an indication only when there is a registered security-based swap dealer on both sides of the transaction. As discussed further below, the Commission seeks to avoid imposing costs on market participants for assessing whether or not they are security-based swap dealers solely for purposes of Regulation SBSR.[117] Therefore, counterparties would have to be identified for purposes of Rule 901(c)(5), as adopted, only if they are registered security-based swap dealers.

g. Rule 901(c)(6)

Re-proposed Rule 901(c)(9) would have required the reporting side to indicate whether or not a security-based swap would be cleared by a clearing agency. This requirement is being adopted substantially as proposed but numbered as Rule 901(c)(6), with an additional

115 Historical data reviewed by the Commission suggest that, among an estimated 300 reporting sides, approximately 50 are likely to be required to register with the Commission as security-based swap dealers. See infra Section XXI(B)(3).

116 See ISDA IV at 16.

117 See infra notes 284 to 285 and accompanying text.

clarification, described below. In the Regulation SBSR Proposing Release, the Commission noted that the use of a clearing agency to clear a security-based swap could affect the price of the security-based swap because counterparty credit risk might be diminished significantly if the security-based swap were centrally cleared.[118] Thus, the Commission preliminarily believed that information concerning whether a security-based swap would be cleared would provide market participants with information that would be useful in assessing the reported price of the security-based swap, thereby enhancing price discovery.[119] One commenter agreed, stating that it "will likely also be necessary to identify whether a price is associated with a bilateral trade or a cleared trade . . . as these distinctions may well have price impacts."[120]

The Commission continues to believe that information concerning whether a security-based swap will be cleared is useful in assessing the price of the security-based swap and will facilitate understanding of how risk exposures may change after the security-based swap is executed. Accordingly, final Rule 901(c)(6) requires the reporting side to indicate "whether the direct counterparties intend that the security-based swap will be submitted to clearing." Reporting of whether the direct counterparties intend that the security-based swap will be submitted to clearing, rather than whether the security-based swap will be cleared, as originally proposed, more accurately reflects the process of entering into and clearing a security-based swap transaction. It may not be known, when the transaction is reported, whether a registered clearing agency will in fact accept the security-based swap for clearing. The Commission

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118 See 75 FR at 75214.

119 See id.

120 Cleary II at 20, note 56.

received no comments on this issue. The Commission believes, however, that the modified language enhances the administration of the rule.

The Commission notes that, in some cases, the identity of the registered clearing agency that clears a security-based swap could be included in the product ID of a security-based swap. If the identity of the registered clearing agency is included in the product ID, no information would have to be separately reported pursuant to Rule 901(c)(6).

h. Rule 901(c)(7)

Re-proposed Rule 901(c)(11) would have required a reporting side to indicate, if applicable, that a security-based swap transaction does not accurately reflect the market. In the Regulation SBSR Proposing Release, the Commission noted that, in some instances, a security-based swap transaction might not reflect the current state of the market.[121] This could occur, for example, in the case of a late transaction report, which by definition would not represent the current state of the market, or in the case of an inter-affiliate transfer or assignment, where the new counterparty might not have an opportunity to negotiate the terms, including the price, of taking on the position.[122] The Commission believed that there might not be an arm's length negotiation of the terms of the security-based swap transaction, and disseminating a transaction report without noting that fact would be inimical to price discovery. Accordingly, Rule 901(c)(11), as proposed and as re-proposed, would have required a reporting side to note such circumstances in its transaction report to the registered SDR.

Rule 907(a)(4), as proposed and as re-proposed, would have required a registered SDR to establish and maintain written policies and procedures that describe, among other things, how a

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121 See 75 FR at 75214.

122 See id. at 75214-15.

reporting side would report security-based swap transactions that, in the estimation of the registered SDR, do not accurately reflect the market. The Commission noted its expectation that these policies and procedures would require, among other things, different indicators being applied in different situations.[123]

One commenter suggested that Rule 901 should require the counterparties to a security-based swap to disclose specific reasons why a security-based swap does not accurately reflect the market because it would not be possible to understand the reported prices without that information.[124] The commenter also stated that the Commission, rather than registered SDRs, should specify the indicators used for such transaction reports.[125]

The Commission agrees in general that an effective regime for public dissemination should provide market observers with appropriate information to assist them in understanding the disseminated transaction information. The Commission also agrees with the commenter that it could be useful to market observers to provide more specific information about particular characteristics of or circumstances surrounding a transaction that could affect its price discovery value. Therefore, after careful consideration, the Commission is adopting the substance of re-proposed Rule 901(c)(11), but is modifying the rule text to reflect final Rule 907(a)(4), and is renumbering the requirement as Rule 901(c)(7). Rule 901(c)(7), as adopted, requires reporting of any applicable flag(s) pertaining to the transaction that are specified in the policies and procedures of the registered SDR to which the transaction will be reported. Rule 907(a)(4)(i) requires a registered SDR to establish and maintain written policies and procedures for

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123 See id. at 75215.

124 See Better Markets I at 6.

125 See id. at 7 ("Such disclosure should not be left to the discretion of the SDRs, but should instead be required by the rules").

"identifying characteristic(s) of a security-based swap, or circumstances associated with the execution of a security-based swap, that could, in the fair and reasonable estimation of a 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." A registered SDR also must establish flags to denote these characteristic(s) or circumstance(s).[126] As discussed in Section VI(G), infra, the Commission generally believes that a registered SDR should consider providing condition flags identifying the following: inter-affiliate security-based swaps; transactions resulting from netting or compression exercises; transactions resulting from a "forced trading session" conducted by a clearing agency; transactions reported late; transactions resulting from the default of a clearing member; and package trades. The Commission believes that these condition flags, and others that registered SDRs may adopt in the future, should provide additional information that will help to prevent market observers from receiving a distorted view of the market. The Commission believes, further, that these condition flags address the commenter's recommendation that security-based swap transaction reports identify the specific reasons why a transaction does not accurately reflect the market.

The Commission disagrees, however, with the commenter's suggestion that a Commission rule rather than the policies and procedures of a registered SDR should identify the specific characteristics or circumstances that must be reported to prevent a transaction report from presenting a distorted view of the market. The Commission continues to believe that requiring registered SDRs to develop, maintain, and require the use of condition flags, and to modify them as needed, will facilitate the development of a flexible reporting regime that is better able to respond quickly to changing conditions in the security-based swap market. This

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126 See Rule 907(a)(4)(ii).

flexibility will help to assure that reported transaction information remains meaningful as the security-based swap market evolves over time.

B. Rule 901(d)—Secondary Trade Information

1. Description of Proposed and Re-Proposed Rule

Rule 901(d)(1), as proposed and as re-proposed, would have required the reporting of certain secondary trade information concerning a security-based swap. Information reported pursuant to Rule 901(d)(1) would be available to regulatory authorities only and would not be publicly disseminated. Rule 901(d)(1), as re-proposed, would have required the reporting of the following secondary trade information to a registered SDR: (1) the participant ID of each counterparty; (2) as applicable, the broker ID, desk ID, and trader ID of the direct counterparty on the reporting side; (3) the amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other; (4) the title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement; (5) the data elements necessary for a person to determine the market value of the transaction; (6) if applicable, and to the extent not provided pursuant to Rule 901(c), the name of the clearing agency to which the security-based swap will be submitted for clearing; (7) if the security-based swap is not cleared, whether the exception in Section 3C(g) of the Exchange Act[127] was invoked; (8) if the security-based swap is not cleared, a description of the settlement terms, including whether the security-based

127 15 U.S.C. 78c-3(g).

swap is cash-settled or physically settled, and the method for determining the settlement value; and (9) the venue where the security-based swap was executed.[128]

As discussed in the Regulation SBSR Proposing Release, the Commission believed that the information required to be reported by proposed Rule 901(d) would facilitate regulatory oversight and monitoring of the security-based swap market by providing comprehensive information regarding security-based swap transactions and trading activity.[129] The Commission believed, further, that this information would assist the Commission in detecting and investigating fraud and trading abuses in the security-based swap market.[130]

Re-proposed Rule 901(d)(2) specified timeframes for reporting the secondary trade information required to be reported under Rule 901(d)(1). Rule 901(d)(2), as re-proposed, would have required the reporting of secondary trade information promptly, but in no event later than: (1) 15 minutes after the time of execution of a security-based swap that is executed and confirmed electronically; (2) 30 minutes after the time of execution for a security-based swap that is confirmed electronically but not executed electronically; or (3) 24 hours after the time of execution for a security-based swap that is not executed or confirmed electronically.

2. Final Rule 901(d)

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128 Rule 901(d)(1), as re-proposed, was substantially similar to Rule 901(d)(1), as proposed, but made several technical changes. Rule 901(d)(1), as re-proposed, revised the rule to add references to the reporting side, the direct counterparty on the reporting side, and secondary trade information.

129 See 75 FR at 75217. Furthermore, to the extent that the Commission receives information that is reported under Rule 901(d), the Commission anticipates that it will keep such information confidential, to the extent permitted by law. See id. at note 59.

130 See id.

As discussed more fully below, the Commission is adopting Rules 901(d)(1) substantially as re-proposed, although it is making several clarifying and technical changes to address issues raised by commenters.

The Commission is not adopting the 15-minute, 30-minute, and 24-hour timeframes in re-proposed Rule 901(d)(2). Instead, final Rule 901(d) requires a reporting side to report the information required under Rule 901(d) within the timeframes specified by Rule 901(j).[131] Because re-proposed Rule 901(d)(2) is not being adopted, re-proposed Rule 901(d)(1) is renumbered as final Rule 901(d), and re-proposed Rules 901(d)(1)(i)-(ix), which would identify the categories of secondary trade information required to be reported, are renumbered as final Rules 901(d)(1)-(9).

Rule 901(d), as adopted, requires the reporting side to report the following secondary trade information: (1) the counterparty ID or 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 Rule 901(c)(1), the terms of any fixed or floating rate payments, including the terms 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 Rule 901(c) or other provisions of Rule 901(d), any additional 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

131 Rule 901(j), which specifies the timeframe for reporting of the information enumerated in Rules 901(c) and 901(d), is discussed in Section VII(B)(1) infra.

provided pursuant to Rule 901(c), the name of the registered 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; (8) to the extent not provided pursuant to other provisions of Rule 901(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; (9) the platform ID, if applicable; and (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.

3. Discussion of Final Rule 901(d) and Response to Comments

a. Rule 901(d)(1)—Counterparty IDs

In the Regulation SBSR Proposing Release, the Commission expressed the view that a registered SDR "must have a systematic means to identify and track" all persons involved in the security-based swap transactions reported to that registered SDR.[132] The Commission intended to accomplish this, in part, through proposed Rule 901(d)(1)(i), which would have required the reporting party to report the participant ID of each counterparty to a registered SDR.[133] As proposed in Rule 900, "participant ID" would have been defined as "the UIC assigned to a participant"[134] and "participant" would have encompassed: (1) a U.S. person that is a

132 75 FR at 75217.

133 See infra Section X (discussing use of LEIs).

134 The definition of "participant ID" was re-proposed, without change, in re-proposed Rule 900(s). The UIC is the unique identification code assigned to a person, unit of a person,

counterparty to a security-based swap that is required to be reported to a registered SDR; or (2) a non-U.S. person that is a counterparty to a security-based swap that is (i) required to be reported to a registered SDR; and (ii) executed in the United States or through any means of interstate commerce, or cleared through a clearing agency that has its principal place of business in the United States.

Re-proposed Rule 901(d)(1)(i) would have required the reporting side to report the participant ID of each counterparty to a security-based swap. Re-proposed Rule 900(s) would have defined "participant" as "a person that is a counterparty to a security-based swap that meets the criteria of § 242.908(b)." Under re-proposed Rule 900(s), the following types of person would have met the criteria of Rule 908(b): (1) U.S. persons; (2) security-based swap dealers and major security-based swap participants; and (3) counterparties to a transaction "conducted within the United States."[135]

The Commission received no comments on re-proposed Rule 901(d)(1)(i), but has determined to adopt, as final Rule 901(d)(1), a modified rule that will, in the Commission's estimation, better accomplish the objective of ensuring that a registered SDR can identify each counterparty to a security-based swap. As re-proposed, the reporting side would have been required to report the participant ID of its counterparty only if the counterparty met the definition of "participant," which would have been limited by Rule 908(b). Under the re-proposed definition of "participant," some counterparties to security-based swaps would not have become participants of the registered SDRs that receive reports of those security-based swaps under Rule

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product, or transaction. <u>See</u> Rule 900(qq). As discussed more fully in Section IV, <u>infra</u>, final Rule 907(a)(5) requires a registered SDR to establish and maintain policies and procedures for assigning UICs in a manner consistent with adopted Rule 903.

135 <u>See</u> Cross-Border Proposing Release, 78 FR at 31065 (discussing re-proposed Rule 908(b)).

901(a). For example, if a U.S. person security-based swap dealer entered into a security-based swap with a non-U.S. person private fund in a transaction that is not conducted within the United States, the security-based swap dealer would have been a participant of the registered SDR to which the security-based swap is reported pursuant to Rule 901(a), but the private fund would not. In this circumstance, Rule 901(d)(1)(i), as re-proposed, would not have provided a mechanism for the reporting of the private fund's identity to the registered SDR; because the private fund would not have been a participant of that registered SDR it would not have received a "participant ID."

The Commission believes that it is necessary and appropriate for a registered SDR to obtain identifying information for all counterparties to security-based swaps that are subject to Regulation SBSR. Without this information being reported to a registered SDR, the Commission's ability to oversee the security-based swap market could be impaired because the Commission might not be able to determine the identity of each counterparty to a security-based swap reported to a registered SDR pursuant to Regulation SBSR.

Final Rule 901(d)(1) addresses this concern by requiring the reporting side to report "the counterparty ID or the execution agent ID of each counterparty, as applicable." The Commission is adopting, as Rule 900(j), the term "counterparty ID," which means "the UIC assigned to a counterparty to a security-based swap."[136] A "counterparty" is a person that is a direct or indirect counterparty of a security-based swap.[137] A "direct counterparty" is a person that is a primary obligor on a security-based swap,[138] and an "indirect counterparty" is a guarantor of a

[136] The Commission is not adopting the re-proposed definition of "participant ID" as this term is not used in Regulation SBSR, as adopted.

[137] See Rule 900(i).

[138] See Rule 900(k).

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.[139] Thus, the definition of "counterparty ID" encompasses UICs that identify all direct and indirect

[139] See Rule 900(p). Re-proposed Rule 900(o) would have defined "indirect counterparty" to mean "a guarantor of a direct counterparty's performance of any obligation under a security-based swap." The Commission is adopting, consistent with the approach it took in the cross-border context, a modified definition of "indirect counterparty" to clarify the type of guarantor relationship that would cause a person to become an indirect counterparty for purposes of Regulation SBSR. See Securities Exchange Act Release No.72472 (June 25, 2014), 79 FR 47278, 47316-17 (August 12, 2014) ("Cross-Border Adopting Release"). Final Rule 900(p) defines "indirect counterparty" to mean 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. Thus, under final Rule 900(p), a person becomes an indirect counterparty to a security-based swap if the guarantee offered by the person permits a direct counterparty on the other side of the transaction to exercise rights of recourse against the person in connection with the security-based swap. The Commission believes that, if a recourse guarantee exists, it is reasonable to assume that the other side of the transaction would look both to the direct counterparty and its guarantor(s) for performance on the security-based swap. If the direct counterparty fails to fulfill its payment obligations on the security-based swap, its guarantor would be obligated to make the required payments. As noted in the Cross-Border Adopting Release, such rights may arise in a variety of contexts. The meaning of the terms "guarantee," "recourse," and any related terms used in Regulation SBSR is the same as the meaning of those terms in the Cross-Border Adopting Release and the rules adopted therein.

counterparties to a security-based swap, even if a particular counterparty is not a participant of a registered SDR.[140]

The Commission believes final Rule 901(d)(1) will accomplish the Commission's objective of obtaining identifying information for all counterparties to a security-based swap and improve regulatory oversight and surveillance of the security-based swap market. The counterparty ID will allow registered SDRs, the Commission, and other relevant authorities to track activity by a particular market participant and facilitate the aggregation and monitoring of that market participant's security-based swap positions.

The Commission also is adopting a requirement in Rule 901(d)(1)(i) for the reporting side to report the "execution agent ID" as applicable.[141] This situation could arise if the identity of a counterparty is not known at the time of execution.[142] In this circumstance, the reporting side would report the execution agent ID because it would not know the counterparty ID.

Regulation SBSR requires reporting of the UIC of each counterparty to a security-based swap.[143] One commenter stated that "each series or portfolio within each trust should be given its own LEI/UCI number to address possible confusion between series or portfolios within the same trust. Each portfolio is distinct with its own separate assets and liabilities."[144] The

140 The process for obtaining UICs, including counterparty IDs, is described in Section X, infra.

141 See infra Section II(C)(3)(b)(i) (discussing execution agent ID).

142 The Commission believes the reporting side may not know the counterparty ID of the other side if, for example, the security-based swap will be allocated after execution. Section VIII describes how Regulation SBSR applies to security-based swaps involving allocation.

143 See Rule 901(d)(1); Rule 907(a)(5) (requiring a registered SDR to have written policies and procedures for assigning UICs in a manner consistent with Rule 903).

144 Institutional Investors Letter at 6.

Commission agrees with this commenter and notes that Rule 901(d)(1) requires the reporting of the UIC for each counterparty to a security-based swap, whether not the counterparty is a legal person.[145] If a counterparty is an entity other than a legal person, such as a series or portfolio within a trust, or an account, Rule 901(d)(1) requires the reporting of the UIC that identifies that counterparty.

Finally, the Commission notes that although it is not adopting a definition of "participant ID," the concept of a "participant" is still utilized in Regulation SBSR. Rule 900(u), as adopted, defines "participant," with respect to a registered SDR, as "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)."[146] The adopted definition makes clear that a person becomes a participant of a particular registered SDR only if the person meets the criteria of Rule 908(b) <u>and</u> is a counterparty to a security-based swap that is reported to that registered SDR on a mandatory basis. A counterparty would not become a participant of <u>all</u> registered SDRs as a result of being a counterparty to a security-based swap that is subject to Regulation SBSR and reported to a particular registered SDR as required by Rule 901(a). The adopted definition also clarifies that a counterparty would not become a participant of a registered SDR as a result of any non-mandatory report[147] submitted to that registered SDR.[148]

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145 Consequently, the word "person," as used in this release, includes any counterparty to a security-based swap, including a counterparty that is not a legal person. <u>Cf.</u> Cross-Border Adopting Release, 79 FR at 47312 (providing that an account, whether discretionary or not, of a U.S. person also is a U.S. person—even though accounts generally are not considered separate legal persons—and noting that this prong of the "U.S. person" definition focuses on the party that actually bears the risk arising from a security-based swap transaction).

146 Re-proposed Rule 900(s) would have defined "participant" as "a person that is a counterparty to a security-based swap that meets the criteria of § 242.908(b)."

147 <u>See</u> <u>infra</u> Section VI(D)(1) (discussing non-mandatory reports).

Similarly, a counterparty that meets the criteria of Rule 908(b) would not become a participant of any registered SDR if the security-based swap is reported pursuant to a substituted compliance determination under Rule 908(c), because such a security-based swap would not be reported to a registered SDR pursuant to Rule 901(a).

The final definition of "participant" is less comprehensive than the re-proposed definition because Rule 908(b), as adopted, is narrower than Rule 908(b), as re-proposed. As discussed in Section XV(D), infra, final Rule 908(b) includes U.S. persons, registered security-based swap dealers, and registered major security-based swap participants. The Commission is not at this time taking action on the prong of re-proposed Rule 908(b) that would have caused a person to become a participant solely by being a counterparty to a security-based swap that is a transaction conducted within the United States. As a result, fewer non-U.S. persons are likely to "meet the criteria of Rule 908(b)," as adopted, because a non-U.S. person that is a counterparty of a security-based swap would meet the criteria of final Rule 908(b) only if that counterparty is a registered security-based swap dealer or a registered major security-based swap participant. Thus, only a U.S. person, a registered security-based swap dealer, or a registered major security-based swap participant could be a "participant" under Regulation SBSR.

b. Rule 901(d)(2)—Additional UICs

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148 Assume, for example, that Fund X is a U.S. person and engages in a single uncleared security-based swap with a registered security-based swap dealer. Further assume that the registered security-based swap dealer, who has the duty to report the transaction under the reporting hierarchy, elects to submit the required transaction report to SDR P, and also submits a non-mandatory report of the transaction to SDR Q. Fund X is now a participant of SDR P but not of SDR Q. Under Rule 900(u), Fund X would not become a participant of SDR Q unless and until it enters into a future security-based swap that is reported on a mandatory basis to SDR Q.

Rule 901(d)(1)(ii), as re-proposed, would have required reporting of, as applicable, the broker ID, desk ID, and trader ID of the direct counterparty on the reporting side. The Commission preliminarily believed that the reporting of this information would help to promote effective oversight, enforcement, and surveillance of the security-based swap market by the Commission and other relevant authorities.[149] The Commission noted, for example, that this information would allow regulators to track activity by a particular participant, a particular desk, or a particular trader. In addition, relevant authorities would have greater ability to observe patterns and connections in trading activity, or examine whether a trader had engaged in questionable activity across different security-based swap products. Such identifiers also would facilitate aggregation and monitoring of the positions of security-based swap counterparties, which could be of significant benefit for systemic risk management.[150]

Adopted Rule 901(d)(2) modifies re-proposed Rule 901(d)(1)(ii) in certain respects. First, final Rule 901(d)(2) replaces the defined term "desk ID" with the defined term "trading desk ID." Second, final Rule 901(d)(2) now includes a requirement to report the branch ID and the execution agent ID of the direct counterparty on the reporting side, in addition to the broker ID, trading desk ID, and trader ID. In conjunction with this requirement, final Rule 900 includes the new defined terms "branch ID" and "execution agent ID." Third, final Rule 900 includes a revised definition of "trader ID." Thus, final Rule 901(d)(2) requires reporting of, "[a]s applicable, the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID of the direct counterparty on the reporting side."[151]

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149 See Regulation SBSR Proposing Release, 75 FR at 75217.

150 See id.

151 As discussed in greater detail in Section XIII(A), infra, Rule 906(a), as adopted, requires reporting to a registered SDR of the branch ID, broker ID, execution agent ID, trader ID,

i. Branch ID and Execution Agent ID

Rule 901(d)(2), as adopted, requires the reporting of, as applicable, the branch ID and execution agent ID of the direct counterpart on the reporting side, in addition to the broker ID, trader ID, and trading desk ID of the direct counterparty on the reporting side. The "branch ID" is the "UIC assigned to a branch or other unincorporated office of a participant."[152] The Commission did not include a requirement to report the branch ID in Rule 901(d), as proposed or as re-proposed. However, the Commission now believes that it is appropriate to include in Regulation SBSR a new concept of the branch ID and require reporting of the branch ID, when a transaction is conducted through a branch, as part of Rule 901(d)(2), as adopted. Reporting of the branch ID, where applicable, will help identify the appropriate sub-unit within a large organization that executed a security-based swap (if a transaction were in fact conducted through that sub-unit). This information also will facilitate the aggregation and monitoring of security-based swap transactions by branch, at the level of the registered SDR and potentially within the firm itself.

Final Rule 901(d)(2) also includes another UIC, the "execution agent ID," that was not included in the proposal or re-proposal. Rule 900(m), as adopted, provides that the execution agent ID is 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." The Commission initially proposed to require reporting of the broker ID in order to obtain a record of an agent that facilitates a transaction, if there is such an agent. The Commission now recognizes, however,

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and trading desk ID, as applicable, of a direct counterparty to a security-based swap that is not the reporting side. Thus, Rules 901(d)(2) and 906(a) together require reporting, as applicable, of the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID of each direct counterparty to a security-based swap.

152 See Rule 900(d).

that entities other than registered brokers could act as agents in a security-based swap transaction. For example, an asset manager could be acting as an agent on behalf of a fund counterparty but likely would not be a broker-dealer. The definition of "execution agent ID" is designed to encompass the entities in addition to brokers that may act as agents for security-based swap counterparties. The broker ID,[153] which also must be reported under final Rule 901(d)(2), will identify a registered broker, if any, that intermediates a security-based swap transaction between two direct counterparties and itself is not a counterparty to the transaction.

The Commission believes that obtaining information about a broker or execution agent, if any, involved in the transaction will provide regulators with a more complete understanding of the transaction and could provide useful information for market surveillance purposes. The Commission notes that some security-based swap transactions may involve multiple agents. For example, an asset manager could use a broker to facilitate the execution of a security-based swap on behalf of one or more of the funds that it advises. In that case, final Rule 901(d) would require reporting of the counterparty ID of the direct counterparty (the fund), the execution agent ID (for the asset manager), and the broker ID (of the broker that intermediated the transaction).

ii. Revised Defined Terms in Rule 901(d)(2)

Rule 901(d)(1)(ii), as re-proposed, would have required the reporting of, among other things, the desk ID of the direct counterparty on the reporting side. Rule 900(i), as re-proposed, would have defined "desk ID" as the UIC assigned to the trading desk of a participant or of a broker of a participant. Rule 900, as re-proposed, did not include a definition of "desk." Final Rule 901(d)(2) requires the reporting of the "trading desk ID," rather than the "desk ID."

153 "Broker ID" is defined as "the UIC assigned to a person acting as a broker for a participant." See Rule 900(e).

Accordingly, the defined term "desk ID" is being replaced in Rule 900 with the defined term "trading desk ID," which Rule 900(ll) defines as "the UIC assigned to the trading desk of a participant." Unlike re-proposed Rule 900, which provided no definition of the term "desk," final Rule 900(kk) provides a definition of the term "trading desk." Specifically, final Rule 900(kk) defines "trading desk" to mean, "with respect to a counterparty, the smallest discrete unit of organization of the participant that purchases or sells financial instruments for the account of the participant or an affiliate thereof." The Commission believes that adding a definition of "trading desk" will help to clarify the rule by describing the type of structure within an enterprise that must receive a trading desk ID. The "trading desk ID" concept is designed to identify, within a large organization, the smallest discrete unit that initiated a security-based swap transaction. Requiring the reporting of the trading desk ID will assist regulators in monitoring the activities and exposures of market participants. The trading desk ID could, among other things, facilitate investigations of suspected manipulative or abusive trading practices.[154]

Final Rule 901(d)(2) also requires reporting of, if applicable, the trader ID of the direct counterparty on the reporting side. Re-proposed Rule 900(gg) would have defined "trader ID" as

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154 The trading desk ID also might allow relevant authorities to determine whether a particular trading desk is engaging in activity that could disrupt the security-based swap markets. For example, in early 2012, a trading desk of JPMorgan Chase and Company known as the Chief Investment Office executed transactions in synthetic credit derivatives that declined in value by at least $6.2 billion later in the year. According to the report of the United States Senate Permanent Subcommittee on Investigations, these trades, which were unknown to the bank's regulators, were "so large in size that they roiled world credit markets." Report of the United States Senate Permanent Subcommittee on Investigations, JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses (March 15, 2013), available at http://www.hsgac.senate.gov/subcommittees/investigations/hearings/chase-whale-trades-a-case-history-of-derivatives-risks-and-abuses (last visited October 7, 2014). The existence of a trading desk ID could, in the future, facilitate the ability of relevant authorities to detect this type of trading activity.

"the UIC assigned to a natural person who executes security-based swaps." This definition would encompass a direct counterparty that executed a security-based swap, as well as a trader acting as agent that executes a security-based swap on behalf of a direct counterparty. The Commission did not intend for the definition of "trader ID" to include both direct counterparties (whose counterparty IDs must be provided pursuant to Rule 901(d)(1)) and traders acting in an agency capacity that execute security-based swaps on behalf of a direct counterparty. To narrow the definition of "trader ID" so that it includes only traders that execute security-based swaps on behalf of direct counterparties, final Rule 900(jj) defines "trader ID" as "the UIC assigned to a natural person who executes one or more security-based swaps on behalf of a direct counterparty." The direct counterparty would be the person, account, or fund that is the direct counterparty to the security-based swap that employs the trader.

iii. Response to Comments

One commenter supported the proposed requirement for reporting broker ID, desk ID, and trader ID, stating that these UICs would "give regulators a capability to aggregate position and trade data in multiple ways including by individual trader to spot concentration risk and insider trading."[155] A second commenter argued that desk structures change relatively frequently and personnel often rotate or transfer to other firms; therefore, the effort to maintain trader ID and desk ID information in a registered SDR could exceed its usefulness.[156] The commenter also

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155 GS1 Letter at 39 (also stating that these elements "would be most critical for performing trading oversight and compliance functions such as trading ahead analysis, assessing trader price collusion, analyzing audit trail data from multiple derivatives markets as well as underlying cash markets. . . Also, lack of unique, unambiguous and universal identification of broker, desks and traders was one of the significant deterrents to analyzing the May 6, 2010 flash crash"). Another commenter generally supported the information required to be reported pursuant to Rule 901(d). See Barnard I at 2.

156 See DTCC II at 11.

indicated that information regarding the desk ID and trader ID would be available from a firm's audit trail.[157]

The Commission questions whether consistent and robust information about a firm's desk and trader activity is available from firms' audit trails. Even if it were, the Commission believes that reporting of the trader ID and the trading desk ID—as well as the branch ID, broker ID, and execution agent ID—will help to assure that information concerning the persons involved in the intermediation and execution of a security-based swap is readily available to the Commission and other relevant authorities. This information could assist in monitoring and overseeing the security-based swap market and facilitate investigations of suspected manipulative or abusive trading practices.

Two other commenters raised issues with requiring reporting of broker, trader, and trading desk IDs.[158] One of these commenters believed that reporting these UICs would require "great cost and effort" from firms, including the costs associated with establishing and maintaining UICs in the absence of a global standard.[159] The commenter also noted that not all of these identifiers are required to be reported in other jurisdictions.[160] In a joint comment letter with another trade association, this commenter also stated that, because these UICs are not currently reported by any participants in the OTC derivatives markets, "[t]he industry will need

157 See id.

158 See ISDA III at 2; ISDA IV at 8; ISDA/SIFMA at 11.

159 ISDA III at 2; ISDA IV at 8.

160 See ISDA IV at 8 (stating that "[u]nder EMIR rules, broker ID is required, but not desk ID or trader ID. In Canada, only broker ID is required, but we note that reporting entities are struggling with the availability of an LEI to identify brokers that have not been subject to a mandate to obtain one"). See also ISDA III at 2.

to develop standards and appropriate methodology to effectively report this information."[161] This comment expressed concern that the proposed requirement "will create significant 'noise' as a result of booking restructuring events (due to either technical or desk reorganization considerations). We therefore recommend that such information be either excluded, or that participants report the Desk ID and Trader ID associated with the actual trade or lifecycle events, but not those resulting from internal reorganization events."[162]

The Commission recognizes that, currently, UICs for branches, execution agents, trading desks, and individual traders are generally not in use. While the Commission agrees with the commenters that there could be a certain degree of cost and effort associated with establishing and maintaining UICs, the Commission believes that such costs have already been taken into account when determining the costs of Regulation SBSR.[163] The costs of developing such UICs are included in the costs for Rule 901 (detailing the data elements that must be reported) and Rule 907 (detailing the requirement that SDRs develop policies and procedures for the reporting of the required data elements).

The Commission confirms that these UICs must be reported pursuant to Rule 901(d)(2) only in connection with the original transaction.[164]

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161 ISDA/SIFMA at 11.

162 Id. See also ISDA IV at 8 ("We suggest that the Commission eliminate broker ID, desk ID and trader ID from the list of reportable secondary trade information. If the Commission wants to retain these fields we strongly believe a cost-benefit analysis should be conducted").

163 See infra Section XXII(C)(1) (providing the economic analysis of these requirements).

164 Thus, a participant would not be required to "re-report" a transaction to the registered SDR if, for example, the trader who executed the transaction leaves the firm some time afterwards. However, the participant will be subject to the policies and procedures of the registered SDR for, among other things, assigning UICs in a manner consistent with Rule 903. See infra Section IV. Those policies and procedures could include a requirement

c. Rule 901(d)(3)—Payment Stream Information

Rule 901(d)(1)(iii), as proposed and re-proposed, would have required the reporting side to report the amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each direct counterparty to the other. The Commission stated that this requirement would include, for a credit default swap, an indication of the counterparty purchasing protection, the counterparty selling protection, and the terms and contingencies of their payments to each other; and, for other security-based swaps, an indication of which counterparty is long and which is short.[165] The Commission noted that this information could be useful to regulators in investigating suspicious trading activity.[166]

One commenter stated the view that proposed Rule 901(d)(1)(iii) was duplicative of proposed Rule 901(d)(1)(v), which would require reporting of the data elements necessary to determine the market value of a transaction.[167] The commenter stated, further, that proposed Rule 901(d)(1)(iii) was unclear about the required form of the description of the terms and contingencies of the payment streams, and requested further clarification of this proposed requirement.[168]

The Commission agrees with the commenter's concerns regarding the need to clarify the information required to be reported under these provisions of Rule 901. Accordingly, the Commission is revising adopted Rule 901(d)(3) to require the reporting, to the extent not

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for the participant to regularly notify the registered SDR about changes in persons or business units requiring a UIC.

165 See Regulation SBSR Proposing Release, 75 FR at 75218, note 62.

166 See id.

167 See DTCC II at 10.

168 See DTCC II at 10; DTCC V at 12.

provided pursuant to Rule 901(c)(1), of the terms of any fixed or floating rate payments, or otherwise customized or non-standardized payment streams, including the frequency and contingencies of any such payments.[169] As discussed above, adopted Rule 901(c)(1)(iv) requires the reporting side to report the terms of any standardized fixed or floating rate payments, and the frequency of any such payments.[170] To the extent that a security-based swap includes fixed or floating rate payments that do not occur on a regular schedule or are otherwise customized or non-standardized, final Rule 901(d)(3) requires the reporting of the terms of those payments, including the frequency and contingencies of the payments. The Commission believes that the changes to final Rule 901(d)(3) make clear that Rule 901(d)(3) requires reporting of customized or non-standardized payment streams, in contrast to the standardized payment streams required to be reported pursuant to Rule 901(c)(1)(iv). The terms required to be reported could include, for example, the frequency of any resets of the interest rates of the payment streams. The terms also could include, for a credit default swap, an indication of the counterparty purchasing protection and the counterparty selling protection, and, for other security-based swaps, an indication of which counterparty is long and which counterparty is short. The Commission believes that information concerning the non-standard payment streams of a security-based swap could be useful to the Commission or other relevant authorities in assessing the nature and extent

169 As discussed above, the requirement to report the amount(s) and currenc(ies) of any up-front payments now appears in Rule 901(c)(3), rather than in Rule 901(d). Rule 901(c)(3), as adopted, requires reporting of the price of a security-based swap, including the currency in which the price is expressed and the amount(s) and currenc(ies) of any up-front payments.

170 If information concerning the terms and frequency of any regular fixed or floating rate payments is included in the product ID for the security-based swap, the reporting side is required to report only the product ID, and would not be required to separately report the terms and frequency of any regular fixed or floating rate payments in addition to the product ID. See Rule 901(c)(1); Section III(B)(2)(b)(ii), supra.

of counterparty obligations and risk exposures. The Commission believes that the changes made to Rule 901(d)(3) will help clarify the information required to be reported under the rule and will eliminate any redundancy between the information required to be reported under Rules 901(c)(1)(iv) and 901(d)(3).

In addition, as discussed more fully below, the Commission is revising re-proposed Rule 901(d)(1)(v), which is renumbered as final Rule 901(d)(5), to indicate that Rule 901(d)(5) requires the reporting of additional data elements necessary to determine the market value of a transaction <u>only to the extent that the information has not been reported pursuant to Rule 901(c) or other provisions of Rule 901(d)</u>. The Commission believes that these changes address the concern that Rule 901(d)(i)(iii) was duplicative of Rule 901(d)(1)(v).

d. <u>Rule 901(d)(4)—Titles and Dates of Agreements</u>

Rule 901(d)(1)(iv), as proposed, would have required reporting of the title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement. Rule 901(d)(1)(v), as proposed, would have required reporting of the data elements necessary for a person to determine the market value of the transaction. The Commission noted that proposed Rule 901(d)(1)(v) would require, for a security-based swap that is not cleared, information related to the provision of collateral, such as the title and date of the relevant collateral agreement. The Commission preliminarily believed that these requirements, together with other information required to be reported under Rule 901(d), would facilitate regulatory oversight of counterparties by providing information concerning counterparty obligations.[171] The Commission re-proposed Rules 901(d)(1)(iv) and 901(d)(1)(v) without revision in the Cross-Border Proposing Release.

In proposing Rules 901(d)(1)(iv) and 901(d)(1)(v), the Commission balanced the burdens associated with reporting entire agreements against the benefits of having information about these agreements, and proposed to require reporting only of the title and date of such master agreements and any other agreement governing the transaction. Similarly, the Commission indicated that proposed Rule 901(d)(1)(v) would require the reporting of the title and date of any collateral agreements governing the transaction.[172]

One commenter disagreed with the Commission's proposed approach. This commenter expressed the view that Regulation SBSR should be more explicit in requiring reports of information concerning collateral and margin for use by regulators because this information would be important for risk assessment and other purposes.[173]

The Commission agrees that it is important for regulatory authorities to have access to information concerning the collateral and margin associated with security-based swap transactions. The Commission also is mindful, however, that requiring the reporting of detailed information concerning the master agreement and other documents governing security-based swaps could impose significant burdens on market participants. In addition, the Commission

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171 See Regulation SBSR Proposing Release, 75 FR at 75218.

172 See id. at 75218, note 63.

173 See Better Markets I at 7-8 (arguing that, to facilitate oversight, security-based swap counterparties should be required to report the core data elements of their collateral arrangements, including, at a minimum: (1) the parties to the agreement; (2) the thresholds for forbearance of posted collateral applicable to each party; (3) the triggers applicable to each party that would require immediate funding (termination of forbearance); and (4) the methodology for measuring counterparty credit risk); Better Markets III at 4-5.

notes that one commenter on proposed Regulation SBSR stated that it would not be possible, in all cases, to identify the collateral associated with a particular security-based swap transaction because collateral is calculated, managed, and processed at the portfolio level rather than at the level of individual transactions.[174]

In light of these considerations, the Commission believes that, for security-based swaps that are not clearing transactions, requiring reporting of 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—but not the agreements themselves or detailed information concerning the agreements—will facilitate regulatory oversight of the security-based swap market by providing regulators with a more complete understanding of a security-based swap counterparty's obligations while not imposing significant burdens on market participants. The Commission anticipates that, if a situation arose where the Commission or another relevant authority needed to consult information about a transaction contained in one of the related agreements, the Commission could request the agreement from one of the security-based swap counterparties. Knowing the title and date of the agreement will assist relevant authorities in identifying the agreement and thereby expedite the process of obtaining the necessary information.

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174 See ISDA/SIFMA I at 14-15. Specifically, the commenter stated that the calculation of exposure collateral "is performed at a netted portfolio level and cannot be broken down to the transaction level—it is simply not possible to identify the specific exposure collateral or the 'exposure' associated with any particular transaction." See id. at 14. The commenter noted, further, that the independent amount, an optional additional amount of collateral that two counterparties may negotiate, "may be specified at transaction level, at portfolio level, at some intermediate level (a combination of product type, currency and maturity, for instance), and possible a hybrid of all three. Therefore it may or may not be possible to identify the [independent amount] associated with a particular transaction, but as a general matter this association cannot be reliably made." See id. at 15.

One commenter argued that the "level of change" necessary to incorporate the titles and dates of master agreements into individual trade messages was excessive and recommended that the trade level reference continue to follow the current process of referencing the lowest level governing document, which would permit the identification of all of the other relevant documents.[175] Another commenter questioned the value of requiring reporting of the title and date of party level agreements.[176] This commenter stated that, because other jurisdictions do not require reporting of the "title and date of a Credit Support Agreement or other similar document ("CSA") governing the collateral arrangement between the parties . . . global trade repositories do not currently have fields to support separate reporting of data pertaining to the CSA from those which define the master agreement. Equally challenging is firms' ability to report data pertaining to the CSA as the terms of these agreements are not readily reportable in electronic format nor could this be easily or accurately achieved."[177] Noting that other global regulators have limited their trade reporting requirements to the relevant date and type of the master agreement, the commenter believed that the information required to be reported should be limited to the identification of party level master agreements that govern all of the derivatives transactions between the parties, and should not include master confirmations or other documentation that is used to facilitate confirmation of the security-based swap.[178]

The Commission understands that reporting the titles and dates of agreements for individual security-based swap transactions may require some modification of current practices. However, the Commission believes that it is important for regulators to know such titles and

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175 See DTCC II at 11.

176 See ISDA IV at 8.

177 Id.

178 See id.

dates so that the Commission and other relevant authorities would know where to obtain further information about the obligations and exposures of security-based swap counterparties, as necessary. The Commission believes that requiring reporting of the titles and dates of master agreements and other agreements governing a transaction—but not the agreements themselves or detailed information concerning the agreements—would provide regulators with access to necessary information without creating an unduly burdensome reporting obligation. Therefore, the Commission is adopting Rule 901(d)(1)(iv) substantially as proposed and re-proposed, while renumbering it final Rule 901(d)(4). With respect to the commenter's concern regarding the difficulty of reporting the terms of the documentation governing a security-based swap, the Commission emphasizes that final Rule 901(d)(4) requires reporting only of the titles and dates of the documents specified in Rule 901(d)(4), but not the terms of these agreements.

The commenter also requested additional clarity regarding the proposed requirement generally.[179] As discussed above, Rule 901(d)(1)(iv), as proposed and re-proposed, would have required reporting of "the title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement." The proposed rule also would have required reporting of the title and date of any collateral agreements governing the transaction.[180] Although the rule, as proposed and re-proposed, would have required reporting of the title and date of any master agreement, margin agreement, collateral agreement, and any other document governing the transaction that is incorporated by reference, the Commission agrees that it would be useful to state more precisely the information required to be

[179] See DTCC V at 12.

[180] See Regulation SBSR Proposing Release, 75 FR at 75218, note 63.

reported and to clarify the scope of the rule. Rule 901(d)(4), as adopted, requires reporting of, "[f]or 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." The new language makes clear that Rule 901(d)(4) applies only to security-based swaps that are not clearing transactions (i.e., security-based swaps that do not have a registered clearing agency as a direct counterparty). Any such agreements relating to a clearing transaction would exist by operation of the rules of the registered clearing agency, and therefore do not need to be reported pursuant to Regulation SBSR because the Commission could obtain information from the registered clearing agency as necessary.

e. Rule 901(d)(5)—Other Data Elements

Rule 901(d)(1)(v), as re-proposed, would have required reporting of the data elements necessary for a person to determine the market value of a transaction. The Commission is adopting Rule 901(d)(1)(v) substantially as re-proposed, but renumbering it as Rule 901(d)(5) and making certain technical and clarifying changes in response to comments.

As discussed above, re-proposed Rule 901(d)(1)(iii) would have required reporting of the amount(s) and currenc(ies) of any up-front payments and the terms and contingencies of the payment streams of each direct counterparty to the other. One commenter believed that re-proposed Rule 901(d)(1)(iii) was duplicative of re-proposed Rule 901(d)(1)(v),[181] and asked the Commission to provide additional clarity on what re-proposed Rule 901(d)(1)(v) requires.[182] To address these comments, the Commission is revising adopted Rule 901(d)(5) to require the

181 See DTCC II at 10.

182 See DTCC V at 12.

reporting, to the extent not required pursuant to Rule 901(c) or other provisions of Rule 901(d), of 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.

Another commenter expressed concern that the requirements of re-proposed Rule 901(d)(1)(v) were vague, "leaving reporting parties and trade repositories with the task of establishing the reportable data with potentially different result."[183] This commenter recommended that Commission revise the rule to clarify the requirement to report "(i) the mark-to-market value and currency code and (ii) the date and time of the valuation in Coordinated Universal Time . . ."[184] Further, because information necessary to determine the market value of a transaction "is determined as part of end of day processes," the commenter requested that the timeframe for reporting data pertaining to market value be based on the end of the day on which the relevant data was determined.[185]

In response to these concerns, the Commission emphasizes that neither Regulation SBSR, as proposed and re-proposed, nor Regulation SBSR, as adopted, requires the reporting of the market value of a security-based swap (although the negotiated price of the actual transaction is required to be reported), either on a one-time or ongoing basis.[186] As noted above, final Rule 901(d)(5) requires reporting, to the extent not required pursuant to Rule 901(c) or other provisions of Rule 901(d), of any additional data elements included in the agreement between the counterparties that are necessary to determine the market value of the transaction. This refers to

183 ISDA IV at 9.

184 Id.

185 See id.

186 In contrast, the CFTC's swap data reporting rules require reporting parties to report the market value of swap transactions to a CFTC-registered swap data repository on a daily basis. See 17 CFR 45.4(a)(2).

all of the contractual terms and conditions of a security-based swap that a party would need to perform its own calculation of the market value of the security-based swap using its own market data. Although the reporting side must include, as part of the initial transaction report, the information necessary to determine the market value of the transaction, Regulation SBSR does not require the reporting side to take the additional step of calculating and reporting the market value of the transaction, nor does it require the reporting side to provide any market data that would be needed to calculate the market value of the transaction.

Rule 901(d)(5) is designed to help to ensure that all of the material terms of the agreement between the counterparties that is necessary to determine the market value of a security-based swap are available to the Commission and other relevant authorities.[187] The Commission continues to believe that this requirement will facilitate regulatory oversight by giving relevant authorities the information necessary to value an entity's security-based swap positions and calculate the exposure resulting from those positions. However, the final language of Rule 901(d)(5) is designed to eliminate any overlap with other provisions of Rule 901(c) or 901(d). For example, if a security-based swap has a product ID, the Commission presumes that all information necessary to identify the security-based swap and determine the market value of the transaction could be derived from the product ID (or the identification information behind that particular product ID). Therefore, it would not be necessary to report any additional information pursuant to Rule 901(d)(5) for a security-based swap for which a product ID is reported.

[187] This could include—by way of example and not of limitation—information about interest rate features, commodities, or currencies that are part of the security-based swap contract.

In addition, the Commission is further clarifying the rule by making a technical change to indicate that final Rule 901(d)(5) requires the reporting only of data elements "included in the agreement between the counterparties." The Commission believes that the rule as proposed and re-proposed—which did not include this phrase—could have been interpreted to require the reporting of information external to the agreement between the counterparties that could have helped determine the market value of the security-based swap (e.g., the levels of supply and demand in the market for the security-based swap). The Commission intended, however, to require reporting only of information included in the agreement between the counterparties, not of general market information. Accordingly, final Rule 901(d)(5) requires the reporting only of data elements "included in the agreement between the counterparties" that are necessary for a person to determine the market value of the transaction.

Finally, one commenter believed that proposed Rule 901(d)(1)(v) should require reporting only of the full terms of a security-based swap as laid out in the trade confirmation.[188] Although the Commission agrees that the full terms of a trade confirmation could, in some cases, provide the data elements included in the agreement between the counterparties that are necessary to determine the market value of a transaction, the Commission notes that the information required to be reported pursuant Rule 901(d)(5) would not necessarily be limited to information included in the trade confirmation. Not all market participants observe the same conventions for confirming their trades. The Commission understands that confirmations for some types of trades are significantly more standardized than others. Some trades may have critical terms included in other documentation, such as master confirmation agreements or credit support annexes. Moreover, confirmation practices in the future may differ from current

188 See DTCC II at 10.

confirmation practices. The Commission believes, therefore, that restricting information reported in accordance with Rule 901(d)(5) to the information included in the confirmation would not provide the Commission and other relevant authorities with sufficient information regarding the market value of a security-based swap.

f. Rule 901(d)(6)—Submission to Clearing

Rule 901(d)(1)(vi), as re-proposed, would have required reporting of the following data element: "If the security-based swap will be cleared, the name of the clearing agency." This information would allow the Commission to verify, if necessary, that a security-based swap was cleared, and to identify the clearing agency that cleared the transaction. The Commission received no comments on this provision and is adopting it substantially as re-proposed, with minor clarifying changes and renumbered as Rule 901(d)(6). Rule 901(d)(6), as adopted, requires reporting of the following: "If applicable, and to the extent not provided pursuant to paragraph (c), the name of the clearing agency to which the security-based swap will be submitted for clearing."

For some security-based swaps, the name of the clearing agency that clears the security-based swap could be inherent in the product ID. Rule 901(d)(6), as adopted, clarifies that the name of the clearing agency to which the security-based swap will be submitted for clearing need not be reported if that information is inherent in the product ID. In addition, the new language regarding whether the security-based swap will be submitted for clearing reflects the possibility that a clearing agency could reject the security-based swap for clearing after it has been submitted. The Commission believes that it would be useful to know the name of the clearing agency to which the transaction is submitted, even if the clearing agency rejects the transaction.

g. Rule 901(d)(7)—Indication of Use of End-User Exception

Rule 901(d)(1)(vii), as re-proposed, would have required reporting of whether a party to the transaction invoked the so-called "end user exception" from clearing, which is contemplated in Section 3C(g) of the Exchange Act.[189] Section 3C(g)(6) of the Exchange Act[190] provides for the Commission to request information from persons that invoke the exception. The Commission preliminarily believed that requiring reporting of whether the exception was invoked in the case of a particular security-based swap would assist the Commission in monitoring use of the exception.[191]

One commenter argued that the Commission should not use the trade reporting mechanism "to police the end-user exception."[192] The commenter expressed concern with an end user having to certify eligibility with each transaction and stated that "it is illogical that filings by swap dealers should determine the eligibility of the end user."[193] The Commission acknowledges the commenter's concerns but believes that they are misplaced. Re-proposed Rule 901(d)(1)(vii) would not require reporting of any information as to the end user's eligibility to

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189 15 U.S.C. 78c-3(g). Section 3C(g)(1) of the Exchange Act provides that the general clearing mandate set forth in Section 3C(a)(1) of the Exchange Act will not apply to a security-based swap if one of the counterparties to the security-based swap: (1) is not a financial entity; (2) is using security-based swaps to hedge or mitigate commercial risk; and (3) notifies the Commission, in a manner set forth by the Commission, how it generally meets if financial obligations associated with entering into non-cleared security-based swaps. The application of Section 3C(g)(1) is solely at the discretion of the security-based swap counterparty that satisfies these conditions. See Securities Exchange Act Release No. 63556 (December 15, 2010), 75 FR 79992 (December 21, 2010).

190 15 U.S.C. 78c-3(g)(6).

191 See Regulation SBSR Proposing Release, 75 FR at 75218.

192 Cravath Letter at 3.

193 Id. at 4.

invoke the exception for a specific transaction; instead, it would require reporting only of the fact of the exception being invoked. The Commission could then obtain information from a registered SDR regarding instances of the exception being invoked and could determine, as necessary, whether to further evaluate whether the exception had been invoked properly. The Commission does not believe that it is necessary or appropriate to require information about the end user's eligibility to invoke the exception to be reported under Rule 901(d). Therefore, the Commission has determined to adopt Rule 901(d)(1)(vii) as re-proposed, but is renumbering it as Rule 901(d)(7).

h. Rule 901(d)(8)—Description of Settlement Terms

Rule 901(d)(1)(viii), as re-proposed, would have required, for a security-based swap that is not cleared, 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. In the Regulation SBSR Proposing Release, the Commission stated its preliminary belief that this information would assist relevant authorities in monitoring the exposures and obligations of security-based swap market participants.[194] One commenter expressed the view that the settlement terms could be derived from other data fields and thus recommended deletion of this data element, or in the alternative, requested additional clarity on what would be required pursuant to this provision.[195]

Re-proposed Rule 901(d)(1)(viii) is being adopted substantially as re-proposed but renumbered as final Rule 901(d)(8) and now includes certain revisions that respond to the commenter and clarify the operation of the rule. Rule 901(d)(8), as adopted, requires: "[t]o the

194 See 75 FR at 75218.

195 See DTCC V at 12.

extent not provide pursuant to 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." The Commission believes that the final rule makes clear that there is no requirement to report information concerning the settlement terms of an uncleared security-based swap if the information was reported pursuant to another provision of Rule 901(d). Similarly, there is no requirement to report the settlement terms pursuant to Rule 901(d)(8) if the settlement terms are inherent in the product ID. Final Rule 901(d)(8) is designed to facilitate regulatory oversight by providing the Commission and other relevant authorities with information necessary to understand the exposures of security-based swap counterparties.

i. Rule 901(d)(9)—Platform ID

Rule 901(d)(1)(ix), as re-proposed, would have required reporting of the venue where a security-based swap was executed. This would include, if applicable, an indication that a security-based swap was executed bilaterally in the OTC market.[196] This information could be useful for a variety of purposes, including studying the development of security-based swap execution facilities ("SB SEFs") or conducting more detailed surveillance of particular security-based swap transactions. In the latter case, the Commission or another relevant authority would find it helpful to know the execution venue, from which it could obtain additional information as appropriate.

One commenter, in discussing the entity that should assign transaction IDs, suggested that linking a trade to a particular platform potentially could result in the unintentional disclosure

196 See Regulation SBSR Proposing Release, 75 FR at 75218.

of the identities of the counterparties.[197] The Commission notes that information concerning the venue where a security-based swap was executed, like all secondary trade information reported under Rule 901(d), is not required to be, and thus may not be, publicly disseminated. Because the platform ID may not be publicly disseminated, there is no potential for it to unintentionally identify the counterparties to the transaction.

The Commission continues to believe that information identifying the venue where a security-based swap was executed, whether on a trading platform or in the OTC market, is necessary information for relevant authorities to conduct surveillance in the security-based swap market and understand developments in the security-based swap market generally. Therefore, the Commission is adopting the rule substantially as re-proposed and renumbering it as final Rule 901(d)(9).

One commenter asked the Commission to clarify that re-proposed Rule 901(d)(1)(ix) would require reporting only of execution platforms required to register with the Commission or the CFTC.[198] The Commission believes that final Rule 901(d)(9) largely accomplishes this result. Specifically, the Commission has revised Rule 901(d)(9) to require reporting, if applicable, of the "platform ID," rather than the "execution venue" more broadly. To implement this requirement, the Commission also is adopting a definition of "platform." Final Rule 900(v) defines a "platform" as "a national securities exchange or a security-based swap execution facility that is registered or exempt from registration."[199] Rule 900(w) defines "platform ID" as

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197 See DTCC II at 15-16.

198 See ISDA IV at 9.

199 The Commission believes that transactions occurring on a registered SB SEF as well as an exempt SB SEF should be reported to a registered SDR. Certain entities that currently meet the definition of "security-based swap execution facility" are not yet registered with the Commission and will not have a mechanism for registering until the Commission

the UIC assigned to the platform on which a security-based swap is executed. The platform ID, like other UICs, must be assigned as provided in Rule 903. The Commission believes that this approach makes clear that other entities that may be involved in executing transactions, such as inter-dealer brokers, are not considered platforms for purposes of this reporting requirement.[200]

j. Rule 901(d)(10)—Transaction ID of Any Related Transaction

Regulation SBSR, as proposed and re-proposed, was designed to obtain complete and accurate reporting of information regarding a security-based swap from its execution through its termination or expiration. In the Regulation SBSR Proposing Release, the Commission noted that maintaining an accurate record of the terms of a security-based swap would require reporting of life cycle event information to a registered SDR.[201] The term "life cycle event" includes

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adopts final rules governing the registration and core principles of SB SEFs. These entities currently operate pursuant to an exemption from certain otherwise applicable provisions of the Exchange Act. See Securities Exchange Act Release No. 34-64678 (June 15, 2011), 76 FR 36287, 36292-93 (June 22, 2011) (Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps). In addition, the Commission has raised the possibility of granting exemptions to certain foreign security-based swap markets that otherwise would meet the definition of "security-based swap execution facility." See Cross-Border Proposing Release, 78 FR at 31056 ("The Commission preliminarily believes that it may be appropriate to consider an exemption as an alternative approach to SB SEF registration depending on the nature or scope of the foreign security-based swap market's activities in, or the nature or scope of the contacts the foreign security-based swap market has with, the United States"). The adopted definition of "platform" requires such entities to be identified in SDR transaction reports and thus will enable the Commission and other relevant authorities to observe transactions that occur on such exempt SB SEFs.

200 Consistent with Rule 901(d)(9), a registered SDR could create a single identifier for transactions that are not executed on a national securities exchange or a SB SEF that is registered or exempt from registration.

201 See 75 FR at 75220. The Commission re-affirmed the importance of life cycle event reporting for security-based swaps in the Cross-Border Proposing Release. See 75 FR at 31068.

terminations, novations, and assignments of existing security-based swaps.[202] As discussed in greater detail in Sections V(C)(5) and VIII(A), infra, a new security-based swap may arise following the allocation, termination, novation, or assignment of an existing security-based swap, and that the reporting side for the new security-based swap must report the transaction to a registered SDR.[203] The Commission believes that it should be able to link any new security-based swaps that arise from the termination, novation, or assignment of an existing security-based swap to the original transaction. For example, when a single security-based swap is executed as a bunched order and then allocated among multiple counterparties, the Commission and other relevant authorities should be able to link the allocations to the executed bunched order.[204] The ability to link a security-based swap that arises from an allocation, termination, novation, or assignment back to the original security-based swap(s) will help to assure that the Commission and relevant authorities have an accurate and current representation of counterparty exposures.

To facilitate the Commission's ability to map a resulting security-based swap back to the original transaction—particularly if the original transaction and the resulting transaction(s) are reported to different registered SDRs—the Commission is adopting Rule 901(d)(10), which requires the reporting side for a security-based swap that arises from an allocation, termination,

202 See infra Section XXI(A) (discussing the definition of "life cycle events").

203 Certain terminations, such as the termination of an alpha upon acceptance for clearing, result in the creation of new security-based swaps (e.g., the beta and gamma). Similarly, security-based swaps that are terminated during netting or compression exercises result in the creation of new security-based swaps. Regardless of the circumstances, if a security-based swap arises from the termination of an existing security-based swap, the reporting side for the new security-based swap must report the transaction to a registered SDR as required by Rule 901(a).

204 See infra Section VIII (explaining the application of Regulation SBSR to security-based swaps involving allocations).

novation, or assignment of one or more existing security-based swaps, to report "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."[205] The Commission does not believe that it is necessary to require reporting of the transaction ID for clearing transactions that result from other clearing transactions because clearing transactions occur solely within the registered clearing agency and are used by the registered clearing agency to manage the positions of clearing members and, possibly their clients. Thus, it would not be necessary for regulatory authorities to have the ability to link together clearing transactions that result from other clearing transactions.

k. Information That Is Not Required by Rule 901(d)

One commenter, responding to a question in the Regulation SBSR Proposing Release,[206] stated that the Commission should not require reporting of the purpose of a security-based swap because it could reveal proprietary information, and because the parties to a security-based swap often will have several reasons for executing the transaction.[207] The Commission agrees that counterparties could have multiple reasons for entering into a security-based swap, and that requiring reporting of a particular reason could be impractical. Furthermore, different sides to the same transactions would likely have different reasons for entering into it. The Commission notes, further, that it did not propose to require reporting of the purpose of the security-based swap and Rule 901, as adopted, does not include a requirement to report this information.

205 See infra Section V(B) (discussing the definition of "clearing transaction").

206 See 75 FR at 75218 (question 39).

207 See ISDA/SIFMA I at 12. See also Barnard I at 2 (stating that the commenter was "not convinced" that the Commission should require reporting of the purpose of a security-based swap transaction).

Two commenters recommended that the Commission require reporting of valuation data on an ongoing basis.[208] The Commission emphasizes that it did not propose to require the reporting of valuation data in either the Regulation SBSR Proposing Release or the Cross-Border Proposing Release, and that it is not adopting such a requirement at this time.[209] However, the Commission will continue to assess the reporting and public dissemination regime under Regulation SBSR and could determine to propose additional requirements, such as the reporting of valuations, as necessary or appropriate. In addition, the Commission notes that the data elements required under Rules 901(c) and 901(d) are designed to allow the public, the Commission, other relevant authorities, or a data analytics firm engaged by a relevant authority, to calculate the market value of a security-based swap at the time of execution of the trade.[210]

C. Reporting of Historical Security-Based Swaps

1. Statutory Basis and Proposed Rule

Section 3C(e)(1) of the Exchange Act[211] requires the Commission to adopt rules

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208 See DTCC II at 10; Markit I at 3. A third commenter, discussing the Commission's proposed rules governing recordkeeping and reporting requirements for security-based swap dealers, major security-based swap participants, and broker-dealers (Securities Exchange Act Release No. 34-71958 (April 17, 2014), 79 FR 25194 (May 2, 2014)), urged the Commission to provide guidance regarding the methods these entities should use to produce valuation information). See Levin Letter at 3-4. A fourth commenter asked the Commission to confirm that there is no requirement to report valuation data on a daily basis, provided that there has been no change in the data. See ISDA IV at 11.

209 See also Section II(B)(3)(e), supra.

210 See Rule 901(d)(5) (requiring reporting of any additional data elements included in the agreement between the counterparties, to the extent not already provided under another provision of Rule 901(c) or 901(d), that are necessary for a person to determine the market value of the transaction); Regulation SBSR Proposing Release, 75 FR at 75218 ("the reporting of data elements necessary to calculate the market value of a transaction would allow regulators to value an entity's [security-based swap] positions and calculate the exposure resulting from those provisions").

211 15 U.S.C. 78c-3(e)(1).

providing for the reporting to a registered SDR or to the Commission of security-based swaps entered into before the date of enactment of Section 3C (i.e., July 21, 2010). By its terms, this provision is not limited to security-based swaps that were still open as of the date of enactment of the Dodd-Frank Act. In the Regulation SBSR Proposing Release, the Commission took the preliminary view that an attempt to collect many years' worth of transaction-level security-based swap data (including data on terminated or expired security-based swaps) would not enhance the goal of price discovery, nor would it be particularly useful to relevant authorities or market participants in implementing a forward-looking security-based swap reporting and dissemination regime.[212] The Commission also took the preliminary view that collecting, reporting, and processing all such data would involve substantial costs to market participants with little potential benefit. Accordingly, the Commission proposed to limit the reporting of security-based swaps entered into prior to the date of enactment to only those security-based swaps that had not expired as of the date of enactment of the Dodd-Frank Act ("pre-enactment security-based swaps").

In addition, Section 3C(e)(2) of the Exchange Act[213] requires the Commission to adopt rules that provide for the reporting of security-based swaps entered into on or after the date of enactment of Section 3C ("transitional security-based swaps").[214]

The Commission proposed Rule 901(i) to implement both of these statutory requirements. Rule 901(i), as proposed, would have required a reporting party to report all of the

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212 See 75 FR at 75223-24.

213 15 U.S.C. 78c-3(e)(2).

214 See Regulation SBSR Proposing Release, 75 FR at 75224. See also re-proposed Rule 900(kk) (defining "transitional security-based swap" to mean "any security-based swap executed on or after July 21, 2010, and before the effective reporting date").

information required by Rules 901(c) and 901(d) for any pre-enactment security-based swap or transitional security-based swap (collectively, "historical security-based swaps"), to the extent such information was available. Thus, Rule 901(i), as proposed and re-proposed, would have required the reporting only of security-based swaps that were open on or executed after the date of enactment (July 21, 2010). The Commission further proposed that historical security-based swaps would not be subject to public dissemination. In the Cross-Border Proposing Release, the Commission re-proposed Rule 901(i) in its entirety with only one technical revision, to replace the term "reporting party" with "reporting side."

2. Final Rule and Discussion of Comments Received

As adopted, Rule 901(i) states: "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 [Rules 901(c) and 901(d)] 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." In adopting Rule 901(i), the Commission is making minor changes to the rule as re-proposed in the Cross-Border Proposing Release. The Commission has added the clause "in a particular asset class" following "transitional security-based swap" and the clause "to a registered security-based swap data repository that accepts security-based swaps in that asset class." The security-based swap market is segregated into different asset classes, and an SDR might choose to collect and maintain data for only a single asset class. These new clauses clarify that a reporting side is not obligated to report historical security-based swaps in a particular asset class to a registered SDR that does not accept security-based swaps in that asset class. A reporting side's duty to report a historical security-based swap in a particular asset class arises only when there exists a registered SDR that accepts security-based swaps in that asset class.

The Commission also is adopting the definition of "pre-enactment security-based swap" as proposed and re-proposed.[215] Further, the Commission is adopting the definition of "transitional security-based swap" substantially as proposed and re-proposed, with one clarifying change and a technical revision to eliminate the obsolete term "effective reporting date."[216] Rule 900(nn), as adopted, defines "transitional security-based swap" to mean "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." Thus, only those security-based swaps that were open as of the date of enactment (July 21, 2010) or opened thereafter must be reported. The Commission continues to believe that the costs of reporting security-based swaps that terminated or expired before July 21, 2010, would not justify any potential benefits, particularly given the difficulty of assembling records concerning these transactions after many years. One commenter specifically agreed with the Commission's proposal to limit reporting of security-

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215 See Rule 900(y).

216 The term "effective reporting date" was used in the compliance schedule set out in re-proposed Rule 910, which the Commission is not adopting. The "effective reporting date," would have been defined to mean, with respect to a registered [SDR], the date six months after the registration date. The "registration date" would have been defined to mean, with respect to a registered SDR, "the date on which the Commission registers the security-based swap data repository, or, if the Commission registers the security-based swap data repository before the effective date of §§ 242.900 through 242.911, the effective date of §§ 242.900 through 242.911." See re-proposed Rules 900(l) and 900(bb), respectively. The Commission is making a conforming change to delete the defined terms "effective reporting date" and "registration date" from final Rule 900. As noted in Section I(F) above, the Commission is proposing a new compliance schedule for Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR in the Regulation SBSR Proposed Amendments Release.

based swaps entered into prior to the date of enactment only to those that had not expired as of that date.[217]

However, this commenter also expressed concern that a blanket requirement to report all pre-enactment security-based swaps "risks double-counting and presenting a distorted view of certain markets."[218] In particular, the commenter indicated that compression exercises and tri-party novations raised concerns regarding the potential for double-counting. The Commission shares the commenter's concern that double-counting could create a distorted view of the security-based swap market. Therefore, the Commission is adding new language at the end of the Rule 901(i) which provides that the reporting side of a pre-enactment or transitional security-based swap must "indicate whether the security-based swap was open as of the date of such report." This information is necessary to allow a registered SDR to calculate a participant's open positions established before the time trade-by-trade reporting becomes mandatory for a particular asset class.

The commenter also stated that "inter-affiliate security-based swaps should not be subject to reporting."[219] The Commission disagrees with this suggestion. As described in Section IX, infra, the Commission believes generally that inter-affiliate security-based swaps should be subject to regulatory reporting and public dissemination. The Commission thus believes that pre-enactment inter-affiliate security-based swaps also should be subject to regulatory reporting, assuming that such security-based swaps were opened after the date of enactment or still open as

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217 See ISDA I at 2, note 1.

218 Id. at 4.

219 ISDA I at 5.

of the date of enactment. The Commission notes, however, that no information reported pursuant to Rule 901(i) will be publicly disseminated.

Having access to information regarding historical security-based swaps will help the Commission and other relevant authorities continue to develop a baseline understanding of positions and risk in the security-based swap market, starting on the date of enactment of the Dodd-Frank Act, which contemplates the regime for regulatory reporting of all security-based swaps. These transaction reports will provide a benchmark against which to assess the development of the security-based swap market over time, and help the Commission to prepare reports that it is required to provide to Congress.

One commenter, while generally supporting the Commission's proposal to require reporting of historical security-based swaps to a registered SDR, argued that only open contracts should be reported.[220] The Commission partially agrees with this comment and thus, as noted above, is requiring reporting of only pre-enactment security-based swaps that were open as of the date of enactment. However, the Commission believes that all security-based swaps entered into on or after the date of enactment should be reported—even if they expired or were terminated before trade-by-trade reporting becomes mandatory—and that the reporting side should indicate whether the security-based swap was open as of the date of such report. While reporting of terminated or expired transitional security-based swaps is not necessary for the calculation of market participants' open positions, this information will assist the Commission and other relevant authorities to create, for surveillance purposes, at least a partial audit trail[221] of

220 See DTCC II at 17.

221 The Commission notes that Rule 901(i) by its terms requires the reporting of historical security-based swaps only "to the extent such information is available." Thus, if

transactions executed after the date of enactment and, more generally, to analyze market developments since the date of enactment.

This commenter also argued that security-based swaps "only [in] their current state should need to be reported, without additional information like execution time."[222] A second commenter expressed concern that the reporting requirements for historical security-based swaps could require parties to modify existing trades that occurred in a heretofore unregulated market in order to comply with Rule 901(i).[223] A third commenter expressed concern that "[t]he submission of non-electronic transaction confirmations [for pre-enactment security-based swaps] will be extremely burdensome for reporting entities,"[224] and recommended instead that the Commission "permit the reporting in a common electronic format of the principal electronic terms" of each such pre-enactment security-based swap.[225]

For several reasons, the Commission believes that Rule 901(i) strikes a reasonable balance between the burdens placed on security-based swap counterparties and the policy goal of enabling the Commission and other relevant authorities to develop a baseline understanding of counterparties' security-based swap positions. First, the Commission notes that Rule 901(i) requires reporting of the data elements set forth in Rules 901(c) and 901(d) only to the extent

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information about terminated or expired transitional security-based swaps no longer exists, it would not be required to be reported under Rule 901(i).

222 DTCC II at 17. See also ISDA I at 5 (requesting that the Commission clarify that market participants are not required to provide trade execution time information for pre-enactment security-based swap transactions).

223 See Roundtable Letter at 11 (stating that "any effort to alter the terms or documentation of existing swaps would be resource intensive with potentially significant negative consequences").

224 Deutsche Bank Letter at 2.

225 Id. at 3.

such information is available. The Commission does not expect, nor is it requiring, reporting sides to create or re-create data related to historical security-based swaps. Thus, if the time of execution of a historical security-based swap was not recorded by the counterparties, it is not required to be reported under Rule 901(i). Similarly, Rule 901(i) does not require counterparties to modify existing transactions in any way to ensure that all data fields are complete. By limiting the reporting requirement to only that information that is available, the Commission is acknowledging that, for historical security-based swaps, certain information contemplated by Rules 901(c) and 901(d) may not be available. The Commission generally believes that the benefits of requiring security-based swap counterparties to reconstruct the missing data elements—including, for example, the time of execution—potentially several years after the time of execution—would not justify the costs.

The Commission agrees with the commenter who argued that providing large volumes of non-electronic confirmations to registered SDRs is not desirable, and that the Commission instead should require reporting in a "common electronic format."[226] As discussed in Section IV, infra, Rules 907(a)(1) and 907(a)(2) require registered SDRs to establish and maintain policies and procedures that enumerate the specific data elements and the acceptable data formats for transaction reporting, including of historical security-based swaps. The Commission expects that registered SDRs and their participants will consult regarding the most efficient and cost effective ways to report the transaction information required by Rule 901(i). Furthermore, to the extent that information regarding a historical security-based swap already has been reported to a person that will register with the Commission as an SDR—or to a person that itself will not seek registration as an SDR but will transfer the historical security-based swap information to an

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226 Deutsche Bank Letter at 2-3.

affiliate that registers as an SDR—Rule 901(i) would be satisfied, and would not require resubmission of that information to the registered SDR.[227]

Finally, the Commission notes an issue relating to the reporting of the counterparty ID of historical security-based swaps. As commenters have discussed,[228] certain foreign jurisdictions have privacy laws or blocking statutes that may prohibit the disclosure of the identity of a counterparty to a financial transaction, such as a security-based swap transaction. Thus, the reporting side of a cross-border security-based swap could face a dilemma: comply with Regulation SBSR and report the identity of the counterparty and thereby violate the foreign law, or comply with the foreign law by withholding the identity of the counterparty and thereby violate Regulation SBSR. As discussed in Section XVI(B), infra, the Commission will consider requests for exemptions from the requirement under Rule 901(i) to report the identity of a counterparty with respect to historical security-based swaps.

III. Where To Report Data

A. All Reports Must Be Submitted to a Registered SDR

Section 13A(a)(1) of the Exchange Act[229] provides that "[e]ach security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to—(A) a registered security-based swap data repository described in Section 13(n); or (B) in the case in which there is no security-based swap data repository that would accept the

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227 One commenter, DTCC, noted that the Trade Information Warehouse could provide an affiliate that will seek registration as an SDR with information related to security-based swaps that were previously reported to the Trade Information Warehouse. See DTCC II at 17.

228 See infra note 956.

229 15 U.S.C. 78m-1(a)(1).

security-based swap, to the Commission." Section 13(m)(1)(G) of the Exchange Act[230] provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository." Rule 901(b) implements these statutory requirements.

Rule 901(b), as re-proposed, would have required reporting of the security-based swap transaction information required under Regulation SBSR "to a registered security-based swap data repository or, if there is no registered security-based swap data repository that would accept the information, to the Commission." In addition, Rule 13n-5(b)(1)(ii) under the Exchange Act, adopted as part of the SDR Adopting Release, requires an SDR that accepts reports for any security-based swap in a particular asset class to accept reports for all security-based swaps in that asset class that are reported to the SDR in accordance with certain SDR policies and procedures. In view of this requirement under Rule 13n-5(b)(1)(ii) and the statutory requirement in Section 13(m)(1)(G) that all security-based swaps, whether cleared or uncleared, must be reported to a registered SDR, the Commission does not anticipate that any security-based swaps will be reported directly to the Commission.

Some commenters noted the potential advantages of designating a single registered SDR for each asset class.[231] Another commenter, however, believed that a diverse range of options for reporting security-based swap data would benefit the market and market participants.[232] These

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230 15 U.S.C. 78m(m)(1)(G).

231 See DTCC II at 14-15 (noting the potential for fragmentation of data and overstatement of net open interest and net exposure if security-based swaps in the same asset class are reported to multiple registered SDRs); ISDA/SIFMA I at note 12 (stating that the designation of a single registered SDR per asset would provide valuable efficiencies because there would be no redundancy of platforms or need for additional data aggregation, which would reduce the risk of errors associated with transmitting, aggregating, and analyzing data from multiple sources).

232 See MFA I at 6.

comments concerning the development of multiple registered SDRs are discussed in Section XIX, infra. No commenters opposed Rule 901(b), and the Commission is adopting Rule 901(b) with technical modifications to clarify the rule.[233]

B. Duties of Registered SDR Upon Receiving Transaction Reports

1. Rule 901(f)—Time Stamps

Rule 901(f), as re-proposed, provided that "[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." The Commission preliminarily believed that this requirement would help regulators to evaluate certain trading activity.[234] For example, a reporting side's pattern of submitting late transaction reports could be an indicator of weaknesses in the reporting side's internal compliance processes. Accordingly, the Commission preliminarily believed that the ability to compare the time of execution with the time of receipt of the report by the registered SDR could be an important component of surveillance activity conducted by relevant authorities.

One commenter, noting that proposed Rule 901(f) would require time-stamping to the nearest second, argued that "[t]ime-stamping increment should be as small as technologically practicable, but in any event no longer than fractions of milliseconds."[235] The commenter

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233 Rule 901(b), as re-proposed, would have required reporting of the security-based swap transaction information required under Regulation SBSR "to a registered security-based swap data repository or, if there is no registered security-based swap data repository that would accept the information, to the Commission." Final Rule 901(b) provides: "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."

234 See Regulation SBSR Proposing Release, 75 FR at 75221.

235 Better Markets I at 9.

expressed the view that, especially in markets with multiple SB SEFs or where algorithmic trading occurs, "the sequencing of trade data for transparency and price discovery, as well as surveillance and enforcement purposes, will require much smaller increments of time-stamping."[236] The Commission notes, however, that Rule 901(f) is designed to allow the Commission to learn when a transaction has been reported to a registered SDR, not when the transaction was executed. The interim phase of applying Regulation SBSR allows transactions to be reported up to 24 hours after time of execution. The Commission believes that no purpose would be served by knowing the moment of reporting to the subsecond. Instead, the Commission believes that this comment is germane instead to the reporting of time of execution. Therefore, the Commission has considered this comment in connection with Rule 901(c)(2) rather than with Rule 901(f).[237]

The Commission continues to believe that requiring a registered SDR to timestamp, to the second, its receipt of any information pursuant to paragraphs (c), (d), (e), or (i) of Rule 901 is appropriate, and is adopting Rule 901(f) as re-proposed. Rule 901(f) will allow the Commission to compare the time of execution against the time of receipt by the registered SDR to ascertain if a transaction report has been submitted late.

2. Rule 901(g)—Transaction IDs

Rule 901(g), as proposed and re-proposed, would have provided that "[a] registered security-based swap data repository shall assign a transaction ID to each security-based swap." The transaction ID was defined in both the proposal and re-proposal as "the unique identification code assigned by a registered security-based swap data repository to a specific security-based

236 Id.

237 See supra notes 76 and 77 and accompanying text.

swap." The Commission preliminarily believed that a unique transaction ID would allow registered SDRs, regulators, and counterparties to more easily track a security-based swap over its duration and would facilitate the reporting of life cycle events and the correction of errors in previously reported security-based swap information.[238] The transaction ID of the original security-based swap would allow for the linking of the original report to a report of a life cycle event. Similarly, the transaction ID would be required to be included on an error report to identify the transaction to which the error report pertained.

In proposing Rule 901(g), the Commission preliminarily believed that, because each transaction is unique, it would not be necessary or appropriate to look to an internationally recognized standards setting body for assigning such identifiers.[239] Instead, proposed Rule 901(g) would have required a registered SDR to use its own methodology for assigning transaction IDs.[240]

Two commenters generally supported use of the transaction ID.[241] One commenter stated that transaction IDs would allow for a complete audit trail, permit the observation of concentrations of trading and risk exposure at the transaction level, and facilitate more timely analysis of market events.[242] The second commenter agreed that a transaction ID would be

238 See Regulation SBSR Proposing Release, 75 FR at 75221.

239 See id.

240 See id.

241 See GS1 Proposal at 42; DTCC II at 15.

242 See GS1 Proposal at 42 (also stating that transaction IDs would benefit internal compliance departments and self-regulatory organizations).

essential for reporting life cycle event and secondary trade information, as well as corrections to reported information.[243]

Commenters expressed mixed views regarding the entity that should assign the transaction ID. One commenter stated that a platform should assign the transaction ID to assure that the identifier is assigned at the earliest point in the life of a transaction.[244] A second commenter suggested that registered SDRs should assign transaction IDs,[245] or have the flexibility to accept transaction IDs already generated by the reporting side or to assign transaction IDs when requested to do so.[246] A third commenter expressed concern that registered SDRs would assign transaction IDs in a non-standard manner, which could hinder regulators' ability to gather transaction data across registered SDRs to reconstruct an audit trail.[247] A fourth commenter, a trade association, recommended that security-based swaps be identified by a Unique Trade Identifier ("UTI") created either by the reporting side or by a platform (including

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243 See DTCC II at 15. Another commenter believed that proposed Regulation SBSR would require public dissemination of the transaction ID, and argued that the transaction ID should not be publicly disseminated, as it could compromise the identity of the counterparties to the security-based swap. The commenter suggested instead that an SDR could create a separate identifier solely for purposes of public dissemination. See ISDA IV at 17. Under Regulation SBSR, as adopted, the transaction ID is not a data element of security-based swap transaction that is required to be publicly disseminated. Thus, registered SDRs must identify transactions in public reports without using the transaction ID. See infra Section XII(C) (discussing requirement for registered SDRs to establish and maintain policies and procedures for disseminating life cycle events).

244 See Tradeweb Letter at 5.

245 DTCC II at 16 (arguing that this approach would "eliminate any unintentional disclosure issues which stem from linking a trade to a specific SEF, potentially increasing the instances of unintended identification of the trade parties").

246 See DTCC V at 14.

247 See GS1 Proposal at 42-43 (recommending an identification system that would allow counterparties, participants, SB SEFs, and registered SDRs to assign transaction IDs to specific transactions).

an execution venue or an affirmation or middleware or electronic confirmation platform) on behalf of the parties.[248] This commenter noted that it has worked with market participants to develop a standard for creating and exchanging a single unique transaction identifier suitable for global reporting.[249]

After careful consideration, the Commission has determined to adopt Rule 901(g) with modifications to respond to concerns raised by the commenters. Final Rule 901(g) provides that a registered SDR "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." The Commission is also making a conforming change to the definition of "transaction ID." Final Rule 900(mm) defines "transaction ID" as "the UIC assigned to a specific security-based swap transaction." As re-proposed, "transaction ID" would have been defined as "the unique identification code assigned by a registered security-based swap data repository to a specific security-based swap."[250] By eliminating the reference to a UIC "assigned by a registered security-based swap data repository," the revised definition contemplates that a third party could assign a transaction ID under Regulation SBSR. However, because the Commission believes that the registered SDR

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248 See ISDA III at 2.

249 See id. In a subsequent comment letter, this commenter indicated that it "strongly believe[s] the party reporting the SBS should assign or provide the Transaction ID" rather than a registered SDR. ISDA IV at 11 (stating that "many SBS already have been reported to other global jurisdictions for which a . . . UTI (including a CFTC Unique Swap Identifier) has already been assigned by one of the parties or a central execution, affirmation or confirmation platform in accordance with industry standard practices for trade identifiers that have developed in the absence of a global regulatory standard. For the sake of efficiency and in consideration of global data aggregation, we recommend that the Commission allow a reporting party to use the UTI already established for a SBS for further reporting under SBSR and acknowledge that trades subject to reporting under SBSR may be assigned a trade identifier in accordance with existing industry UTI practices").

250 See re-proposed Rule 900(jj).

is in the best position to promote the necessary uniformity for UICs that will be reported to it, the reporting side would be permitted to report a transaction ID generated by a third party only if the third party had employed a methodology for generating transaction IDs that had been established or endorsed by the registered SDR.

Rule 901(g), as adopted, provides flexibility by requiring a registered SDR either to assign a transaction ID itself or to establish or endorse a methodology for assigning transaction IDs. Thus, under adopted Rule 901(g), an SB SEF, a counterparty, or another entity could assign a transaction ID, provided that it assigned the transaction ID using a methodology established or endorsed by the registered SDR. This approach will allow market participants to determine the most efficient and effective procedures for assigning transaction IDs and will accommodate the use of different processes that might be appropriate in different circumstances.[251] For example, an SB SEF might generate the transaction ID for a security-based swap executed on its facilities (provided the SB SEF does so using a methodology established or endorsed by the registered SDR[252]), while a registered SDR or security-based swap dealer counterparty might generate the transaction ID for a security-based swap that is not executed on an SB SEF.

251 This approach will allow a platform to assign the transaction ID in certain cases, as recommended by a commenter. See Tradeweb Letter at 5.

252 Thus, the Commission only partially agrees with the commenter who believed that the registered SDR should assign transaction IDs, in order to "eliminate any unintentional disclosure issues which stem from linking a trade to a specific SEF, potentially increasing the instances of unintended identification of the trade parties." DTCC II at 16. The Commission shares the commenter's concern that the transaction ID not result in the unintended identification of the counterparties. However, this would not require that the registered SDR itself issue the transaction ID in all cases; the registered SDR could allow submission of transaction IDs generated by third parties (such as SB SEFs or counterparties), provided that the registered SDR endorsed the methodology whereby third parties can generate transaction IDs. Furthermore, the Commission notes that the transaction ID is not a data element required by Rule 901(c) and thus it should not be

IV. How To Report Data—Rules 901(h) and 907

A. Introduction

Designing a comprehensive system of transaction reporting and post-trade transparency for security-based swaps involves a constantly evolving market, thousands of participants, and potentially millions of transactions. The Commission does not believe that it is necessary or appropriate to specify by rule every detail of how this system should operate. On some matters, there may not be a single correct approach for carrying out the purposes of Title VII's requirements for regulatory reporting and public dissemination of security-based swap transactions.

The Commission believes that registered SDRs will play an important role in developing, operating, and improving the system for regulatory reporting and public dissemination of security-based swaps. Registered SDRs are at the center of the market infrastructure, as the Dodd-Frank Act requires all security-based swaps, whether cleared or uncleared, to be reported to them.[253] Accordingly, the Commission believes that some reasonable flexibility should be given to registered SDRs to carry out their functions—for example, to specify the formats in which counterparties must report transaction data to them, connectivity requirements, and other protocols for submitting information. Furthermore, the Commission anticipates that counterparties will make suggestions to registered SDRs for altering and improving their practices, or developing new policies and procedures to address new products or circumstances, consistent with the requirements set out in Regulation SBSR.

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publicly disseminated—so market observers should not be able to learn the transaction ID in any case.

253 See 15 U.S.C. 13m(m)(1)(G).

Accordingly, proposed Rule 907 would have required each registered SDR to establish and maintain written policies and procedures addressing various aspects of security-based swap transaction reporting. Proposed Rules 907(a)(1) and 907(a)(2) would have required a registered SDR to establish policies and procedures enumerating the specific data elements that must be reported, the acceptable data formats, connectivity requirements, and other protocols for submitting information; proposed Rule 907(a)(3) would have required a registered SDR to establish policies and procedures for reporting errors and correcting previously submitted information; proposed Rule 907(a)(4) would have required a registered SDR to establish policies and procedures for, among other things, reporting and publicly disseminating life cycle events and transactions that do not reflect the market; proposed Rule 907(a)(5) would have required a registered SDR to establish policies and procedures for assigning UICs; proposed Rule 907(a)(6) would have required a registered SDR to establish policies and procedures for obtaining ultimate parent and affiliate information from its participants; and proposed Rule 907(b) would have required a registered SDR to establish policies and procedures for calculating and publicizing block trade thresholds. The Commission also proposed to require registered SDRs to make their policies and procedures publicly available on their websites, and to update them at least annually.[254] Rule 901(h), as proposed and re-proposed, would have required reports to be made to a registered SDR "in a format required by the registered security-based swap data repository, and in accordance with any applicable policies and procedures of the registered security-based swap data repository."

Furthermore, because all security-based swaps must be reported to a registered SDR, registered SDRs are uniquely positioned to know of any instances of untimely, inaccurate, or

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[254] See proposed Rules 907(c) and 907(d).

incomplete reporting. Therefore, proposed Rule 907(e) would have required registered SDRs to have the capacity to provide the Commission with reports related to the timeliness, accuracy, and completeness of the data reported to them.

The Commission re-proposed Rule 907 as part of the Cross-Border Proposing Release with only minor conforming changes.[255] Rule 901(h) was re-proposed without revision.

B. Rules 907(a)(1), 907(a)(2), and 901(h)—Data Elements and Formats

The comments addressing Rule 907 were generally supportive of providing flexibility to registered SDRs to develop policies and procedures.[256] One commenter stated, for example, that overly prescriptive rules for how data is reported will almost certainly result in less reliable or redundant data flowing into an SDR when higher quality data is available. In this commenter's view, the Commission should not prescribe the exact means of reporting for SDRs to meet regulatory obligations, and SDRs should be afforded the flexibility to devise the most efficient, effective, and reliable methods of furnishing the Commission with the complete set of data necessary to fulfill regulatory obligations.[257] The Commission is adopting Rule 907 with some revisions noted below.

Final Rule 907(a)(1) requires a registered SDR to establish and maintain written policies and procedures 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 [Rules 901(c) and 901(d)]." The Commission revised Rule 907(a)(1) to make certain non-substantive changes and

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255 As initially proposed, Rule 907 used the term "reporting party." As described in the Cross-Border Proposing Release, the term "reporting party" was replaced with "reporting side" in Rule 907 and throughout Regulation SBSR.

256 See DTCC IV at 5. See also Barnard I at 3.

257 See DTCC IV at 5.

to move the requirement to establish policies and procedures for life cycle event reporting from final Rule 907(a)(1) to final Rule 907(a)(3).[258] Final Rule 907(a)(2) requires a registered SDR to establish and maintain written policies and procedures 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." The Commission is adopting Rule 907(a)(2) as re-proposed.

The Commission continues to believe that it is neither necessary nor appropriate to mandate a fixed schedule of data elements to be reported, or a single format or language for reporting such elements to a registered SDR. The Commission anticipates that industry standards for conveying information about security-based swap transactions will evolve over time, and the approach taken in Rule 907 is designed to allow Regulation SBSR's reporting requirements to evolve with them. The Commission further anticipates that security-based swap products with novel contract terms could be developed in the future. Establishing, by Commission rule, a fixed schedule of data elements risks becoming obsolete, as new data elements—as yet unspecified—could become necessary to reflect the material economic terms of such products. Final Rules 907(a)(1) and 907(a)(2) give registered SDRs the duty, but also the flexibility, to add, remove, or amend specific data elements or to adjust the required reporting protocols over time in a way that captures all of the material terms of a security-based swap

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258 As initially proposed, Rule 907(a)(1) would have required policies and procedures that enumerate the specific data elements of a security-based swap or life cycle event that a reporting party must report. In addition, proposed Rule 907(a)(4) would have required a registered SDR to establish policies and procedures for reporting and publicly disseminating life cycle events, among other things. The Commission is consolidating the requirements to establish policies and procedures for reporting life cycle events in final Rule 907(a)(3). See infra Section XII(C). The Commission also revised Rule 907(a)(1) so that the final rule text refers to the data elements "that must be reported," rather than the data elements that a reporting side must report.

while minimizing the reporting burden on its participants.[259] One commenter supported this approach, stating that "[a] registered SDR should have the flexibility to specify acceptable formats, connectivity requirements and other protocols for submitting information."[260] The commenter added that "[m]arket practice, including the structure of confirmation messages and detail of economic fields, evolve over time, and the SDR should have the capability to adopt and set new formats."[261] The Commission anticipates that feedback and ongoing input from participants will help registered SDRs to craft appropriate policies and procedures regarding data elements and reporting protocols.

The same commenter, in a subsequent comment letter, expressed concern that market participants could adopt different interpretations of the requirement to report payment stream information, which could result in inconsistent reporting to registered SDRs.[262] The Commission notes that final Rule 907(a)(1) requires a registered SDR to enumerate the specific data elements of a security-based swap that must be reported, and final 907(a)(2) requires a registered SDR, among other things, to specify acceptable data formats for submitting required information. Because Rules 907(a)(1) and 907(a)(2) provide a registered SDR with the authority to identify the specific data elements that must be reported with respect to the payment streams of a security-based swap and the format for reporting that information, the Commission does not

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259 While an SDR would have flexibility regarding the data elements and the protocols for reporting to the SDR, pursuant to Rule 13n-4(a)(5), which is being adopted in the SDR Adopting Release, the data provided by an SDR to the Commission must "be in a form and manner acceptable to the Commission . . . ." The Commission anticipates that it will specify the form and manner that will be acceptable to it for the purposes of direct electronic access.

260 See DTCC II at 20.

261 Id.

262 See DTCC V at 11.

believe that market participants will have flexibility to adopt inconsistent interpretations of the information required to be reported with respect to payment streams. Instead, persons with the duty to report transactions will be required to provide the payment stream information using the specific data elements and formats specified by the registered SDR.

One commenter argued that a uniform electronic reporting format is essential, and was concerned that Rules 901(h) and 907(a)(2) would permit multiple formats and connectivity requirements for the submission of data to a registered SDR.[263] The Commission considered the alternative of requiring a single reporting language or protocol for conveying information to registered SDRs, and three commenters encouraged the use of the FpML standard.[264] While FpML could be a standard deemed acceptable by a registered SDR pursuant to Rule 907(a)(2), the Commission does not believe that it is necessary or appropriate at this time for the Commission itself to require FpML as the only permissible standard by which reporting sides report transaction data to a registered SDR.[265] The Commission is concerned that adopting a regulatory requirement for a single standard for reporting security-based swap transaction information to registered SDRs could result in unforeseen adverse consequences, particularly if that standard proves incapable of being used to carry information about all of the material data elements of all security-based swaps, both those that exist now and those that might be created in the future. Thus, the Commission has adopted an approach that permits registered SDRs to select their own standards for how participants must report data to those SDRs. The Commission agrees with the commenter who recommended that all acceptable data formats should be open-

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263 See Better Markets I at 4.

264 See DTCC II at 16; ISDA I at 4; ISDA/SIFMA I at 8.

265 But see infra note 268.

source structured data formats.[266] The Commission believes that any reporting languages or protocols adopted by registered SDRs must be open-source structured data formats that are widely used by participants, and that information about how to use any such language or protocol is freely and openly available.[267]

The Commission believes that, however registered SDRs permit their participants to report security-based swap transaction data to the SDRs, those SDRs should be able to provide to the Commission normalized and uniform data, so that the transaction data can readily be used for regulatory purposes without the Commission itself having to cleanse or normalize the data.[268]

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266 See Barnard Letter at 3.

267 One commenter argued that the Commission should not require registered SDRs to support all connectivity methods, as the costs to do so would be prohibitive. See DTCC II at 20. Under Rule 907(a)(2), as adopted, a registered SDR need not support all connectivity methods or data formats. A registered SDR may elect to support only one data format, provided that it is "an open-source structured data format that is widely used by participants."

268 See SDR Adopting Release, Section VI(D)(2)(c)(ii) ("data provided by an SDR to the Commission must be in a form and manner acceptable to the Commission ... [T]he form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs. The Commission continues to consider whether it should require the data to be provided to the Commission in a particular format. The Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis of [security-based swap] data by the Commission. The Commission intends to maximize the use of any applicable current industry standards for the description of [security-based swap] data, build upon such standards to accommodate any additional data fields as may be required, and develop such formats and taxonomies in a timeframe consistent with the implementation of [security-based swap] data reporting by SDRs. The Commission recognizes that as the [security-based swap] market develops, new or different data fields may be needed to accurately represent new types of [security-based swaps], in which case the Commission may provide updated specifications of formats and taxonomies to reflect these new developments. Until such time as the Commission adopts specific formats and taxonomies, SDRs may provide direct electronic access to the Commission to data in the form in which the SDRs maintain such data").

However, it does not follow that information must be submitted to a registered SDR using a single electronic reporting format. The Commission believes that a registered SDR should be permitted to make multiple reporting formats available to its participants if it chooses, provided that the registered SDR can quickly and easily normalize and aggregate the reported data in making it accessible to the Commission and other relevant authorities. If a registered SDR is not willing or able to normalize data submitted pursuant to multiple data formats, then its policies and procedures under Rule 907(a)(2) should prescribe a single data format for participants to use to submit data to the registered SDR.

The Commission believes that the policies and procedures of a registered SDR, required by Rule 907(a)(1), likely will need to explain the method for reporting if all the security-based swap transaction data required by Rules 901(c) and 901(d) are being reported simultaneously, and how to report if responsive data are being provided at separate times.[269] One way to accomplish this would be for the registered SDR to link the two reports by the transaction ID, which could be done by providing the reporting side with the transaction ID after the reporting side reports the information required by Rule 901(c). The reporting side would then include the transaction ID with its submission of data required by Rule 901(d), thereby allowing the

[269] Regulation SBSR, as proposed and re-proposed, contemplated two "waves" of reporting: the Rule 901(c) information would have been required to be reported in real time; while the Rule 901(d) information could have been provided later (depending on the type of transaction, perhaps as much as one day after time of execution). However, because Regulation SBSR, as adopted, requires both sets of information to be reported within 24 hours of execution, the Commission anticipates that many reporting sides will choose to report both sets of information in only a single transaction report. Under Rule 901, as adopted, a reporting side is not prohibited from reporting the Rule 901(c) information before the Rule 901(d) information, provided that the policies and procedures of the registered SDR permit this outcome, and both sets of information are reported within the timeframes specified in Rule 901(j).

registered SDR to match the report of the Rule 901(c) data and the subsequent report of the Rule 901(d) data.

Finally, Rule 901(h), as re-proposed, would have provided: "A reporting side shall electronically transmit the information required under this section in a format required by the registered security-based swap data repository, and in accordance with any applicable policies and procedures of the registered security-based swap data repository." The Commission received only one comment on Rule 901(h), which is addressed above.[270] The Commission is adopting Rule 901(h) as re-proposed, with two minor revisions to clarify the rule. First, the rule text has been revised to refer to "A" reporting side instead of "The" reporting side. Accordingly, the Commission has revised Rule 901(h) to refer to the registered SDR to which a reporting side reports transactions. Second, Rule 901(h), as adopted, does not include the phrase "and in accordance with any applicable policies and procedures of the registered security-based swap data repository." The Commission believes that it is sufficient for the rule to state that the reporting side must report the transaction information "in a format required by" the registered SDR.[271]

C. Rule 907(a)(6)—Ultimate Parent IDs and Counterparty IDs

As originally proposed, Rule 907(a)(6) would have required a registered SDR to establish and maintain written policies and procedures "[f]or periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) with which the counterparty is affiliated, using ultimate parent IDs and participant IDs" (emphasis

270 See supra note 263 and accompanying text.

271 As noted above, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis by the Commission of security-based swap data submitted to it by an SDR. See supra note 268.

added). The Commission re-proposed Rule 907(a)(6) with the word "participant" in place of the word "counterparty." Re-proposed Rule 907(a)(6) would have required a registered SDR to establish and maintain written policies and procedures for periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) with which the counterparty is affiliated, using ultimate parent IDs and participant IDs. The Commission received one comment relating to Rule 907(a)(6), which suggested that parent and affiliate information could be maintained by a market utility rather than by one or more registered SDRs[272]

The Commission notes that Regulation SBSR neither requires nor prohibits the development of a market utility for parent and affiliate information. Regulation SBSR requires a registered SDR to obtain parent and affiliate information from its participants and to maintain it, whether or not a market utility exists. Regulation SBSR does not prohibit SDR participants from storing parent and affiliate information in a market utility or from having the market utility report such information to a registered SDR as agent on their behalf, so long as the information is provided to the registered SDR in a manner consistent with Regulation SBSR and the registered SDR's policies and procedures.

The Commission is adopting Rule 907(a)(6) substantially as re-proposed, with a technical change to replace the word "counterparty" with the word "participant" and a conforming change to replace the reference to "participant IDs" with a reference to "counterparty IDs." Thus, final Rule 907(a)(6) requires a registered SDR to establish and maintain written policies and procedures "[f]or periodically obtaining from each participant information that identifies the

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272 See GS1 Proposal at 44.

participant's ultimate parent(s) and any participant(s) with which the participant is affiliated, using ultimate parent IDs and counterparty IDs" (emphasis added).

V. Who Reports—Rule 901(a)

A. Proposed and Re-proposed Rule 901(a)

Section 13(m)(1)(F) of the Exchange Act[273] provides that parties to a security-based swap (including agents of parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission. Section 13(m)(1)(G) of the Exchange Act[274] provides that each security-based swap, "whether cleared or uncleared," shall be reported to a registered SDR. Section 13A(a)(3) of the Exchange Act[275] specifies the party obligated to report a security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization. Rule 901(a), as adopted, assigns to specific persons the duty to report certain security-based swaps to a registered SDR, thereby implementing Sections 13(m)(1)(F), 13(m)(1)(G), and 13A(a)(3) of the Exchange Act. In addition, in the Regulation SBSR Proposed Amendments Release, the Commission is proposing revisions to Rule 901(a), as adopted, to further implement these provisions of the Exchange Act as they apply to clearing transactions (as defined below) and transactions executed on platforms and that will be submitted to clearing.

As originally proposed, Rule 901(a) would have assigned reporting duties exclusively to one of the direct counterparties to a security-based swap based on the nationality of the counterparties. The original proposal contemplated three scenarios: both direct counterparties

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273 15 U.S.C. 78m(m)(1)(F).

274 15 U.S.C. 78m(m)(1)(G).

275 15 U.S.C. 78mA(a)(3).

are U.S. persons, only one direct counterparty is a U.S. person, or neither direct counterparty is a U.S. person.[276] Under the original proposal, if only one counterparty to a security-based swap is a U.S. person, the U.S. person would have been the reporting party. If neither counterparty is a U.S. person (and assuming the security-based swap is subject to Regulation SBSR), the counterparties would have been required to select the reporting party. Where both counterparties to a security-based swap are U.S. persons, the reporting party would have been determined according to the following hierarchy:

(i) If only one counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant would be the reporting party.

(ii) If one counterparty is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer would be the reporting party.

(iii) With respect to any other security-based swap, the counterparties to the security-based swap would be required to select the reporting party.

Under Rule 901(a) as originally proposed, for a security-based swap between: (1) a non-registered U.S. person; and (2) a security-based swap dealer or major security-based swap participant that is a non-U.S. person, the non-registered U.S. person would have been the reporting party. The Commission preliminarily believed that, as between a U.S. person and a non-U.S. person, it was more appropriate to assign the duty to report to the U.S. person, even if the non-U.S. person was a security-based swap dealer or major security-based swap

[276] See proposed Rules 901(a)(1)-(3); Regulation SBSR Proposing Release, 75 FR at 75211.

participant.[277]

In the Cross-Border Proposing Release, the Commission revised proposed Rule 901(a) in two significant ways. First, the Commission proposed to expand the scope of Regulation SBSR to require reporting (and, in certain cases, public dissemination) of any security-based swap that has a U.S. person acting as guarantor of one of the direct counterparties, even if neither direct counterparty is a U.S. person. To effectuate this requirement, the Cross-Border Proposing Release added the following new defined terms: "direct counterparty," "indirect counterparty," "side," and "reporting side." A "side" was defined to mean a direct counterparty of a security-based swap and any indirect counterparty that guarantees the direct counterparty's performance of any obligation under the security-based swap.[278] The Commission revised proposed Rule 901(a) to assign the duty to report to a "reporting side," rather than a specific counterparty. Re-proposed Rule 901(a) generally preserved the reporting hierarchy of Rule 901(a), as originally proposed, while incorporating the "side" concept to reflect the possibility that a security-based swap might have an indirect counterparty that is better suited for carrying out the reporting duty than a direct counterparty. Thus, Rule 901(a), as re-proposed in the Cross-Border Proposing

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277 See Regulation SBSR Proposing Release, 75 FR at 75211.

278 See re-proposed Rule 900(ee); Cross-Border Proposing Release, 78 FR at 31211. The Commission is adopting this term in Rule 900(hh) with a minor modification to more clearly incorporate the definition of "indirect counterparty." Final 900(hh) defines "side" to mean "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." Final Rule 900(p) defines "indirect counterparty" to mean "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."

Release, would have assigned the reporting obligation based on the status of each person on a side (i.e., whether any person on the side is a security-based swap dealer or major security-based swap participant), rather than the status of only the direct counterparties. Second, the Commission proposed to expand the circumstances in which a security-based swap dealer or major security-based swap participant that is not a U.S. person would incur the duty to report a security-based swap.

Under Rule 901(a), as originally proposed, a non-U.S. person that is a direct counterparty to a security-based swap that was not executed in the United States or through any means of interstate commerce never would have had a duty to report the security-based swap, even if the non-U.S. person was a security-based swap dealer or major security-based swap participant or was guaranteed by a U.S. person. As re-proposed in the Cross-Border Proposing Release, Rule 901(a) re-focused the reporting duty primarily on the status of the counterparties, rather than on their nationality or place of domicile. Under re-proposed Rule 901(a), the nationality of the counterparties would determine who must report only if neither side included a security-based swap dealer or major security-based swap participant. In such case, if one side included a U.S. person while the other side did not, the side with the U.S. person would have been the reporting side. Similar to the original proposal, however, if both sides included a U.S. person or neither side included a U.S. person, the sides would have been required to select the reporting side.

B. Final Rule 901(a)

Rule 901(a), as adopted, establishes a "reporting hierarchy" that specifies the side that has the duty to report a security-based swap.[279] The reporting side, as determined by the

[279] However, Rule 901(a) does not address who has the reporting duty for the following types of security-based swaps: (1) a clearing transaction; (2) a security-based swap that

reporting hierarchy, is required to submit the information required by Regulation SBSR to a registered SDR.[280] The reporting side may select the registered SDR to which it makes the required report. However, with respect to any particular transaction, all information required to be reported by Rule 901(a)(2)(ii), as adopted, must be reported to the same registered SDR. In the Regulation SBSR Proposed Amendments Release, issued as a separate release, the Commission is proposing additional provisions of Rule 901(a) that would assign reporting responsibilities for clearing transactions and platform-executed security-based swaps that will be submitted to clearing. The Commission also anticipates soliciting further comment on reporting duties for a security-based swap where neither side includes a registered security-based swap dealer or major security-based swap participant and neither side includes a U.S. person or only one side includes a U.S. person.[281]

1. Reporting Hierarchy

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is executed on a platform and that will be submitted to clearing; (3) a security-based swap where neither side includes a registered security-based swap dealer, a registered major security-based swap participant, or a U.S. person; and (4) a security-based swap where one side consists of a non-registered U.S. person and the other side consists of a non-registered non-U.S. person.

280 Final Rule 900(gg) defines "reporting side" to mean "the side of a security-based swap identified by § 242.901(a)(2)." Rule 900(cc), as re-proposed, would have defined "reporting side" to mean "the side of a security-based swap having the duty to report information in accordance with §§ 242.900 through 911 to a registered security-based swap data repository, or, if there is no registered security-based swap data repository that would receive the information, to the Commission." Final Rule 900(gg) modifies the definition to define the reporting side by reference to final Rule 901(a), which identifies the person that will be obligated to report a security-based swap to a registered SDR under various circumstances.

281 The Commission notes that Rule 901(a), as adopted, does address how the reporting duty is assigned when both sides include a U.S. person and neither side includes a registered security-based swap dealer or a registered major security-based swap participant. In that case, the sides would be required to select which is the reporting side. See Rule 901(a)(2)(ii)(E)(1).

Final Rule 901(a)(2)(ii) adopts the reporting hierarchy largely as proposed in the Cross-Border Proposing Release, but limits its scope. The reporting hierarchy in Rule 901(a), as proposed and as re-proposed in the Cross-Border Proposing Release, did not contain separate provisions to address reporting responsibilities for two kinds of security-based swaps that are described in the Regulation SBSR Proposed Amendments Release: clearing transactions and security-based swaps that are executed on a platform and that will be submitted to clearing. The Regulation SBSR Proposed Amendments Release solicits comment on proposed rules that address the reporting of these types of security-based swaps. The reporting hierarchy in Rule 901(a)(2)(ii), as adopted, applies to security-based swaps that are covered transactions.[282] The reporting hierarchy is designed to locate the duty to report with counterparties who are most likely to have the resources and who are best able to support the reporting function.

Specifically, final Rule 901(a)(2)(ii) provides that, for a covered transaction, the reporting side will be as follows:

(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

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282 See supra notes 11-12 and accompanying text.

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].[283]

The following examples explain the operation of final Rule 901(a)(2)(ii). For each example, assume that the relevant security-based swap is not executed on a platform.

- Example 1. A non-registered U.S. person executes a security-based swap with a registered security-based swap dealer that is a non-U.S. person. Neither side has a

[283] This provision, as set forth in the Cross-Border Proposing Release, would have provided: "If neither side of the security-based swap includes a security-based swap dealer or major security-based swap participant: (i) If both sides include a U.S. person or neither side includes a U.S. person, the sides shall select the reporting side. (ii) If only one side includes a U.S. person, that side shall be the reporting side." The Commission anticipates seeking further comment on how Title VII should apply to non-U.S. persons who engage in certain security-based swap activities in the United States, particularly dealing activities. Accordingly, the Commission is not deciding at this time how Regulation SBSR will apply to (1) transactions where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side; and (2) transactions where there is no registered security-based swap dealer or registered major security-based swap participant on either side and there is a U.S. person on only one side. One commenter recommended that this proposed part of the hierarchy be revised to refer only to cases where both sides are U.S. persons, as the commenter did not believe that a security-based swap for which neither party is a security-based swap dealer, major security-based swap participant, or a U.S. person would be subject to reporting under Regulation SBSR. See ISDA IV at 19. As discussed, the Commission is not adopting this provision of proposed Rule 901(a). The Commission anticipates seeking further comment on how Title VII should apply to non-U.S. persons who engage in certain security-based swap activities in the United States, particularly dealing activities, and is not deciding at this time how Regulation SBSR will apply to transactions where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side. The Commission notes that, under final Rule 908(a)(1)(ii), a security-based swap is subject to regulatory reporting and public dissemination if it was accepted for clearing by a clearing agency having its principal place of business in the United States. See infra Section XV(C)(4).

guarantor. The registered security-based swap dealer is the reporting side.

- Example 2. Same facts as Example 1, except that the non-registered U.S. person is guaranteed by a registered security-based swap dealer. Because both sides include a person that is a registered security-based swap dealer, the sides must select which is the reporting side.
- Example 3. Two private funds execute a security-based swap. Both direct counterparties are U.S. persons, neither is guaranteed, and neither is a registered security-based swap dealer or registered major security-based swap participant. The sides must select which is the reporting side.

In Rule 901(a)(2)(ii), as adopted, the Commission has included the word "registered" before each instance of the terms "security-based swap dealer" and "major security-based swap participant." A person is a security-based swap dealer or major security-based swap participant if that person meets the statutory definition of that term, regardless of whether the person registers with the Commission.[284] A person meeting one of those statutory definitions must register with the Commission in that capacity. However, persons meeting one of the statutory definitions cannot register in the appropriate capacity until the Commission adopts registration rules for these classes of market participant. The Commission has proposed but not yet adopted registration rules for security-based swap dealers and major security-based swap participants.

284 See Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71) (defining "security-based swap dealer"); Section 3(a)(67) of the Exchange Act, 15 U.S.C. 78c(a)(67) (defining "major security-based swap participant"). See also 17 CFR 240.3a71-2 (describing the time at which a person will be deemed to be a security-based swap dealer); 17 CFR 240.3a67-8 (describing the time at which a person will be deemed to be a major security-based swap participant).

Thus, currently, there are no registered security-based swap dealers even though many market participants act in a dealing capacity in the security-based swap market.

Including the word "registered" before each instance of the terms "security-based swap dealer" and "major security-based swap participant" in final Rule 901(a)(2)(ii) means that it will not be necessary for a person to evaluate whether it meets the definition of "security-based swap dealer" or "major security-based swap participant" solely in connection with identifying which counterparty must report a security-based swap under Regulation SBSR.[285]

A result of the Commission's determination to apply duties in Rule 901(a)(2)(ii) based on registration status rather than on meeting the statutory definition of "security-based swap dealer" or "major security-based swap participant" is that, until such persons register with the Commission as such, all covered transactions will fall within Rule 901(a)(2)(ii)(E). In other words, under the adopted reporting hierarchy, because neither side of the security-based swap includes a <u>registered</u> security-based swap dealer or <u>registered</u> major security-based swap participant, the sides shall select the reporting side.

2. <u>Other Security-Based Swaps</u>

Rule 901(a), as proposed and re-proposed in the Cross-Border Proposing Release, did not differentiate between platform-executed security-based swaps and other types of security-based swaps in assigning the duty to report. Similarly, the proposed and re-proposed rule would have

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285 As the Commission noted in the Cross-Border Adopting Release, the assessment costs for making such evaluations are likely to be substantial. <u>See</u> Cross-Border Adopting Release, 79 FR 47330-34. The Commission's approach here is consistent with the approach described in the Cross-Border Adopting Release, where the Commission noted that security-based swap dealers and major security-based swap participants "will not be subject to the requirements applicable to those dealers and major participants until the dates provided in the applicable final rules." 79 FR at 47368. <u>See also</u> Intermediary Definitions Adopting Release, 77 FR at 30700.

assigned reporting obligations without regard to whether a particular security-based swap was cleared or uncleared.[286] In the Regulation SBSR Proposing Release, the Commission expressed a preliminary view that cleared and uncleared security-based swaps should be subject to the same reporting procedures.[287] The Commission preliminarily believed that security-based swap dealers and major security-based swap participants generally should be responsible for reporting security-based swap transactions of all types, because they are more likely than other counterparties to have appropriate systems in place to facilitate reporting.[288]

Commenters raised a number of concerns about the application of the reporting hierarchy to platform-executed security-based swaps that will be submitted to clearing and clearing transactions.[289] The Commission has determined that final resolution of these issues would benefit from further consideration and public comment. Accordingly, in the Regulation SBSR Proposed Amendments Release, the Commission is proposing amendments to Rule 901(a) that would assign the reporting obligation for clearing transactions and platform-executed security-based swaps that will be submitted to clearing.

To differentiate between security-based swaps that are subject to the reporting hierarchy in Rule 901(a)(2)(ii) and those that are not, the Commission is defining a new term, "clearing transaction," in Rule 900(g). A "clearing transaction" is "a security-based swap that has a

286 See 75 FR at 75211.

287 See id.

288 See id.

289 See infra Section V(C) for an overview of these comments. A detailed summary of and response to these comments appears in the Regulation SBSR Proposed Amendments Release.

registered clearing agency as a direct counterparty."[290] This definition encompasses all security-based swaps that a registered clearing agency enters into as part of its security-based swap clearing business. The definition includes, for example, any security-based swaps that arise if a registered clearing agency accepts a security-based swap for clearing, as well as any security-based swaps that arise as part of a clearing agency's internal processes, such as security-based swaps used to establish prices for cleared products and security-based swaps that result from netting other clearing transactions of the same product in the same account into an open position.[291]

Two models of clearing—an agency model and a principal model—are currently used in the swap markets. In the agency model, which predominates in the U.S. swap market, a swap that is accepted for clearing—often referred to in the industry as an "alpha"—is terminated and replaced with two new swaps, known as "beta" and "gamma." The Commission understands that, under the agency model, one of the direct counterparties to the alpha becomes a direct counterparty to the beta, and the other direct counterparty to the alpha becomes a direct counterparty to the gamma. The clearing agency would be a direct counterparty to each of the

290 In connection with the definition of "clearing transaction," the Commission is adopting a definition of "registered clearing agency." Final Rule 900(ee) defines "registered clearing agency" to mean "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." In addition, the Commission is not adopting re-proposed Rule 900(h), which would have defined the term "derivatives clearing organization" to have the same meaning as provided under the Commodity Exchange Act. This term is not used in Regulation SBSR, as adopted, so the Commission is not including a definition of the term in Rule 900.

291 Under Rule 900(g), a security-based swap that results from clearing is an independent security-based swap and not a life cycle event of a security-based swap that is submitted to clearing. Thus, Rule 901(e), which addresses the reporting of life cycle events, does not address what person has the duty to report the clearing transactions that arise when a security-based swap is accepted for clearing.

beta and the gamma.[292] This release uses the terms "alpha," "beta," and "gamma" in the same way that they are used in the agency model of clearing in the U.S. swap market.[293] The Commission notes that, under Regulation SBSR, an alpha is not a "clearing transaction," even though it is submitted for clearing, because it does not have a registered clearing agency as a direct counterparty.[294]

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292 If both direct counterparties to the alpha are clearing members, the direct counterparties would submit the transaction to the clearing agency directly and the resulting beta would be between the clearing agency and one clearing member, and the gamma would be between the clearing agency and the other clearing member. The Commission understands, however, that, if the direct counterparties to the alpha are a clearing member and a non-clearing member (a "customer"), the customer's side of the trade would be submitted for clearing by a clearing member acting on behalf of the customer. When the clearing agency accepts the alpha for clearing, one of the resulting swaps—in this case, assume the beta—would be between the clearing agency and the customer, with the customer's clearing member acting as guarantor for the customer's trade. The other resulting swap—the gamma—would be between the clearing agency and the clearing member that was a direct counterparty to the alpha. See, e.g., Byungkwon Lim and Aaron J. Levy, "Contractual Framework for Cleared Derivatives: The Master Netting Agreement Between a Clearing Customer Bank and a Central Counterparty," 10 Pratt's Journal of Bankruptcy Law (October 2014) 509, 515-17 (describing the clearing model for swaps in the United States).

293 In the principal model of clearing, which the Commission understands is used in certain foreign swap markets, a customer is not a direct counterparty of the clearing agency. Under this model, a clearing member would clear a security-based swap for a customer by entering into a back-to-back swap with the clearing agency: the clearing member would become a direct counterparty to a swap with the customer, and then would become a counterparty to an offsetting swap with the clearing agency. In this circumstance, unlike in the agency model of clearing, the swap between the direct counterparties might not terminate upon acceptance for clearing.

294 This release does not address the application of Section 5 of the Securities Act of 1933, 15 U.S.C. 77a et seq. ("Securities Act"), to security-based swap transactions that are intended to be submitted to clearing (e.g., alpha transactions, in the agency model of clearing). Rule 239 under the Securities Act, 17 CFR 230.239, provides an exemption for certain security-based swap transactions involving an eligible clearing agency from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions. This exemption does not apply to security-based swap transactions not involving an eligible clearing agency, including a transaction that is intended to be submitted to clearing, regardless of whether the security-based swaps subsequently are cleared by an eligible clearing agency. See Exemptions for Security-Based Swaps Issued By Certain Clearing

C. Discussion of Comments and Basis for Final Rule

The Commission requested and received comment on a wide range of issues related to Rule 901(a), as proposed and re-proposed in the Cross-Border Proposing Release. As described in more detail below, commenters addressed a number of topics, including the application of Rule 901(a) to sides rather than direct counterparties, the role of agents in the reporting process, the application of Rule 901(a) to cleared security-based swaps, and the types of entities that should be required to report security-based swaps.

1. Application of the Reporting Hierarchy to Sides

The Commission received a number of comments on the reporting hierarchy in proposed Rule 901(a).[295] As described in the Cross-Border Proposing Release, a number of commenters objected to the reporting hierarchy in Rule 901(a), as originally proposed, on the grounds that it would unfairly impose reporting burdens on non-registered U.S.-person counterparties that enter into security-based swaps with non-U.S.-person security-based swap dealers or major security-based swap participants.[296] In the Cross-Border Proposing Release, the Commission re-proposed a modified reporting hierarchy in response to the commenters' concerns.[297]

Agencies, Securities Act Release No. 33-9308 (March 30, 2012), 77 FR 20536 (April 5, 2012).

295 See ISDA/SIFMA I at 19; DTCC II at 8; ICI I at 5 (stating that security-based swap dealers are the only market participants that currently have the standardization necessary to report the required security-based swap data); SIFMA I at 3 (arguing that an end user should not incur higher transaction costs or potential legal liabilities depending on the domicile of its counterparty); Vanguard Letter at 6 (stating that non-U.S. person security-based swap dealers and major security-based swap participants would be more likely to have appropriate systems in place to facilitate reporting than unregistered counterparties).

296 See Cross-Border Proposing Release, 78 FR at 31066. See also note 295, supra (describing the relevant comments).

297 See re-proposed Rule 901(a); Cross-Border Proposing Release, 78 FR at 31066, 31212.

The Commission believes that a non-registered person should not incur the duty to report a security-based swap when a registered security-based swap dealer or registered major security-based swap participant, directly or indirectly, is on the other side of the transaction, and is adopting the reporting hierarchy in Rule 901(a)(2)(ii) to effect this result. Rule 901(a), as adopted, is designed to assign reporting duties to the person best positioned to discharge those duties. The Commission believes that registered security-based swap dealers and registered major security-based swap participants, regardless of whether they are U.S. persons, will have greater technological capability than non-registered persons to report security-based swaps as required by Regulation SBSR. Accordingly, the Commission is adopting the reporting hierarchy in Rule 901(a)(2)(ii) largely as re-proposed to give registered security-based swap dealers and registered major security-based swap participants reporting obligations, regardless of whether they are U.S. persons. Furthermore, the Commission believes that it is appropriate to assign the duty to report to the side that includes a non-U.S. person registered security-based swap dealer or major security-based swap participant, even as an indirect counterparty, if neither the direct or indirect counterparty on the other side includes a registered security-based swap dealer or a registered major security-based swap participant. The fact that a person is a registered security-based swap dealer or registered major security-based swap participant implies that the person has substantial contacts with the U.S. security-based swap market and thus would understand that it could incur significant regulatory duties arising from its security-based swap business, or has voluntarily registered and chosen to undertake the burdens associated with such registration. The fact that a person is a registered security-based swap dealer or registered major security-based swap participant also implies that the person has devoted substantial infrastructure and administrative resources to its security-based swap business, and thus would be more likely to have the capability to carry out the reporting function than a non-registered counterparty.

In response to the Cross-Border Proposing Release, one commenter raised concerns about burdens that the re-proposed reporting hierarchy might place on U.S. persons.[298] This commenter noted that certain non-U.S. persons might engage in security-based swap dealing activities in the United States below the de minimis threshold for security-based swap dealer registration. The commenter expressed the view that an unregistered non-U.S. person that is acting in a dealing capacity likely would have "greater technological capability and resources available to fulfill the reporting function" than an unregistered U.S. person that is not acting in a dealing capacity.[299] The commenter suggested that, when an unregistered U.S. person enters into a security-based swap with an unregistered non-U.S. person that is acting in a dealing capacity, it "would be more efficient and fair" to allow the counterparties to choose the reporting side than to assign the reporting obligation to the unregistered U.S. person.[300]

The Commission acknowledges these comments. The Commission did not propose, and is not adopting, rules that would permit counterparties to choose to impose reporting burdens on the unregistered non-U.S. person that is acting in a dealing capacity in this scenario. The Commission believes that the issue of whether the counterparties should be able to choose the reporting side when an unregistered non-U.S. person acts in a dealing capacity with respect to a security-based swap involving an unregistered U.S. person would benefit from further comment.

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298 See IIB Letter at 26.

299 See id.

300 See id.

Accordingly, Rule 901(a)(2)(ii), as adopted, does not assign a reporting side for security-based swaps involving an unregistered non-U.S. person and an unregistered U.S. person.

Other commenters focused on the Commission's proposal to introduce the "side" concept to the reporting hierarchy. In response to the Cross-Border Proposing Release, three comments recommended that direct counterparties bear reporting duties, rather than sides (i.e., that guarantors of direct counterparties not incur reporting responsibilities).[301] One of these commenters recommended that a non-U.S. company that provides its U.S. affiliate with a guarantee should not be subject to reporting responsibilities because the non-U.S. company would be outside the Commission's jurisdiction.[302] Another commenter noted that non-U.S. guarantors should not cause a security-based swap to become reportable.[303] The Commission generally agrees with these comments. As discussed in more detail in Section XV(C)(5), infra, Rule 908(a) of Regulation SBSR makes clear that a non-U.S. person guarantor would not cause a security-based swap to become reportable, unless the guarantor is a registered security-based swap dealer or a registered major security-based swap participant.[304] Moreover, Rule 908(b) provides that, notwithstanding any other provision of Regulation SBSR, a non-U.S. person guarantor of a security-based swap that is reportable would not incur any obligation under Regulation SBSR, including a reporting obligation under Rule 901(a)(2)(ii), unless the guarantor is a registered security-based swap dealer or a registered major security-based swap participant.

301 See JSDA Letter at 6; ISDA III; ISDA IV at 3-4.

302 See JSDA Letter at 6.

303 See ISDA IV at 4 (recommending that the Commission should not include non-U.S. person guarantors in the definition of "indirect counterparty").

304 Section XV(C)(5), infra, explains why the Commission has determined that security-based swaps having non-U.S. person guarantors that are registered as security-based swap dealers or major security-based swap participants should be reportable under Regulation SBSR.

Thus, for a security-based swap involving, on one side, the guaranteed U.S. affiliate of an unregistered non-U.S. person, only the guaranteed U.S. affiliate could incur reporting obligations under Regulation SBSR.[305]

The Commission disagrees with the broader point made by the commenters, however, and continues to believe that it is appropriate to adopt a final rule that places the reporting duty on the reporting side, rather than on a specific counterparty on the reporting side. The Commission notes that Rule 908(b)—which is discussed in more detail in Section XV, infra—limits the types of counterparties that incur obligations under Regulation SBSR to U.S. persons, registered security-based swap dealers, and registered major security-based swap participants. A person that does not fall within one of the categories enumerated in Rule 908(b) incurs no duties under Regulation SBSR. Accordingly, there may be situations where the direct counterparty on the reporting side—rather than the indirect counterparty, as in the commenter's example—would not fall within Rule 908(b) and therefore would incur no obligation under Regulation SBSR.[306] There will be cases where all counterparties on the reporting side fall within Rule 908(b). In these cases, Rule 901(a)(2)(ii), as adopted, provides reasonable flexibility to the counterparties on the reporting side to determine the specific person who will carry out the function of reporting the security-based swap on behalf of the reporting side. As stated in the Cross-Border Proposing Release, the Commission "understands that many reporting parties already have established linkages to entities that may register as registered SDRs, which could significantly reduce the

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305 If the non-U.S. person guarantor is a registered security-based swap dealer or major security-based swap participant, the exclusion in Rule 908(b) would not apply, and both the direct and indirect counterparties would jointly incur the duty to report.

306 Rule 908(a) describes when Regulation SBSR applies to a security-based swap having at least one side that includes a non-U.S. person. See infra Section XV(C).

out-of-pocket costs associated with establishing the reporting function."[307] A reporting side could leverage these existing linkages, even if the entity that has established connectivity to the registered SDR is an indirect counterparty to the transaction.

The other commenters argued that incorporating indirect counterparties into current reporting practices could take considerable effort, because these practices, developed for use with the CFTC's swap data reporting regime, do not consider the registration status of indirect counterparties.[308] The commenter recommended that the industry should be permitted to use existing reporting party determination logic because negotiating the identity of the reporting side on a trade-by-trade basis would not be feasible.[309] Furthermore, one commenter noted that there is no industry standard source for information about indirect counterparties. As a result, "despite the requirement for participants to [provide] this information to [a registered SDR], there is a chance that the parties...could come up with a different answer as to which of them is associated with an indirect counterparty."[310]

The Commission acknowledges these commenters' concerns, but continues to believe that it is appropriate for the reporting hierarchy to take into account both the direct and indirect counterparties on each side. Even without an industry standard source for information about indirect counterparties, counterparties to security-based swaps will need to know the identity and status of any indirect counterparties on a trade-by-trade basis to determine whether the

307 78 FR at 31066 (citing Regulation SBSR Proposing Release, 75 FR at 75265).

308 See ISDA III; ISDA IV at 3-4 (noting also that Canada's swap data reporting regime resembles the CFTC's swap data reporting regime in so far as it does not consider the status of indirect counterparties).

309 See ISDA III.

310 Id. See also ISDA IV at 3-4.

transaction is subject to Regulation SBSR under final Rule 908(a).[311] By considering the status of indirect counterparties when assigning reporting obligations, Regulation SBSR is designed to reduce reporting burdens on non-registered persons without imposing significant new costs on other market participants, even though market participants may need to modify their reporting workflows. The Commission believes that market participants could adapt the mechanisms they develop for purposes of adhering to Rule 908(a) to facilitate compliance with the reporting hierarchy in Rule 901(a)(2)(ii). For example, the documentation for the relevant security-based swap could alert both direct counterparties to the fact that one counterparty's obligations under the security-based swap are guaranteed by a registered security-based swap dealer or registered major security-based swap participant. The counterparties can use that information to identify which side would be the reporting side for purposes of Regulation SBSR.

The Commission further believes that incorporating indirect counterparties into current reporting workflows is unlikely to cause substantial disruption to existing reporting logic because the status of an indirect counterparty likely will alter reporting practices in few situations. Most transactions in the security-based swap market today involve at least one direct counterparty who is likely to be a security-based swap dealer.[312] In such case, the current industry practice of determining the reporting side based only on the status of direct counterparties is likely to produce a result that is consistent with Rule 901.[313] The Commission understands that, in the

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311 See infra Section XV.

312 See Cross-Border Adopting Release, 79 FR at 47293 (noting that transactions between two ISDA-recognized dealers represent the bulk of trading activity in the single-name credit default swap market).

313 Assume, for example, that a security-based swap dealer executes a transaction with a non-registered person, and that current industry practices default the reporting obligation to the security-based swap dealer. This result is consistent with Rule 901(a)(2)(ii)(B), which states that the side including the registered security-based swap dealer will be the

current security-based swap market, market participants that are likely to be non-registered persons transact with each other only on rare occasions. In these circumstances, the status of an indirect counterparty could cause one side to become the reporting side, rather than leaving the choice of reporting side to the counterparties. For example, if a registered security-based swap dealer or registered major security-based swap participant guarantees one side of such a trade, the side including the non-registered person and the guarantor would, under Rule 901(a)(2), be the reporting side. The Commission believes that, if a registered security-based swap dealer or registered major security-based swap participant is willing to accept the responsibility of guaranteeing the performance of duties under a security-based swap contract, it should also be willing to accept the responsibility of having to report that security-based swap to satisfy Regulation SBSR. In any event, the Commission believes that, if a guarantor's security-based swap activities are extensive enough that it must register as a security-based swap dealer or major security-based swap participant, it would have systems in place to ensure that it complies with the regulatory obligations attendant to such registration, including any reporting obligations for security-based swaps.

Finally, one commenter requested that the Commission provide guidance that reporting parties could follow when the reporting hierarchy instructs them to select the reporting side.[314] The Commission does not believe at this time that it is necessary or appropriate for the Commission itself to provide such guidance, because the determination of which counterparty is

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reporting side for such transactions. Assume, however, that the non-registered direct counterparty is guaranteed by another registered security-based swap dealer. Because both sides include a registered security-based swap dealer, Rule 901(a)(2)(ii)(A) requires the sides to select the reporting side. Agreeing to follow current industry practices—and locating the duty on the side that has the direct counterparty that is a registered security-based swap dealer—would be consistent with Rule 901(a)(2)(ii)(A).

314 See Better Markets I at 10.

better positioned to report these security-based swaps is likely to depend on the facts and circumstances of the particular transaction and the nature of the counterparties. Rule 901(a)(2)(ii), as adopted, instructs the sides to select the reporting side only when the two sides are of equal status (i.e., when both sides include a registered security-based swap dealer or when neither side includes a registered security-based swap dealer or registered major security-based swap participant). The Commission understands that, under existing industry conventions, market participants who act in a dealing capacity undertake the reporting function. Thus, the Commission believes that Rule 901(a)(2)(ii), as adopted, is not inconsistent with these current industry practices. Furthermore, the Commission would not be averse to the development and use of new or additional industry standards that create a default for which side would become the reporting side in case of a "tie," provided that both sides agree to use such standards.

2. Reporting by Agents

In the Regulation SBSR Proposing Release, the Commission noted that Rule 901(a) would not prevent a reporting party from entering into an agreement with a third party to report a security-based swap on behalf of the reporting party.[315] Several commenters strongly supported the use of third-party agents to report security-based swaps.[316]

Four commenters addressed the types of entities that may wish to report security-based swaps on behalf of reporting parties. One commenter stated that platforms, clearing agencies, brokers, and stand-alone data reporting vendors potentially could provide reporting services to

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[315] See 75 FR at 75211.

[316] See Barnard I at 2; DTCC II at 7; DTCC III at 13 (allowing third-party service providers to report security-based swaps would reduce the regulatory burden on counterparties and would assure prompt compliance with reporting obligations); ISDA/SIFMA I at 17 (noting that portions of the OTC derivatives market likely would rely on third-party agents to meet their reporting obligations); MarkitSERV I at 9; MarkitSERV II at 7-8; MarkitSERV III at 4-5.

security-based swap counterparties.[317] Another commenter requested that the Commission clarify that a security-based swap counterparty that was not the reporting party under Rule 901(a) would be able to agree contractually to report a security-based swap on behalf of the reporting party under Rule 901(a).[318] A third commenter noted that many market participants will look to third-party service providers to streamline the reporting process.[319] One commenter, however, recommended that the Commission should consider limiting the use of third-party reporting service providers to SB SEFs or other reporting market intermediaries, such as exchanges, because allowing unregulated third parties with potentially limited experience could lead to incomplete or inaccurate security-based swap reporting.[320]

Although the Commission agrees that security-based swap transaction information must be reported in a timely and accurate manner to fulfill the transparency and oversight goals of Title VII, the Commission does not believe that it is necessary, at this time, to allow only regulated intermediaries to perform reporting services on behalf of a reporting side. The Commission believes that reporting sides have a strong incentive to ensure that agents who report on their behalf have the capability and dedication to perform this function. In this regard, the Commission notes that any reporting side who contracts with a third party, including the non-reporting side, to report a security-based swap transaction on its behalf would retain the obligation to ensure that the information is provided to a registered SDR in the manner and form

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317 See ISDA/SIFMA I at 17 (explaining that there likely would be competition to provide reporting services and that market participants would be able to contract with appropriate vendors to obtain the most efficient allocation of reporting responsibilities).

318 See SIFMA I at 2, note 3.

319 See MarkitSERV IV at 3.

320 See Tradeweb Letter at 4-5.

required under Regulation SBSR. Thus, a reporting side could be held responsible if its agent reported a security-based swap transaction to a registered SDR late or inaccurately.

In addition, the Commission believes that allowing entities other than regulated intermediaries to provide reporting services to reporting persons could enhance competition and foster innovation in the market for post-trade processing services. This could, in turn, encourage more efficient reporting processes to develop over time as technology improves and the market gains experience with security-based swap transaction reporting. Accordingly, Rule 901(a), as adopted, does not limit the types of entities that may serve as reporting agents on behalf of reporting sides of security-based swaps. Furthermore, nothing in Rule 901(a), as adopted, prohibits the reporting side from using the non-reporting side to report as agent on its behalf.[321]

3. Reporting Clearing Transactions

In establishing proposed reporting obligations, Regulation SBSR, as proposed and as re-proposed, did not differentiate between cleared and uncleared security-based swaps. Accordingly, cleared and uncleared security-based swaps would have been treated in the same manner for purposes of reporting transactions to a registered SDR. Multiple commenters addressed the reporting of cleared and uncleared security-based swaps. Two commenters supported the Commission's proposal to assign reporting obligations for cleared security-based swaps through the reporting hierarchy in all circumstances.[322] These commenters noted that the

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321 See SIFMA I at 2, note 3.

322 See DTCC VI at 8-9; MarkitSERV III at 4-5. See also DTCC VII passim (suggesting operational difficulties that could arise if a person who is not a counterparty to a security-based swap has the duty to report); DTCC VIII (noting that "there has been a long held view that the SEC proposed model [for security-based swap data reporting] provides for a better defined process flow approach that achieves data quality, assigns proper ownership of who should report, and provides the most cost efficiencies for the industry as a whole").

Commission's proposal would allow security-based swap counterparties, rather than clearing agencies, to choose the registered SDR that receives data about their security-based swaps.[323] Other commenters objected to the proposal on statutory and operational grounds.[324] Two commenters argued that Title VII's security-based swap reporting provisions and Regulation SBSR should not extend to clearing transactions.[325] In the alternative, they argued that, if the Commission requires clearing transactions to be reported to a registered SDR, the clearing agency that clears a security-based swap should have the duty to report the associated clearing transactions to a registered SDR of its choice because, "in contrast to uncleared [security-based swaps], the Clearing Agency is the sole party who holds the complete and accurate record of transactions and positions for cleared [security-based swaps] and in fact is the only entity capable of providing accurate and useful positional information on cleared [security-based swaps] for systemic risk monitoring purposes."[326]

After careful consideration of the comments, the Commission has determined not to apply the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, to clearing transactions.[327] In the Regulation SBSR Proposed Amendments Release, the Commission is proposing to revise Rule

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323 See DTCC VI at 8-9; MarkitSERV III at 3-5.

324 See CME/ICE Letter at 2-4; ICE Letter at 2-5; CME II at 4; ISDA IV at 5.

325 See CME/ICE Letter at 2, 4; CME II at 4.

326 CME/ICE Letter at 3-4. See also ICE Letter at 2-5 (arguing that a clearing agency would be well-positioned to issue a termination message for a swap that has been accepted for clearing and subsequently report the security-based swaps that result from clearing); DTCC X (arguing for allowing the reporting side to determine which SDR to report to for cleared security-based swaps); ISDA IV at 5 (expressing the view that "the clearing agency is best-positioned to report cleared [security-based swaps] timely and accurately as an extension of the clearing process").

327 As stated above, a clearing transaction is a security-based swap that has a registered clearing agency as a direct counterparty.

901(a) to assign reporting duties for clearing transactions.[328] However, the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, applies to alpha transactions that are not executed on a platform.[329]

One commenter expressed the view that reporting the alpha "adds little or no value to an analysis of market exposure since it is immediately replaced by the beta and gamma and cannot exist unless the swap is cleared."[330] This commenter argued, therefore, that alpha transactions should not be reported to registered SDRs. The Commission disagrees with this comment, and believes instead that having a record of all alphas at registered SDRs will ensure that registered SDRs receive complete information about security-based swap transactions that are subject to the Title VII reporting requirement. This requirement is designed, in part, to provide valuable information about the types of counterparties active in the security-based swap market. Reconstructing this information from records of betas and gammas would be less efficient and potentially more prone to error than requiring reports of the alpha in the first instance. Furthermore, requiring reporting of the alpha transaction eliminates the need to address issues that would arise if there is a delay between the time of execution of the alpha and the time that it is submitted to clearing, or if the transaction is rejected by the clearing agency.

This commenter also stated that, if the alpha is reported, the "key to improving data quality is to have a single party responsible for reporting a cleared transaction, and thus with respect to whether reporting for purposes of public dissemination and/or reporting to a

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328 Rule 901(a), as adopted, reserves Rule 901(a)(2)(i) for assigning reporting obligations for clearing transactions.

329 Reporting requirements for platform-executed alphas are discussed in Section V(C)(4), infra, and in the Regulation SBSR Proposed Amendments Release.

330 ISDA IV at 6.

[registered SDR], the clearing agency should be responsible for the alpha once it is accepted for clearing."[331] This commenter believed that this approach allows the data pertaining to the execution of the alpha to be more easily and accurately linked to the resulting beta and gamma.[332] The Commission also sees the importance in being able to link information about the alpha to a related beta and gamma. However, the Commission does not believe that relying solely on the clearing agency to report transaction information is the only or the more appropriate way to address this concern. As discussed in Section II(B)(3)(j), supra, the Commission is adopting in Rule 901(d)(10) a requirement that the reports of new security-based swaps (such as a beta and gamma) that result from the allocation, termination, novation, or assignment of one or more existing security-based swaps (such as an alpha) must include the transaction ID of the allocated, terminated, assigned, or novated security-based swap(s). This requirement is designed to allow the Commission and other relevant authorities to link related transactions across different registered SDRs.

4. Reporting by a Platform

Commenters expressed mixed views regarding reporting by platforms. Some commenters, addressing Rule 901(a) as originally proposed, recommended that the Commission require a platform to report security-based swaps executed on or through its facilities.[333] One of these commenters stated that a platform would be in the best position to ensure the accurate and timely reporting of a transaction executed on its facilities.[334] Another commenter expressed the

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331 Id.

332 Id.

333 See ICI I at 5; Tradeweb Letter at 3-4; Vanguard Letter at 2, 7.

334 See Tradeweb Letter at 3. This commenter also stated that the counterparties to a transaction executed on a platform should be relieved of any reporting obligations

view that having platforms report security-based swaps would facilitate economies in the marketplace by reducing the number of reporting entities.[335]

Four commenters, however, recommended that the Commission not impose reporting requirements on platforms.[336] Three of these commenters argued that certain practical considerations militate against assigning reporting duties to platforms.[337] Specifically, these commenters believed that a platform might not have all of the information required to be reported under Rules 901(c) and 901(d).[338] These commenters further noted that, even if a platform could report the execution of a security-based swap, it would lack information about life cycle events.[339] The third commenter stated that it could be less efficient for a platform to report than to have counterparties report.[340]

After careful consideration of the issues raised by the commenters, the Commission has determined not to apply the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, to platform-

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because they would not be in a position to control or confirm the accuracy of the information reported or to control the timing of the platform's reporting. See id. at 3-4.

335 See Vanguard Letter at 7.

336 See ISDA/SIFMA I at 18; ISDA IV at 7; MarkitSERV III at 4; WMBAA II at 6.

337 See ISDA/SIFMA I at 18; ISDA IV at 7; WMBAA II at 6.

338 See id.

339 See WMBAA II at 6 (observing that it would take a platform at least 30 minutes to gather and confirm the accuracy of all required information and recommending that the reporting party should be able to contract with a SB SEF to report a security-based swap on its behalf); ISDA/SIFMA I at 17-18 (noting that a platform may not know whether a security-based swap submitted for clearing had been accepted for clearing); ISDA IV at 7 (noting that certain aspects of the CFTC regime for reporting bilateral swaps executed on facility have been challenging due to the difficulty for SEFs to know and report certain trade data that is not essential to the trade execution, and because of the shared responsibility for reporting since the SEF/DCM is responsible for the initial creation data reporting and the SD/MSP is responsible for the continuation data reporting).

340 See MarkitSERV III at 4.

executed transactions that will be submitted to clearing. In the Regulation SBSR Proposed Amendments Release, the Commission is proposing to assign reporting duties for platform-executed security-based swaps that will be submitted to clearing.[341] If the security-based swap will not be submitted to clearing, the platform would have no reporting obligation, and the reporting hierarchy in final Rule 901(a)(2)(ii) would apply.[342] The Commission notes that Section 13A(a)(3) of the Exchange Act provides that, for a security-based swap not accepted by any clearing agency, one of the counterparties must report the transaction. The reporting hierarchy of final Rule 901(a)(2)(ii) implements that provision and clarifies which side has the duty to report. The Commission believes that, in the case of security-based swaps that will not be submitted to clearing, the counterparties either will know each other's identity at the time of execution or the they will learn this information from the platform immediately or shortly after execution,[343] which will allow them to determine which side will incur the duty to report under

341 Rule 901(a), as adopted, reserves Rule 901(a)(1) for assigning reporting obligations for platform-executed security-based swaps that will be submitted to clearing.

342 See ISDA IV at 7 (recommending that for a bilateral transaction executed on a platform that is not intended for clearing, one of the counterparties should be responsible for reporting, per the proposed reporting hierarchy).

343 Market participants typically are unwilling to accept the credit risk of an unknown counterparty and therefore generally would not execute a security-based swap anonymously, unless the transaction would be cleared. Based on discussions with market participants, however, the Commission understands that certain temporarily registered CFTC SEFs offer "work-up" sessions that allow for anonymous execution of uncleared swaps in a limited circumstance. In a "work-up" session, after a trade is executed, other SEF participants may be given the opportunity to execute the same product at the same price. In a typical work-up session, the SEF would "flash" the execution to other SEF participants, who could then submit long or short interest to trade at the same price. The Commission understands that such interest could be submitted anonymously, and that a participant in a work-up session must agree to accept the credit risk of any other participant, if the work-up is conducted in a product that is not cleared. The Commission understands that the platform will inform each participant that executes a trade of the identity of its counterparty shortly after completion of the work-up session.

Rule 901(a)(2)(ii), as adopted.

5. Reporting of a Security-Based Swap Resulting from a Life Cycle Event

Rule 901(e)(1)(i) requires the reporting side for a security-based swap to report a life cycle event of that security-based swap—such as a termination, novation, or assignment—to the registered SDR to which it reported the original transaction.[344] Certain life cycle events may result in the creation of a new security-based swap. The Commission is modifying Rule 901(a) to identify the reporting side for this new security-based swap.[345]

Rule 901(e), as adopted, identifies the reporting side for a life cycle event. Rule 901(e) does not, however, address who will be the reporting side for a new security-based swap that arises from a life cycle event (such as a termination) of an existing security-based swap.[346] To identify the reporting side for the new security-based swap, the Commission is modifying the introductory language of final Rule 901(a) to provide that a "security-based swap, including a security-based swap that results from the allocation, termination, novation, or assignment of

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344 However, a reporting side is not required to report whether or not a security-based swap has been accepted for clearing. See infra Section XII(A) (discussing life cycle event reporting).

345 Security-based swaps resulting from an allocation are discussed in greater detail in Section VIII(A) infra.

346 As re-proposed, paragraphs (1) and (2) of Rule 901(e) would have identified the reporting side for a security-based swap resulting from a life cycle event, if the reporting side for the initial security-based swap ceased to be a counterparty to the security-based swap resulting from the life cycle event. The Commission believes that these proposed provisions are unnecessary in light of the reporting hierarchy in Rule 901(a). Therefore, as described above, the Commission has determined that security-based swap counterparties should use the reporting hierarchy in Rule 901(a) to determine the reporting side for all security-based swaps, including security-based swaps that result from a life cycle event to another security-based swap.

another security-based swap, shall be reported" as provided in the rest of the rule.[347] This change responds to a commenter who suggested that reporting obligations be reassessed upon novation based on the current registration status of the remaining party and the new party to the security-based swap.[348] The reporting side designated by Rule 901(a) for the new transaction could be different from the reporting side for the original transaction.[349] The reporting side for the new security-based swap would be required to report the transaction within 24 hours of the time of creation of the new security-based swap.[350]

Rule 901(d)(10) requires the reporting side for the new security-based swap to report the transaction ID of the original security-based swap as a data element of the transaction report for

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347 As proposed, this introductory language read "[t]he reporting party shall be as follows." In the Cross-Border Proposing Release, the Commission proposed to modify this language to be "[t]he reporting side for a security-based swap shall be as follows."

348 See ISDA IV at 7.

349 Assume, for example, that a registered security-based swap dealer and a hedge fund execute a security-based swap. The execution does not occur on a platform and the transaction will not be submitted to clearing. Under Rule 901(a)(2)(ii)(B), as adopted, the registered security-based swap dealer is the reporting side for the transaction. Assume further that three days after execution the registered security-based swap dealer and the hedge fund agree that the registered security-based swap dealer will step out of the trade through a novation and will be replaced by a registered major security-based swap participant. Pursuant to Rule 901(e), as adopted, the registered security-based swap dealer would be required to report the novation to the same registered SDR that received the initial report of the security-based swap. At this point, the transaction between the registered security-based swap dealer and the hedge fund is complete and the registered security-based swap dealer would have no further reporting obligations with respect to the transaction. Under Rule 901(a)(2)(ii)(D), as adopted, the registered major security-based swap participant is the reporting side for the security-based swap that results from the novation of the transaction between the registered security-based swap dealer and the hedge fund. The registered major security-based swap participant is the reporting side for the resulting transaction.

350 If the time that is 24 hours after the time of the creation of the new security-based swap would fall on a day that is not a business day, the report of the new security-based swap would be due by the same time on the next day that is a business day. See Rule 901(j).

the new security-based swap.[351] The Commission believes that this requirement will allow the Commission and other relevant authorities to link the report of a new security-based swap that arises from the allocation, termination, novation, or assignment of an existing security-based swap to the original security-based swap. As a result of these links, the Commission believes that it is not necessary or appropriate to require that a security-based swap that arises from the allocation, termination, novation, or assignment of an existing security-based swap be reported to the same registered SDR that received the transaction report of the original transaction. Thus, the reporting side for a security-based swap that arises as a result of the allocation, termination, novation, or assignment of an existing security-based swap could report the resulting new security-based swap to a registered SDR other than the registered SDR that received the report of the original security-based swap.

VI. Public Dissemination—Rule 902

A. Background

In addition to requiring regulatory reporting of all security-based swaps, Regulation SBSR seeks to implement Congress's mandate for real-time public dissemination of all security-based swaps. Section 13(m)(1)(B) of the Exchange Act authorizes the Commission "to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery."[352] Section

351 Rule 901(d)(10) provides that if a "security-based swap arises from the allocation, termination, novation, or assignment of one or more existing security-based swaps," the reporting side must report "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." See supra Section II(C)(3)(k) (discussing Rule 901(d))(10)).

352 15 U.S.C. 78m(m)(1)(B). Section 13m(1)(E) of the Exchange Act, 15 U.S.C. 78m(m)(1)(E), requires the Commission rule for real-time public dissemination of

13(m)(1)(C) of the Exchange Act[353] authorizes the Commission to provide by rule for the public availability of security-based swap transaction, volume, and pricing data as follows:

(1) With respect to those security-based swaps that are subject to the mandatory clearing requirement described in Section 3C(a)(1) of the Exchange Act (including those security-based swaps that are excepted from the requirement pursuant to Section 3C(g) of the Exchange Act),[354] the Commission shall require real-time public reporting for such transactions;[355]

(2) With respect to those security-based swaps that are not subject to the mandatory clearing requirement described in Section 3C(a)(1) of the Exchange Act, but are cleared at a registered clearing agency, the Commission shall require real-time public reporting for such transactions;

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security-based swap transactions to: (1) "specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts" and (2) "specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public." The treatment of block trades is discussed in Section VII, infra.

353 15 U.S.C. 78m(m)(1)(C).

354 15 U.S.C. 78c-3(g).

355 Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1), provides that it shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under the Exchange Act or a clearing agency that is exempt from registration under the Exchange Act if the security-based swap is required to be cleared. Section 3C(g)(1) of the Exchange Act, 15 U.S.C. 78c-3(g)(1), provides that requirements of Section 3C(a)(1) will not apply to a security-based swap if one of the counterparties to the security-based swap (1) is not a financial entity; (2) is using security-based swaps to hedge or mitigate commercial risk; and (3) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

(3) With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a SDR or the Commission under Section 3C(a)(6),[356] the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person; and

(4) With respect to security-based swaps that are determined to be required to be cleared under Section 3C(b) of the Exchange Act but are not cleared, the Commission shall require real-time public reporting for such transactions.[357]

Furthermore, Section 13(m)(1)(D) of the Exchange Act[358] authorizes the Commission to require registered entities (such as registered SDRs) to publicly disseminate the security-based swap transaction and pricing data required to be reported under Section 13(m) of the Exchange Act. Finally, Section 13(n)(5)(D)(ii) of the Exchange Act[359] requires SDRs to provide security-based swap information "in such form and at such frequency as the Commission may require to comply with public reporting requirements."

In view of these statutory provisions, the Commission proposed Rule 902—Public Dissemination of Transaction Reports. In the Regulation SBSR Proposing Release, the Commission expressed its belief that the best approach would be to require market participants to

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356 The reference in Section 13(m)(1)(C)(iii) of the Exchange Act to Section 3C(a)(6) of the Exchange Act is incorrect. Section 3C of the Exchange Act does not contain a paragraph (a)(6). See generally Am. Petroleum Institute v. SEC, 714 F.3d 1329, 1336-37 (D.C. Cir 2013) (explaining that "[t]he Dodd Frank Act is an enormous and complex statute, and it contains" a number of "scriveners' errors").

357 Section 3C(b)(1) of the Exchange Act requires the Commission to review on an ongoing basis each security-based swap, or any group, category, type, or class of security-based swap to make a determination that such security-based swap, or group, category, type, or class of security-based swap should be required to be cleared.

358 15 U.S.C. 78m(m)(1)(D).

359 15 U.S.C. 78m(n)(5)(D)(ii).

report transaction information to a registered SDR and require registered SDRs to disseminate that information to the public.[360] Many commenters expressed general support for public dissemination of security-based swap information.[361] In addition, as discussed more fully below, the Commission received a large number of comments addressing specific aspects of public dissemination of transaction reports.[362]

The current market for security-based swaps is opaque. Dealers know about order flow that they execute, and may know about other dealers' transactions in certain instances, but information about executed transactions is not widespread. Market participants—particularly

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360 See 75 FR 75227.

361 See Barnard I at 3 (recommending full post-trade transparency as soon as technologically and practically feasible, with an exemption to permit delayed reporting of block trades); CII Letter at 2 ("the transparency resulting from the implementation of the proposed rules would not only lower systemic risk and strengthen regulatory oversight, but also, importantly for investors, enhance the price discovery function of the derivatives market"); DTCC II at 17-18 (noting that the proposed rules are designed to balance the benefits of post-trade transparency against the potentially higher costs of transferring or hedging a position following the dissemination of a report of a block trade); Ethics Metrics Letter at 3 (last-sale reporting of security-based swap transactions will "provide material information to eliminate inefficiencies in pricing [financial holding company] debt and equity in the U.S. capital markets"); FINRA Letter at 1 (stating that the proposed trade reporting and dissemination structure, and the information it would provide to regulators and market participants, are vital to maintaining market integrity and investor protection); Getco Letter at 3 (noting that in the absence of accurate and timely post-trade transparency for most security-based swap transactions only major dealers will have pricing information and therefore new liquidity providers will not participate in the security-based swap market); ICI I at 1-2 (stating that market transparency is a key element in assuring the integrity and quality of the security-based swap market); Markit I at 4 (stating that security-based swap data should be made available on a non-delay basis to the public, media, and data vendors); MFA I at 1 (supporting the reporting of security-based swap transaction data to serve the goal of market transparency); SDMA I at 4 ("Post-trade transparency is not only a stated goal of the Dodd-Frank Act it is also an instrumental component in establishing market integrity. By creating real time access to trade information for all market participants, confidence in markets increases and this transparency fosters greater liquidity"); ThinkNum Letter passim; Shatto Letter passim.

362 See infra notes 377 to 386 and accompanying text and Section VI(D).

non-dealers—have to rely primarily on their understanding of the market's fundamentals to arrive at a price at which they would be willing to assume risk. The Commission believes that, by reducing information asymmetries between dealers and non-dealers and providing more equal access to all post-trade information in the security-based swap market, post-trade transparency could help reduce implicit transaction costs and promote greater price efficiency.[363] The availability of post-trade information also could encourage existing market participants to increase their activity in the market and encourage new participants to join the market—and, if so, increase liquidity and competition in the security-based swap market. In addition, all market participants will have more comprehensive information with which to make trading and valuation determinations.

Security-based swaps are complex derivative products, and there is no single accepted way to model a security-based swap for pricing purposes. The Commission believes that post-trade pricing and volume information will allow valuation models to be adjusted to reflect how other market participants have valued a security-based swap product at a specific moment in time. Public dissemination of last-sale information also will aid dealers in deriving better quotations, because they will know the prices at which other market participants have traded. Last-sale information also will aid end users and other non-registered entities in evaluating current quotations by allowing them to request additional information if a dealer's quote differs from the prices of the most recent transactions. Furthermore, smaller market participants that view last-sale information will be able to test whether quotations offered by dealers before the last sale were close to the price at which the last sale was executed. In this manner, post-trade

[363] See infra Section XXII(C)(2)(a). See also infra note 1255 (discussing implicit transaction costs).

transparency will promote price competition and more efficient price discovery in the security-based swap market.

The Commission is adopting Rule 902 with certain modifications and technical changes discussed in more detail below. Final Rule 902(a) sets forth the basic duty of a registered SDR to publicly disseminate transaction reports. Final Rule 902(c) sets forth certain types of security-based swaps and certain other information about security-based swaps that a registered SDR shall not publicly disseminate. Final Rule 902(d), the so-called "Embargo Rule," is designed to promote fair access to information about executed security-based swaps.[364]

Rule 902(b), as proposed and re-proposed, would have established a mechanism for registered SDRs to publicly disseminate transaction reports of block trades. As discussed in more detail in Section VII, infra, the Commission is not adopting thresholds for determining what constitutes a block trade. Accordingly, the Commission believes that it is not necessary or appropriate at this time to adopt rules specifically addressing the public dissemination of block trades.

B. Registered SDR's Duty to Disseminate—Rule 902(a)

Rule 902(a), as proposed and re-proposed, would have required a registered SDR to publicly disseminate a transaction report of any security-based swap immediately upon receipt of transaction information about the security-based swap, except in the case of a block trade.[365]

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364 Final Rule 902(d) provides that "[n]o person shall make available to one or more persons (other than a counterparty or post-trade processor) transaction information relating to a security-based swap before the primary trade information about the security-based swap is submitted to a registered security-based swap data repository."

365 The Commission recognized, however, that there may be circumstances when a registered SDR's systems might be unavailable for publicly disseminating transaction data. In such cases, proposed Rule 902(a) would have required a registered SDR to disseminate the transaction data immediately upon its re-opening. See Regulation SBSR

Further, Rule 902(a), as initially proposed, provided that the transaction report would consist of "all the information reported by the reporting party pursuant to § 242.901, plus any indicator or indicators contemplated by the registered security-based swap data repository's policies and procedures that are required by § 242.907." Rule 902(a) was revised and re-proposed as part of the Cross-Border Proposing Release to add that a registered SDR would not have an obligation to publicly disseminate certain types of cross-border security-based swaps that are required to be reported but not publicly disseminated.[366]

Commenters generally were supportive of the Commission's approach of requiring registered SDRs to be responsible for public dissemination of security-based swap transaction reports.[367] One commenter, for example, stated that allowing other types of entities to have the regulatory duty to disseminate data could lead to undue complications for market participants.[368] In addition, the commenter expressed the view that real-time public dissemination of security-based swap data is a "core function" of registered SDRs, and that permitting only registered SDRs to publicly disseminate security-based swap data would help to assure the accuracy and completeness of the data.[369] However, one commenter appeared to recommend that a clearing

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Proposing Release, 75 FR 75228. Rule 904 of Regulation SBSR deals with hours of operation of registered SDRs and related operational procedures. See infra Section XI.

366 This carve-out was necessitated by re-proposed Rule 908(a), which contemplated situations where a security-based swap would be required to be reported to a registered SDR but not publicly disseminated. See 78 FR 31060.

367 See FINRA Letter at 5; DTCC II at 18 (stating that SDRs should be able to disseminate data effectively and should be the sole source of data dissemination); DTCC IV at 4; MarkitSERV I at 7-8 (stating that only registered SDRs, or their agents, should be permitted to disseminate security-based swap data); Thomson Reuters Letter at 6-7 (stating that publication and dissemination of security-based swap transaction information should be the responsibility of registered SDRs rather than SB SEFs).

368 See DTCC II at 18.

369 See DTCC IV at 4.

agency should be responsible for public dissemination of "relevant pricing data for a security-based swap subject to clearing."[370]

The Commission has carefully analyzed the comments and is adopting the approach of requiring public dissemination through registered SDRs. The Commission believes that this approach will promote efficiency in the security-based swap market, or at least limit inefficiency.[371] Section 13(m)(1)(G) of the Exchange Act[372] provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository." Thus, security-based swaps would have to be reported to registered SDRs regardless of the mechanism that the Commission chooses for public dissemination. By requiring registered SDRs to carry out the task of public dissemination, the Commission will not require reporting steps beyond those already required by the Exchange Act. Furthermore, the Commission believes that assigning registered SDRs the duty to publicly disseminate will help promote efficiency and consistency of post-trade information. Market observers will not have to obtain market data from potentially several other sources —such as SB SEFs, clearing agencies, or the counterparties themselves—to have a full view of security-based swap market activity.

1. Format of Disseminated Data

In the Regulation SBSR Proposing Release, the Commission acknowledged that multiple uniquely formatted data feeds could impair the ability of market participants to receive,

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370 See ISDA IV at 6 (stating that "as regards public dissemination of relevant pricing data for a SBS subject to clearing, such reporting should be done by the clearing agency when a SBS is accepted for clearing and the clearing agency reports for the beta and gamma").

371 See infra Section XXII(B)(2).

372 15 U.S.C. 78m(m)(1)(G).

understand, or compare security-based swap transaction data and thus undermine its value.[373] Furthermore, the Commission suggested that one way to address that issue would be to dictate the exact format and mode of providing required security-based swap data to the public, while acknowledging various problems with that approach.[374] The Commission proposed, however, to identify in proposed Rules 901(c) and 901(d) the categories of information that would be required to be reported, and to require registered SDRs to establish and maintain policies and procedures that, among other things, would specify the data elements that would be required to be reported.[375] The Commission preliminarily believed that this approach would promote the reporting of uniform, material information for each security-based swap, while providing flexibility to account for changes to the security-based swap market over time.[376]

Two commenters generally supported the Commission's approach of providing registered SDRs with the flexibility to define the relevant data fields.[377] However, one commenter stated that the final rules should clearly identify the data fields that will be publicly disseminated.[378] Another commenter emphasized the importance of presenting security-based swap information in a format that is useful for market participants, and expressed concern that proposed Regulation SBSR did "nothing to ensure that the data amassed by individual SDRs is aggregated and

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373 See 75 FR at 75227.

374 See id.

375 See id. at 75213.

376 See id.

377 See Barnard I at 2 (stating that the categories of information required to be reported under the proposed rules should be "complete and sufficient so that its dissemination will enhance transparency and price discovery"); MarkitSERV I at 10 (expressing support for the Commission's "proposal to provide [registered] SDRs with the authority to define the relevant fields on the basis of general guidelines as set out by the SEC").

378 See ISDA/SIFMA I at 10. See also ISDA IV at 9 and Section II(2)(a), supra, for a response.

disseminated in a form that is genuinely useful to traders and regulators and on a nondiscriminatory basis."[379] This commenter further believed that to provide meaningful price discovery, data must be presented in a format that allows market participants to view it in near-real time, fits onto the limited space available on their trading screens, and allows them to view multiple markets simultaneously.[380]

The Commission has carefully considered these comments and continues to believe that it is not necessary or appropriate at this time for the Commission to dictate the format and mode of public dissemination of security-based swap transaction information by registered SDRs. Therefore, Rule 902(a), as adopted, provides registered SDRs with the flexibility to set the format and mode of dissemination through its policies and procedures, as long as the reports of security-based swaps that it publicly disseminates include the information required to be reported by Rule 901(c), plus any "condition flags" contemplated by the registered SDR's policies and procedures under Rule 907.[381] The Commission notes that it anticipates proposing for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis by the Commission of security-based swap data submitted to it by an SDR. The Commission intends to maximize the use of any applicable current industry standards for the description of security-based swap data, and build upon such standards to accommodate any additional data fields as may be required.

2. Timing of Public Dissemination

379 Better Markets II at 2-3 (also arguing that the Commission should require disclosure of the component parts of a complex transaction to prevent market participants from avoiding transparency by creating complex composite transactions).

380 See Better Markets I at 3; Better Markets II at 4.

381 The Commission notes that final Rule 902(a) references "condition flags," rather than "indicator or indicators," as was proposed, to conform with Rule 907, as adopted.

Rule 902(a), as re-proposed, would have required a registered SDR to publicly disseminate a transaction report of a security-based swap immediately upon (1) receipt of information about the security-based swap from a reporting side, or (2) re-opening following a period when the registered SDR was closed, unless the security-based swap was a block trade or a cross-border security-based swap that was required to be reported but not publicly disseminated. One commenter agreed with the proposed requirement, stating that reported security-based swap transaction information "should be made available on a non-delayed basis to the public, media, and data vendors."[382]

The Commission is adopting the requirement contained in Rule 902(a), as re-proposed, that a registered SDR must disseminate a transaction report of a security-based swap "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."[383] "Immediately," as used in this context, implies a wholly automated process to accept the incoming information, process the information to assure that only information required to be disseminated is disseminated, and disseminate a trade report through electronic means.

3. Dissemination of Life Cycle Events

Rule 902(a), as adopted, provides that, in addition to transaction reports of security-based swaps, a registered SDR "shall publicly disseminate … a life cycle event or adjustment due to a life cycle event." Rule 902(a), as proposed and re-proposed, did not specifically refer to such information, but, as noted in the Regulation SBSR Proposing Release, proposed Rule 907(a)(4) would have required a registered SDR to "establish and maintain written policies and procedures

382 Markit I at 4.

383 See infra Section XI (discussing Rule 904, which deals with hours of operation of registered SDRs and related operational procedures).

describing how reporting parties shall report—and, consistent with the enhancement of price discovery, how the registered SDR shall publicly disseminate—reports of, and adjustments due to, life cycle events."[384] One commenter argued that the Commission should limit public dissemination to new trading activity and should exclude maintenance or life cycle events.[385] The Commission disagrees, and believes instead that, if information about a security-based swap is publicly disseminated but subsequently one or more of the disseminated data elements is revised due to a life cycle event (or an adjustment due to a life cycle event), the revised information would provide market observers a more accurate understanding of the market. The Commission, therefore, is clarifying Rule 902(a) to make clear the requirement to disseminate life cycle events. Final Rule 902(a) provides, in relevant part, that a registered SDR "shall publicly disseminate a transaction report of the security-based swap or a life cycle event or adjustment due to a life cycle event immediately upon receipt."[386]

4. Correction of Minor Drafting Error

Rule 902(a), as initially proposed and re-proposed, provided that the transaction report that is publicly disseminated "shall consist of all the information reported pursuant to Rule 901, plus any indicator or indicators contemplated by the registered security-based swap data

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384 Regulation SBSR Proposing Release, 75 FR at 75237.

385 See ISDA/SIFMA I at 12. See also ISDA IV at 13 (arguing that only life cycle events that result in a change to the price of a security-based swap should be subject to public dissemination, and requesting that "any activity on a [security-based swap] that does not affect the price of the reportable [security-based swap]" be excluded from public dissemination).

386 To enhance the usefulness of a public transaction report of a life cycle event, final Rule 907(a)(3) requires a registered SDR to have policies and procedures for appropriately flagging public reports of life cycle events. See infra Section XII(C). This requirement is designed to promote transparency by allowing market observers to distinguish original transactions from life cycle events.

repository's policies and procedures that are required by Rule 907" (emphasis added). However, in the Regulation SBSR Proposing Release, the Commission specified that the transaction report that is disseminated should consist of all the information reported pursuant to Rule 901(c).[387] The statement from the preamble of the Regulation SBSR Proposing Release is correct. The Commission did not intend for all of the information reported pursuant to Rule 901 to be publicly disseminated;[388] this would include, for example, regulatory data reported pursuant to Rule 901(d) and information about historical security-based swaps reported pursuant to Rule 901(i). The Commission is correcting this drafting error so that final Rule 902(a) explicitly states that 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" (emphasis added).

5. Use of Agents by a Registered SDR to Carry Out the Public Dissemination Function

One commenter discussed the appropriateness of third-party service providers carrying out the public dissemination function on behalf of registered SDRs.[389] The Commission believes that, in the same way that reporting sides may engage third-party agents to report transactions on their behalf, registered SDRs may engage third-party providers to carry out the public dissemination function on their behalf. In both cases, the entity with the legal duty would remain responsible for compliance with Regulation SBSR if its agent failed to carry out the function in a manner stipulated by Regulation SBSR. Thus, reporting sides and registered SDRs should

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387 See 75 FR at 75212-13.

388 Two comments specifically noted this lack of clarity. See ISDA/SIFMA I at 12; ISDA IV at 14.

389 See MarkitSERV I at 7-8.

engage only providers that have the capacity and reliability to carry out those duties.

C. Definition of "Publicly Disseminate"

In the Regulation SBSR Proposing Release, the Commission defined "publicly disseminate" in Rule 900 to mean "to make available through the Internet or other electronic data feed that is widely accessible and in machine-readable electronic format." The Commission re-proposed this definition renumbering it Rule 900(y), in the Cross-Border Proposing Release.

The Commission received no comment letters directly discussing the proposed definition, although as noted above many commenters commented on various other aspects of public dissemination, including the format of disseminated data[390] and timing of public dissemination.[391] The Commission is adopting the definition of "publicly disseminate" as proposed and re-proposed. The Commission continues to believe that, to satisfy the statutory mandate for public dissemination, security-based swap transaction data must be widely accessible in a machine-readable electronic format. These data are too numerous and complex for direct human consumption and thus will have practical use only if they can be downloaded and read by computers. The definition of "publicly disseminate" recognizes the Internet as one, but not the only, possible electronic medium to make these data available to the public.

D. Exclusions from Public Dissemination—Rule 902(c)

1. Discussion of Final Rule

Rule 902(c), as proposed and re-proposed, set forth three kinds of information that a registered SDR would be prohibited from disseminating. First, in Rule 902(c)(1), the Commission proposed that a registered SDR would be prohibited from disseminating the identity

[390] See supra Section VII(B)(1).

[391] See supra Section VII(B)(2).

of any counterparty to a security-based swap. This would implement Section 13(m)(1)(E)(i) of the Exchange Act,[392] which requires the Commission's rule providing for the public dissemination of security-based swap transaction and pricing information to ensure that "such information does not identify the participants." The Commission received three comments that generally urged the Commission to ensure the anonymity of security-based swap counterparties, either through non-dissemination of the identity of any counterparty or by limiting public dissemination of other data elements they believed could lead to disclosure of counterparties' identities.[393] To address the commenters' concerns, the Commission is adopting Rule 902(c)(1) as proposed and re-proposed, with one conforming change.[394] Final Rule 902(c)(1) explicitly prohibits a registered SDR from disseminating the identity of any counterparty. Further, Rule 902(a) explicitly provides for the public dissemination of a transaction report that consists only

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392 15 U.S.C. 13m(m)(1)(E)(i). This section is applicable to security-based swaps that are subject to Sections 13(m)(1)(C)(i) and (ii) of the Exchange Act—i.e., security-based swaps that are subject to the mandatory clearing requirement in Section 3C(a)(1) and security-based swaps that are not subject to the mandatory clearing requirement in Section 3C(a)(1) but are cleared.

393 See Deutsche Bank Letter at 6 (asking the SEC and CFTC to impose strict requirements on an SDR's handling, disclosure, and use of identifying information); DTCC II at 9 (noting that trading volume in most single name credit derivatives is "extremely thin" and disclosing small data samples, particularly from narrow time periods, may not preserve the anonymity of the trading parties); ISDA/SIFMA I at 12; MFA I at 2 (arguing that participant IDs should not be included in any publicly disseminated transaction report to protect identities and proprietary trading strategies of security-based swap market participants).

394 Re-proposed Rule 902(c)(1) would have prohibited a registered SDR from publicly disseminating the identity of either counterparty to a security-based swap. Final Rule 902(c)(1) prohibits a registered SDR from publicly disseminating the identity of any counterparty to a security-based swap. Final Rule 900(i) defines counterparty to mean "a person that is a direct counterparty or indirect counterparty of a security-based swap." This conforming change to Rule 902(c)(1) makes clear that a registered SDR may not publicly disseminate the identity of any counterparty—direct or indirect—of a security-based swap.

of "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." Limiting the publicly disseminated trade report to these specific data elements is designed to further avoid disclosure of any counterparty's identity, including the counterparty ID of a counterparty, even in thinly-traded markets.[395]

Second, the Commission proposed in Rule 902(c)(2) that, with respect to a security-based swap that is not cleared at a clearing agency and that is reported to a registered SDR, a registered SDR would be prohibited from disseminating any information disclosing the business transactions and market positions of any person. This would implement Section 13(m)(1)(C)(iii) of the Exchange Act,[396] which provides that, with respect to the security-based swaps that are not cleared and which are reported to an SDR or the Commission, "the Commission shall require real-time public reporting... in a manner that does not disclose the business transactions and market positions of any person." The Commission received no comments that directly addressed proposed Rule 902(c)(2), although one commenter noted that "all market participants have legitimate interests in the protection of their confidential and identifying financial information."[397] By prohibiting a registered SDR from disseminating any information disclosing the business transactions and market positions of any person, the Commission believes that Rule 902(c)(2) will help preserve the confidential information of market participants, in addition to implementing Section 13(m)(1)(C)(iii) of the Exchange Act. Accordingly, the Commission is adopting Rule 902(c)(2) as proposed and re-proposed.

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395 See infra Section VI(D)(1)(f) (discussing public dissemination of thinly-traded products).

396 15 U.S.C. 13(m)(1)(C)(iii).

397 Deutsche Bank Letter at 6.

Third, the Commission preliminarily believed that it would be impractical and unnecessary for a registered SDR to publicly disseminate reports of historical security-based swaps reported pursuant to Rule 901(i), and therefore included this exclusion in proposed Rule 902(c)(3).[398] The Commission received no comments regarding proposed Rule 902(c)(3). The Commission continues to believe that it would be impractical for a registered SDR to publicly disseminate reports of historical security-based swaps reported pursuant to Rule 901(i). Accordingly, the Commission is adopting Rule 902(c)(3) as proposed and re-proposed.

The Commission calls particular attention to the relationship between Rules 901(i), 901(e), and 902. Rule 901(i) requires reporting of historical security-based swaps to a registered SDR. Rule 902(c)(3) provides that the initial transaction reported pursuant to Rule 901(i) shall not be publicly disseminated. A historical security-based swap might remain open after market participants are required to begin complying with the requirement in Rule 901(e) to report life cycle events.[399] If a life cycle event of a historical security-based swap relating to any of the primary trade information—i.e., the data elements enumerated in Rule 901(c)—occurs after public dissemination is required for security-based swaps in a particular asset class, Rule 902(a) would require the registered SDR to publicly disseminate a report of that life cycle event, plus any condition flags required by the registered SDR's policies and procedures under Rule 907. In other words, Rule 902(c)(3)'s exclusion from public dissemination for historical security-based swaps applies only to the initial transaction, not to any life cycle event of that historical security-based swap relating to the primary trade information that occurs after public dissemination in that asset class is required. Therefore, life cycle events relating to the primary trade information

398 75 FR at 75286.

399 See Regulation SBSR Proposed Amendments Release, Section VII (proposing a new compliance schedule for Regulation SBSR).

of historical security-based swaps must, after the public dissemination requirement goes into effect, be publicly disseminated.[400]

At the same time, correcting an error in the Rule 901(c) information relating to a historical security-based swap would not trigger public dissemination of a corrected report. Rule 905 applies to all information reported pursuant to Regulation SBSR, including historical security-based swaps that must be reported pursuant to Rule 901(i). Rule 905(b)(2) requires the registered SDR to publicly disseminate a correction of a transaction only if the corrected information falls within Rule 901(c) and the transaction previously was subject to a public dissemination requirement. Historical security-based swaps are not subject to the public dissemination requirement; therefore, corrections to Rule 901(c) information in historical security-based swaps are not subject to public dissemination either.

Rule 902(a), as proposed, would have provided that a registered SDR shall publicly disseminate a transaction report of a security-based swap reported to it, "[e]xcept in the case of a block trade." Rule 902(a), as re-proposed, would have retained the exception for block trades and added a second exception, for "a trade that is required to be reported but not publicly disseminated."[401] In final Regulation SBSR, the Commission is revising Rules 902(a) and 902(c) to consolidate into a single rule—Rule 902(c)—all the types of security-based swaps and

400 For example, a termination of a historical security-based swap—occurring after public dissemination in that asset class becomes required—would have to be publicly disseminated. A termination represents the change in the notional amount of the transaction from a positive amount to zero. Because the notional amount is a Rule 901(c) element, the termination of the historical security-based swap would have to be publicly disseminated.

401 This second exception was necessitated by revisions to Rule 908 made in the Cross-Border Proposing Release that would have provided that certain cross-border security-based swaps would be subject to regulatory reporting but not public dissemination. See 78 FR at 31215.

the kinds of information that a registered SDR is prohibited from disseminating. Therefore, Rule 902(a), as adopted, now provides that a registered SDR shall publicly disseminate a transaction report of a security-based swap "except as provided in paragraph (c)."

In addition to adopting subparagraphs (1), (2), and (3) of Rule 902(c), as proposed and re-proposed, the Commission is modifying Rule 902(c) to expand the number of exclusions from public dissemination from three to seven. First, the Commission is adding Rule 902(c)(4), which prohibits a registered SDR from disseminating a non-mandatory report, and is adding a new Rule 900(r) to define "non-mandatory report" as any information provided to a registered SDR by or on behalf of a counterparty other than as required by Regulation SBSR. Situations may arise when the same transaction may be reported to two separate registered SDRs. This could happen, for example, if the reporting side reports a transaction to one registered SDR, as required by Rule 901, but the other side elects to submit the same transaction information to a second registered SDR. The Commission has determined that any non-mandatory report should be excluded from public dissemination because the mandatory report of that transaction will have already been disseminated, and the Commission seeks to avoid distorting the market by having two public reports issued for the same transaction.[402]

Second, the Commission is adding Rule 902(c)(5), which prohibits a registered SDR from disseminating any information regarding a security-based swap that is subject to regulatory reporting but not public dissemination under final Rule 908(a) of Regulation SBSR.[403] Rule 902(a), as re-proposed, would have prohibited a registered SDR from publicly disseminating information concerning a cross-border security-based swap that is required to be reported but not

402 See infra Section XIX (explaining how a registered SDR can determine whether the report it receives is a non-mandatory report).

403 See infra Section XV(A).

publicly disseminated. The Commission received no comments on this specific provision, and is relocating it from re-proposed Rule 902(a) to final Rule 902(c)(5). Rule 902(c)(5), as adopted, will prohibit a registered SDR from disseminating "[a]ny 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)."

Third, the Commission is adding Rule 902(c)(6), which prohibits a registered SDR from disseminating any information regarding certain types of clearing transactions.[404] Regulation SBSR, as proposed and re-proposed, did not provide any exemption from public dissemination for clearing transactions. However, the Commission has determined that publicly disseminating reports of clearing transactions that arise from the acceptance of a security-based swap for clearing by a registered clearing agency or that result from netting other clearing transactions would be unlikely to further Title VII's transparency objectives. Any security-based swap transaction, such as an alpha, that precedes a clearing transaction must be publicly disseminated. Clearing transactions, such as the beta and the gamma, that result from clearing a security-based swap or from netting clearing transactions together do not have price discovery value because they are mechanical steps taken pursuant to the rules of the clearing agency. Therefore, the Commission believes that non-dissemination of these clearing transactions is appropriate in the public interest and consistent with the protection of investors.

Fourth, the Commission is adding Rule 902(c)(7), which prohibits a registered SDR from disseminating any information regarding the allocation of a security-based swap. As discussed in more detail in Section VIII, infra, the Commission has determined that, to comply with this

404 Rule 900(f) defines "clearing transaction" as "a security-based swap that has a registered clearing agency as a direct counterparty."

prohibition, a registered SDR will satisfy its public dissemination obligations for a security-based swap involving allocation by disseminating only the aggregate notional amount of the executed bunched order that is subsequently allocated. The Commission believes that this is an appropriate means of public dissemination, because the price and size of the executed bunched order were negotiated as if the transaction were a single large trade, rather than as individual smaller trades. In the Commission's view, public dissemination of the allocations would not enhance price discovery because the allocations are not individually negotiated.[405] Furthermore, although the Commission has taken the approach in other situations of requiring public dissemination of the transaction but with a condition flag to explain the special circumstances related to the transaction,[406] for the reasons stated above, the Commission does not believe that this approach is appropriate here. Rule 902(c)(7)'s exception to public dissemination for the individual allocations also is designed to address commenter concerns that publicly disseminating the sizes of individual allocations could reveal the identities or business strategies of fund groups that execute trades on behalf of multiple client funds.[407] For similar reasons, Rule

405 The size in which a transaction is executed could significantly affect the price of the security-based swap. Thus, all other things being equal, the price negotiated for a large trade could be significantly different from the price negotiated for a small trade. Publicly disseminating the prices of small trades that are allocated from the bunched order execution might not provide any price discovery value for another small trade if it were to be negotiated individually. Nor does the Commission believe that publicly disseminating the prices and sizes of the allocations would provide any more price discovery than a single print of the bunched order execution, because the allocations result from a single negotiation for the bunched order size. However, if "child" transactions of a larger "parent" transaction are priced differently from the parent transaction, these child transactions would not fall within the exclusion in Rule 902(c)(7).

406 See infra Section IX (discussing requirements for public dissemination of inter-affiliate security-based swaps).

407 See MFA I at 2-3 ("we are concerned that post-allocation [security-based swap] data, if publicly disseminated, will allow any of the fund's counterparties to identify transactions that the fund executed with others. Counterparties are often aware of an investment

902(c)(7), as adopted, prohibits a registered SDR from publicly disseminating the fact that an initial security-based swap has been terminated and replaced with several smaller security-based swaps as part of the allocation process.[408] The Commission believes that any marginal benefit of publicly disseminating this type of termination event would not be justified by the potential risk to the identity or business strategies of fund groups that execute trades on behalf of multiple client funds.[409]

Registered SDRs will need to rely on the information provided by reporting sides to determine whether Rule 902(c) excludes a particular report from public dissemination. As described in more detail in Section VI(G), Rule 907(a)(4)(iv) requires a registered SDR, among other things, to establish and maintain written policies and procedures directing its participants to apply to the transaction report a condition flag designated by the registered SDR to indicate when the report of a transaction covered by Rule 902(c) should not be publicly disseminated.[410] A registered SDR would not be liable for a violation of Rule 902(c) if it disseminated a report of a transaction that fell within Rule 902(c) if the reporting side for that transaction failed to appropriately flag the transaction as required by Rule 907(a)(4).

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manager's standard fund allocation methodology and therefore, reporting transactions at the allocated level with trade execution time will make evident an allocation scheme that other participants can easily associate with a particular investment manager").

408 Ordinarily, the termination of a security-based swap that has been publicly disseminated would itself be an event that must be publicly disseminated. See Rule 902(a) (generally providing that a registered SDR 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 receiving an appropriate transaction report).

409 For the reasons noted above, the Commission believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exclude these types of information from public dissemination under Regulation SBSR.

410 Rule 907(a)(4) provides registered SDRs with some discretion in determining how a reporting side must flag reported data that will be excluded from public dissemination. See infra Section VI(G).

2. Other Exclusions from Public Dissemination Sought by Commenters

Several commenters advanced arguments against public dissemination of various types of security-based swaps. The Commission notes at the outset that the statutory provisions that require public dissemination of security-based swap transactions state that all security-based swaps shall be publicly disseminated.

a. Customized Security-Based Swaps

Several commenters expressed the view that transaction information regarding customized security-based swaps should not be publicly disseminated because doing so would not enhance price discovery, would be of limited use to the public, or could be confusing or misleading to market observers.[411] However, one commenter urged the Commission to require public dissemination of all of the information necessary to calculate the price of a customized security-based swap.[412]

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411 See Barclays Letter at 3; Cleary II at 6, 16 (stating that public reporting of customized security-based swaps would not aid price discovery, and that the Commission should require the public dissemination of key terms of a customized transaction and an indication that it is customized); DTCC II at 9 (noting the difficulty of comparing price data across transactions that are non-standard and have different terms); ISDA/SIFMA I at 11 (stating that customized security-based swaps provide little to no price discovery value and should not be subject to public dissemination); MFA I at 3 (arguing that Congress did not intend to require public dissemination of comprehensive information for customized security-based swaps and that price discovery serves a purpose only if there is a broad market for the relevant transaction, which is not the case with customized security-based swaps).

412 See Better Markets I at 7; Better Markets II at 3 (stating that many transactions characterized as too complex for reporting or dissemination are, in fact, composites of more straightforward transactions, and that there should be disclosure of information concerning these components to provide meaningful transparency and to prevent market participants from avoiding disclosure by creating composite transactions).

Section 13(m)(1)(C) of the Exchange Act[413] authorizes the Commission to provide by rule for the public availability of security-based swap transaction, volume, and pricing data for four types of security-based swaps, which together comprise the complete universe of potential security-based swaps. With respect to "security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository"—which category would include customized or bespoke security-based swaps—Section 13(m)(1)(C) provides that "the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person" (emphasis added).

The Commission does not believe that the commenters who argued against disseminating reports of bespoke transactions have provided sufficient justification for an exception to public dissemination. To the contrary, the Commission believes that dissemination of transaction reports of customized security-based swaps could still provide useful information to market observers. Although all of the material elements of a bespoke transaction necessary to understand the market value might not be publicly disseminated, it is an overstatement to argue categorically that bespoke transactions would have no price discovery value, as certain commenters suggested.[414] The disseminated price could, for example, still have an anchoring effect on price expectations for future negotiations in similar or related products, even in thinly-traded markets. Furthermore, even if it is difficult to compare price data across customized transactions, by disseminating reports of all bespoke transactions, market observers can

413 15 U.S.C. 13(m)(1)(C)(iii).

414 See supra note 411.

understand the relative number and aggregate notional amounts of transactions in bespoke products versus standardized products.

The Commission recognizes, however, that market observers should have information that permits them to readily distinguish transactions in standardized products from transactions in bespoke security-based swaps. Accordingly, Rule 901(c)(1)(v) provides that, when reporting a transaction to a registered SDR, the reporting side must attach a flag to indicate whether a security-based swap is customized to the extent that the other information provided pursuant to Rule 901(c) does not provide all of the material information necessary to identify the security-based swap or does not contain the data elements necessary to calculate the price of the security-based swap. In addition, final Rule 907(a)(4) requires a registered SDR to establish policies and procedures concerning the use of appropriate flags on disseminated transaction reports that are designed to assist market observers in interpreting the relevance of a transaction.

b. Inter-Affiliate Transactions

Several commenters argued that the Commission should not require public dissemination of inter-affiliate security-based swaps. Issues relating to regulatory reporting and public dissemination of inter-affiliate transactions are discussed in Section IX, infra.

c. Security-Based Swaps Entered into in Connection with a Clearing Member's Default

One commenter argued that reports of security-based swaps effected in connection with a clearing agency's default management processes following the default of a clearing member should not be publicly disseminated in real time.[415] This commenter believed that public

[415] See LCH.Clearnet Letter at 2 (explaining that, to manage a defaulting clearing member's portfolio, a clearing agency would rely on its non-defaulting members to provide liquidity for a small number of large transactions that would be required to hedge the

dissemination of these transactions could undermine a clearing agency's default management processes and have a negative effect on market stability, particularly because a default likely would occur during stressed market conditions. Accordingly, the commenter recommended that reports of security-based swaps entered into in connection with a clearing agency's default management processes be made available to the Commission in real time but not publicly disseminated until after the default management processes have been completed, as the Commission determines appropriate.

The Commission believes that, at present, the commenter's concerns are addressed by the Commission's approach for the interim phase of Regulation SBSR, which offers reporting sides up to 24 hours after the time of execution to report a security-based swap.[416] The Commission believes that this approach strikes an appropriate balance between promoting post-trade transparency and facilitating the default management process, and is broadly consistent with the commenter's suggestion to allow for public dissemination after the default management process has been completed. Further, the commenter suggested that such transactions typically occur in large size; thus, transactions entered into by surviving clearing members might qualify for any block exception, if the Commission were to promulgate such an exception in the future. The Commission intends to revisit the commenter's concern in connection with its consideration of block thresholds and other potential rules relating to block trades.

d. Total Return Security-Based Swaps

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defaulting member's portfolio, and the ability of non-defaulting members to provide liquidity for these transactions would be impaired if the transactions were reported publicly before the members had an opportunity to mitigate the risks of the transactions).

416 See Rule 901(j); Section VII(B), infra. If 24 hours after the time of execution would fall on a day that is not a business day, reporting would be required by the same time on the next day that is a business day.

Three commenters argued that there should be no public dissemination of total return security-based swaps ("TRSs"), which offer risks and returns proportional to a position in a security, securities, or loan(s) on which a TRS is based.[417] One of these commenters argued that "TRS pricing information is of no value to the market because it is driven by many considerations including the funding levels of the counterparties to the TRS and therefore may not provide information about the underlying asset for the TRS."[418] Another commenter suggested that the fact that TRSs are hedged in the cash market, where trades are publicly disseminated, would mitigate the incremental price discovery benefit of public dissemination of the TRSs.[419] Similarly, a third commenter argued that requiring public dissemination of an equity TRS transaction would not enhance transparency, and could confuse market participants, because the hedging transactions are already publicly disseminated.[420]

The Commission has carefully considered these comments but believes that these commenters have not provided sufficient justification to support a blanket exclusion from public dissemination for TRSs. The Commission believes, rather, that market observers should be given an opportunity to decide how to interpret the relevance of a disseminated trade to the state of the market, and reiterates that relevant statutory provisions state that all security-based swaps

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417 See Barclays Letter at 2-3; Cleary II at 13-14; ISDA/SIFMA I at 13.

418 ISDA/SIFMA I at 13.

419 See Cleary II at 13-14. The primary concern of this commenter with respect to equity TRSs was the proposed exclusion of equity TRSs from the reporting delay for block trades. See id. The Commission expects to consider this comment in connection with its consideration of rules for block trades.

420 See Barclays Letter at 3. The commenter also expressed more general concerns regarding the potential consequences of reduced liquidity in the equity TRS market, noting that if liquidity in the equity TRS market is impaired, liquidity takers could migrate away from a diversified universe of security-based swap counterparties to a more concentrated group of prime brokers, which could increase systemic risk by concentrating large risk positions with a small number of prime brokers. See Barclays Letter at 8.

shall be publicly disseminated. These statutory provisions do not by their terms distinguish such public dissemination based on particular characteristics of a security-based swap.

The Commission also has considered the argument advanced by one of the commenters that requiring instantaneous public dissemination of an equity TRS transaction could confuse market participants, because the hedging transactions are already publicly disseminated.[421] The Commission disagrees that dissemination of both transactions (i.e., the initial transaction and the hedge) would cause confusion. In other securities markets, public dissemination of initial transactions and their hedges occur on a regular basis.[422] Valuable information could be obtained by observing whether transactions in related products executed close in time have the same or different prices.[423] The commenter who expressed concerns about potential negative consequences of reduced liquidity in the equity TRS market provided no evidence to support its claim.[424]

e. Transactions Resulting from Portfolio Compression

One group of commenters argued that transactions resulting from portfolio compression exercises do not reflect trading activity, contain no market information, and thus should be excluded from public dissemination.[425] One member of that group requested clarification that

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421 See Barclays Letter at 3.

422 For example, a trade in a listed single-stock option is frequently hedged by a trade in the underlying stock. Each trade is disseminated via the relevant consolidated tape.

423 For example, a difference in prices between an equity TRS and the underlying securities might suggest mispricing of either leg of the trade, signaling to market participants the existence of economic rents they could subsequently compete away. Additionally, price discrepancies also could be related to fees or liquidity premiums charged by equity TRS dealers. See infra Section XXII(B)(2)(a).

424 See Barclays Letter at 8.

425 See ISDA/SIFMA I at 12. See also DTCC II at 20 (stating, with respect to portfolio compression activities, that "an exact pricing at individual trade level between parties is

only trades representing the end result of a netting or compression would need to be reported. This commenter expressed the view that publicly disseminating original transactions as well as the transactions that result from netting or compression would result in double-counting and could present a distorted view of the market.[426]

The Commission recognizes that portfolio compression is designed to mitigate risk between counterparties by reducing gross exposures, and any new security-based swaps executed as a result reflect existing net exposures and might not afford market participants an opportunity to negotiate new terms. Nevertheless, there may be some value in allowing market observers to see how often portfolio compressions occur and how much net exposure is left after much of the gross exposure is terminated. Furthermore, it is possible that new positions arising from a compression exercise could be repriced, and thus offer new and useful pricing information to market observers. Therefore, the Commission is not convinced that there would be so little value in disseminating such transactions that they all should be excluded from public dissemination, even though the original transactions that are netted or compressed may previously have been publicly disseminated. With respect to the commenter's concern regarding double-counting, the Commission notes that Rule 907(a)(4) requires a registered SDR to have policies and procedures for flagging special circumstances surrounding certain transactions, which could include transactions resulting from portfolio compression. The Commission believes that market observers should have the ability to assess reports of transactions resulting from portfolio compressions, and that a condition flag identifying a transaction as the result of a portfolio compression exercise would help to avoid double-counting.

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not meaningful and, therefore, these transactions should not be disseminated"); ISDA IV at 13.

426 See ISDA I at 4-5.

f. Thinly Traded Products

Three commenters expressed concern about the potential impact of real-time public dissemination on thinly traded products.[427] One of these commenters suggested that "security-based swaps traded by fewer than ten market makers per month should be treated as illiquid and subject to public reporting only on a weekly basis."[428] The Commission disagrees with this suggestion. In other classes of securities—e.g., listed equity securities, OTC equity securities, listed options, corporate bonds, municipal bonds—all transactions are disseminated in real time, and there is no delayed reporting for products that have only a limited number of market makers. The Commission is not aware of characteristics of the security-based swap market that are sufficiently different from those other markets to warrant delayed reporting because of the number of market makers. Furthermore, given the high degree of concentration in the U.S. security-based swap market, many products have fewer than ten market makers. Thus, the commenter's suggestion—if accepted by the Commission—could result in delayed reporting for a substantial percentage of security-based swap transactions, which would run counter to Title VII's goal of having real-time public dissemination for all security-based swaps (except for block trades). Finally, as noted above, the Title VII provisions that mandate public dissemination on a real-time basis do not make any exception for security-based swaps based on the number of market makers.

Another commenter expressed concern that mandating real-time reporting of thinly-traded products and illiquid markets could increase the price of entering into a derivatives

427 See Bachus/Lucas Letter at 2; ISDA IV at 14; UBS Letter at 1. These comments also are discussed in Section VII(B) infra.

428 UBS Letter at 1, note 5.

contract to hedge risk by facilitating speculative front-running.[429] Another commenter expressed concern about the impact of real-time post-trade transparency for illiquid security-based swaps on pre-trade transparency that currently exists in the form of indicative prices provided by dealers to their clients (known as "runs").[430] This commenter requested that the Commission provide illiquid security-based swaps with an exception from real-time reporting and instead allow for delays roughly commensurate with the trading frequency of the security-based swap.[431] Under the adopted rules, counterparties generally will have up to 24 hours after the time of execution to report security-based swap transactions. This reporting timeframe is designed, in part, to minimize the potential for market disruption resulting from public dissemination of any security-based swap transaction during the interim phase of Regulation SBSR. The Commission anticipates that, during the interim period, it will collect and analyze data concerning the sizes of transactions that potentially affect liquidity in different segments of the market in connection with considering block thresholds.

E. Dissemination of Block Transactions—Rule 902(b)

Rule 902(b), as proposed and re-proposed, would have required a registered SDR to publicly disseminate a transaction report for a block trade (except for the notional amount of the transaction) immediately upon receipt of the information about the block trade from the reporting party, along with the transaction ID and an indicator that the report represented a block trade.

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429 See Bachus/Lucas Letter at 2.

430 See ISDA IV at 14 (expressing concern that the combination of name-attributed runs and a rapidly disseminated set of post-trade information would make it relatively easy for many participants to reconstruct the identity of parties to a particular transaction, which may reduce dealers' willingness to disseminate pre-trade price information in the form of runs, thereby reducing pre-trade transparency).

431 See id.

Rule 902(b) would further have required the registered SDR to disseminate a complete transaction report for the block trade, including the full notional amount of the transaction, within specified timeframes ranging from eight to 26 hours after execution, depending on the time when the security-based swap was executed. Thus, under Rule 902(b), as proposed and re-proposed, market participants would learn the price of a security-based swap block trade in real time, and would learn the full notional amount of the transaction on a delayed basis.[432]

For the reasons discussed in detail in Section VII(B), infra, the Commission is not adopting Rule 902(b).

F. The Embargo Rule—Rule 902(d)

Rule 902(d), as proposed, would have provided that "[n]o person other than a registered security-based swap data repository shall make available to one or more persons (other than a counterparty) transaction information relating to a security-based swap before the earlier of 15 minutes after the time of execution of the security-based swap; or the time that a registered security-based swap data repository publicly disseminates a report of that security-based swap." In other words, the information about the security-based swap transaction would be "embargoed" until a registered SDR has in fact publicly disseminated a report of the transaction (or until such time as a transaction should have been publicly disseminated). Rule 902(d) is also referred to as the "Embargo Rule." Rule 902(d) was not revised as part of the Cross-Border Proposing Release, and was re-proposed in exactly the same form as had been initially proposed.

Under Regulation SBSR, only registered SDRs must publicly disseminate security-based swap transaction data to the public. However, other persons with knowledge of a transaction—

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432 The only difference between Rule 902(b) as proposed and as re-proposed was that the term "reporting party" was changed to "reporting side."

the counterparties themselves or the venue on which a transaction is executed—also might wish to disclose information about the transaction to third parties (whether for commercial benefit or otherwise). An unfair competitive advantage could result if some market participants could obtain security-based swap transaction information before others. Regulation SBSR, by carrying out the Congressional mandate to publicly disseminate all security-based swap transactions, is intended to reduce information asymmetries in the security-based swap market and to provide all market participants with better information—and better access to information—to make investment decisions. Therefore, the Commission proposed Rule 902(d), which would have imposed a partial and temporary restriction on sources of security-based swap transaction information other than registered SDRs.

Three commenters supported the view that market participants (including SB SEFs) should not be permitted to distribute their security-based swap transaction information before such information is disseminated by a registered SDR.[433] However, three other commenters strongly opposed the proposed Embargo Rule.[434] Other commenters expressed a concern that the proposed Embargo Rule would make it more difficult for SB SEFs to offer "work-up"[435]

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433 See Markit II at 4 (stating that if SB SEFs were permitted to disseminate data elements of a security-based swap transaction, confusion and data fragmentation would inevitably result, which would ultimately undermine the goal of increased transparency); Barnard I at 4 (stating that market participants should be prohibited from distributing their market data prior to the dissemination of that data by a registered SDR to prevent the development of a two-tier market); ISDA IV at 17 (stating that "it is unclear why any person should be allowed to make the data available to another market data source ahead of the time that [an SDR] is allowed to publicly disseminate such transaction," and recommending that proposed Rule 902(d) be revised to refer only to the time that an SDR disseminates a report of the security-based swap).

434 See GFI Letter at 2; SDMA II at 4; WMBAA Letter at 8-9.

435 See GFI Letter at 3 ("A typical workup transaction begins when two market participants agree to transact at a certain price and quantity. The transaction does not necessarily end there, however, and the two participants then have the opportunity to transact further

functionality.[436] This "work-up" process, according to one of the commenters, is designed to foster liquidity in the security-based swap market and to facilitate the execution of larger-sized transactions.[437]

The Commission has carefully reviewed the comments received and has determined to revise the Embargo Rule to provide that the act of sending a report to a registered SDR—not the act of the registered SDR actually disseminating it—releases the embargo. Rule 902(d), as adopted, provides: "No person shall make available to one or more persons (other than a counterparty <u>or a post-trade processor</u>) transaction information relating to a security-based swap <u>before the primary trade information about the security-based swap is sent to a registered security-based swap data repository</u>" (emphasis added).

The Commission agrees with the majority of commenters that it would be beneficial for security-based swap market participants to have the ability to disseminate and receive transaction data without being constrained by the time when a registered SDR disseminates the transaction information. The Commission understands that, in some cases, entities that are likely to become

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volume at the already-established price. Thereafter, other market participants may join the trade and transact with either the original counterparties to the trade or with other firms if they agree to trade further volume at the established price"); SDMA II at 3 ("Trade work ups are a common practice in which the broker looks for additional trading interest at the same time a trade is occurring—or "flashing" on the screen—in the same security at the same price. The ability to view the price of a trade as it is occurring is critical to broker's ability to locate additional trading interest. The immediate flash to the marketplace increases the probability that additional buyers and sellers, of smaller or larger size, will trade the same security at the same time and price"); WMBAA II at 3 ("Work-up enables traders to assess the markets in real-time and make real-time decisions on trading activity, without the fear of moving the market one way or another").

436 <u>See</u> GFI Letter at 3; SDMA II at 3 (if "the SB SEF is prohibited from 'flashing' the price of a trade as it occurs and the brokers must wait until after the SB SDR has disclosed the price, the broker's window of opportunity to locate additional trading interest will close"); WMBAA II at 3.

437 <u>See</u> GFI Letter at 3.

SB SEFs may want to broadcast trades executed electronically across their platforms to all subscribers, because knowing that two counterparties have executed a trade at a particular price can, in some cases, catalyze trading by other counterparties at the same price. Allowing dissemination of transaction information to occur simultaneously with transmission to a registered SDR will allow SB SEF participants to see last-sale information for the particular markets on which they are trading, which could facilitate the work-up process and thus enhance price discovery.

One commenter expressed concern, however, that permitting the distribution of market data prior to dissemination of the information by a registered SDR could result in the development of a two-tier market.[438] Although the Commission generally shares the commenter's concern about information asymmetries, the Commission does not believe that Rule 902(d), as adopted, raises that concern. Certain market participants might learn of a completed transaction before others who rely on public dissemination through a registered SDR. However, the time lag is likely to be very small because Rule 902(a) requires a registered SDR to publicly disseminate a transaction report "immediately upon receipt of information about the security-based swap." The Commission understands that, under the current market structure, trading in security-based swaps occurs for the most part manually (rather than through algorithmic means) and infrequently. Thus, obtaining knowledge of a completed transaction through private means a short time before others learn of the transaction from a registered SDR is unlikely, for the foreseeable future, to provide a significant advantage. Furthermore, as discussed above regarding the "work-up" process, the most likely recipients of direct information about the completed transaction are other participants of the SB SEF. Thus, an important

438 See Barnard I at 4.

segment of the market—i.e., competitors of the counterparties to the original transaction in the work up who are most likely to have an interest in trading the same or similar products—are still benefitting from post-trade transparency, even if it comes via the work-up process on the SB SEF rather than through a registered SDR.

Two commenters raised arguments related to the ownership of the security-based swap transaction data and were concerned that the proposed Embargo Rule would place improper restrictions on the use of security-based swap market data.[439] One of these commenters recommended that the Commission revise the Embargo Rule "in such a way that . . . the security-based swap counterparties and SB SEFs [would] continue to have the ability to market and commercialize their own proprietary data."[440] The other commenter recommended that the Commission make clear that nothing in the final rules is intended "to impose or imply any limit on the ability of market participants . . . to use and/or commercialize data they create or receive in connection with the execution or reporting of swap data."[441]

The Commission declines to revise Rule 902(d) in the manner suggested by these commenters. As the Commission notes in the SDR Adopting Release, "the issue of who owns the data is not particularly clear cut, particularly when value is added to it."[442] If the

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439 See WMBAA II at 8; Tradeweb Letter II at 6.

440 WMBAA II at 8.

441 Tradeweb Letter II at 6.

442 SDR Adopting Release, Section VI(D)(3)(c)(iii) (citing difficulties associated with determining ownership of data as one of several reasons for not adopting, at this time, a rule prohibiting an SDR and its affiliates from using, for commercial purposes, security-based swap data that the SDR maintains without obtaining express written consent from both counterparties to the security-based swap transaction or the reporting party). See also Securities Exchange Act Release 63825 (February 2, 2011), 76 FR 10948 (February

Commission were to revise the rule in the manner suggested by commenters, it would seem to make a presumption about who owns the data, which may be viewed as the Commission favoring one business model over another. As further noted in the SDR Adopting Release, the Commission does not support any particular business model[443] and, therefore, does not believe it is necessary or appropriate to revise the rule as suggested by these commenters.

As originally proposed, the Embargo Rule had an exception for disseminating the transaction information to counterparties, as the counterparties to the transaction should be allowed to receive information about their own security-based swap transactions irrespective of whether such information has been reported to or disseminated by a registered SDR. However, two commenters noted that SB SEFs also will need to provide transaction data to entities involved in post-trade processing, irrespective of whether the embargo has been lifted.[444] The Commission recognizes that, after a trade is executed, there are certain entities that perform post-trade services—such as matching, confirmation, and reporting—that may need to receive the transaction information before it is sent to a registered SDR. For example, a third party could not act as agent in reporting a transaction to a registered SDR on behalf of a reporting side if it could not receive information about the executed transaction before it was submitted to the registered SDR. In the Regulation SBSR Proposing Release, the Commission stated that counterparties to a security-based swap

28, 2011) at 10961-7 ("SB SEF Proposing Release") (discussing the proposed imposition of certain requirements on SB SEFs with respect to services provided and fees charged).

443 See SDR Adopting Release, Section III(D) (discussing business models of SDRs).

444 See BlackRock Letter at 9; ISDA IV at 17 (recommending a carve-out from Rule 902(d) for third-party service providers that one or both counterparties use for execution, confirmation, trade reporting, portfolio reconciliation and other services that do not include the public dissemination of security-based swap data).

could rely on agents to report security-based swap data on their behalf.[445] Without an exception, such use of agents could be impeded, an action the Commission did not intend. Accordingly, the Commission is revising the Embargo Rule to add an explicit exception for "post-trade processors." The Commission is also adding a new paragraph (x) to final Rule 900, which defines "post-trade processor" as "any person that provides affirmation, confirmation, matching, reporting, or clearing services for a security-based swap transaction."

Finally, one commenter recommended a carve-out from Rule 902(d) not only for counterparties, but also for their affiliates, "to allow for internal communication of SBS data."[446] Rule 902(d)—as proposed, re-proposed, and adopted—includes a carve-out for counterparties, which could include affiliates, to the extent that an affiliate is an indirect counterparty as defined in Rule 900. The Commission continues to believe that it is necessary for counterparties to know when they have executed a trade. The Commission further notes that Rule 902(d), as adopted, contains an exception for post-trade processors,[447] which could include post-trade processors that are affiliates of the counterparties. Thus, Rule 902(d) would not prohibit a counterparty to a security-based swap transaction from providing the transaction information to an affiliate before providing it to a registered SDR, if that affiliate will serve as the counterparty's agent for reporting the transaction to the registered SDR. However, Rule 902—as proposed, re-proposed, and adopted—includes no

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445 See 75 FR at 75211-12.

446 ISDA IV at 17.

447 See Rule 900(x) (defining "post-trade processor" as "any person that provides affirmation, confirmation, matching, reporting, or clearing services for a security-based swap transaction").

broad carve-out for all affiliates of the counterparties. The Commission does not see a basis for allowing such a broad exception for all affiliates, which could undermine the purpose of Rule 902(d), as discussed above.

G. Condition Flags—Rule 907(a)(4)

Rule 907(a)(4), as originally proposed, would have required a registered SDR to establish and maintain written policies and procedures "describing how reporting parties shall report and, consistent with the enhancement of price discovery, how the registered security-based swap depository shall publicly disseminate, reports of, and adjustments due to, life cycle events; security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty; and any other security-based swap transactions that, in the estimation of the registered security-based swap data depository, do not accurately reflect the market." The Commission re-proposed Rule 907(a)(4) in the Cross-Border Proposing Release with only minor technical revisions.[448]

One commenter expressed the view that a registered SDR should have the flexibility to determine and apply special indicators.[449] Another commenter suggested that, to be meaningfully transparent, security-based swap transaction data should include "condition flags" comparable to those used in the bond market.[450] As discussed more fully below, the Commission agrees that such "condition flags" could provide additional transparency to the security-based swap market. The Commission believes that the condition flags that registered SDRs will develop pursuant to final Rule 907(a)(4) could provide information similar to the

448 The Commission changed the words "reporting parties" to "reporting sides" and "depository" to "repository."

449 See Barnard I at 3.

450 See MarkitSERV I at 10.

information provided by the condition flags used in the bond market. The registered SDR's condition flags could include, for example, flags indicating that a security-based swap was an inter-affiliate transaction or a transaction entered into as part of a trade compression.

A third commenter suggested that a registered SDR should not have discretion to determine whether a particular transaction reflects the market, as the registered SDR may not have sufficient information to make such a determination.[451] The Commission agrees with the commenter that a registered SDR may not have sufficient information to ascertain whether a particular transaction "do[es] not accurately reflect the market," as would have been required under Rule 907(a)(4), as originally proposed. Therefore, the Commission will not require the registered SDR to have policies and procedures for attaching an indicator that merely conveys that the transaction, in the estimation of the registered SDR, does not accurately reflect the market.

Instead, the Commission believes that requiring the registered SDR to provide information about any special circumstances associated with a transaction report could help market observers better understand the report and enhance transparency. For example, Rule 901(c)(1)(v), as adopted, requires a reporting side to attach a flag if a security-based swap is customized to the extent that other information provided for the swap does not provide all of the material information necessary to identify the customized security-based swap or does not contain the data elements necessary to calculate the price.[452] In addition, Rule 905(b)(2), as adopted, requires a registered SDR that receives a correction to information that it previously

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451 See DTCC II at 20.

452 See supra Section II(B)(2)(b)(vi).

disseminated publicly to publicly disseminate a corrected transaction report with an indication that the report relates to a previously disseminated transaction.[453]

The Commission, therefore, is adopting Rule 907(a)(4) with certain additional language to respond to the comments and to clarify how Rule 907(a)(4) should apply in circumstances contemplated by but not fully addressed in the original proposal or the re-proposal. The Commission has revised Rule 907(a)(4) as follows: new subparagraph (i) requires the registered SDR to have policies and procedures for "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 circumstances to receive a distorted view of the market." This language retains the idea that the appropriate characteristics or circumstances remain "in the estimation of" the registered SDR, but requires the SDR's exercise of this discretion to be "fair and reasonable" to emphasize that the estimation should not result in flags that would not allow market observers to better understand the transaction reports that are publicly disseminated. Rule 907(a)(4)(i), as adopted, also widens the scope of transactions to which the provision applies.[454] This provision grants a registered SDR the

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453 See infra Section XX(B).

454 This revision to Rule 907(a)(4) also removes the references to public dissemination of life cycle events that were proposed and re-proposed. These references have been relocated to final Rule 907(a)(3). Rule 907(a)(3), as proposed and re-proposed, addressed only the reporting and public dissemination of error reports. Life cycle events are similar to error reports in that they reflect new information that relates to a previously executed security-based swap. Therefore, Rule 907(a)(3), as adopted, now requires a registered SDR to have policies and procedures 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 (i) is an error correction required to be disseminated by [Rule 905(b)(2)]; or (ii) is a life cycle event, or any adjustment due

flexibility to determine which special circumstances require flags and to change that determination over time, if warranted.[455] Subparagraph (ii) provides that the registered SDR's policies and procedures must "establish[] flags to denote such characteristic(s) or circumstance(s)," explicitly incorporating the concept of condition flags suggested by the commenter.[456] Subparagraph (iii) requires policies and procedures "directing participants to apply such flags, as appropriate, in their reports" to the registered SDR. Finally, subparagraph (iv) requires these policies and procedures to address, in part, "applying such flags to disseminated reports to help to prevent a distorted view of the market."

The Commission also is adopting Rule 907(a)(4) with certain additional language in subparagraph (iv) that clarifies the handling of security-based swap information that is required to be reported under Rule 901 but which a registered SDR is required by Rule 902(c) not to publicly disseminate. As noted above, even in the initial proposal, the Commission contemplated that certain information would fall into this category.[457] Rule 907(a), as originally proposed, would have required a registered SDR to establish and maintain policies and procedures that addressed, among other things, the public dissemination of security-based swap data. Carrying out that duty in a manner consistent with Rule 902—and, in particular, with Rule 902(c)—will necessarily require a registered SDR to differentiate reported information that is required to be publicly disseminated from reported information that is required not to be publicly

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to a life cycle event, required to be disseminated by [Rule 902(a)]." See infra Section XII(C).

455 See Barnard I at 3.

456 See MarkitSERV I at 10.

457 See Regulation SBSR Proposing Release, 75 FR at 75234-35.

disseminated.[458] The new language in final Rule 907(a)(4)(iv)(B) calls attention to this particular requirement. Rule 907(a)(4)(iv)(B), as adopted, requires the registered SDR to have policies and procedures for suppressing from public dissemination a transaction referenced in Rule 902(c).[459]

In addition to the requirements for indications in the case of error reports or bespoke transactions, the Commission believes that registered SDRs generally should include the following in its list of condition flags:

- Inter-affiliate security-based swaps. As discussed in detail in Section VI(D), infra, the Commission is not exempting inter-affiliate transactions from public dissemination. However, the Commission believes it could be misleading if market observers did not understand that a transaction involves affiliated counterparties.

458 One commenter noted its view that Rule 907(a)(4), as proposed, seemed to delegate to the discretion of the SDR whether and how certain security-based swap activity would be publicly disseminated, and requested that the Commission clearly establish in Regulation SBSR that certain security-based swap activity is not subject to public dissemination. See ISDA IV at 13. The Commission believes that the rules as adopted do clearly establish what security-based swap activity is not subject to public dissemination. Rule 902(a), as adopted, requires the registered SDR to 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, except as provided in Rule 902(c). Rule 902(c) provides a list of information and types of security-based swap transactions that a registered security-based swap shall not disseminate. See supra Section VI(D).

459 Under Rule 907(a)(4)(iv), the registered SDR's policies and procedures must direct the reporting side to apply appropriate flags to transaction reports. In the case of a report falling within Rule 902(c), the reporting side for the relevant transaction is required to use the flag that signals to the registered SDR that the report should not be publicly disseminated. The Commission notes that Rule 907(a)(4) affords registered SDRs some discretion to determine precisely how a reporting side must flag reported data that will be excluded from public dissemination under Rule 902(c). For example, a registered SDR may determine not to require a specific "do not disseminate" tag for historical security-based swaps if it is clear from context that they are historical security-based swaps and not current transactions. As described in Section VI(D) above, the Commission does not believe that a registered SDR would violate Rule 902(c) if it disseminated a report of a transaction that fell within Rule 902(c) if the reporting side fails to appropriately flag the transaction.

- Transactions resulting from netting or compression exercises.[460] The Commission believes that market observers should be made aware that these transactions are related to previously existing transactions and generally do not represent new risks being assumed by the counterparties.
- Transactions resulting from a "forced trading session" conducted by a clearing agency.[461] The Commission believes that it would be helpful for market observers to understand that such transactions may not be available to market participants outside of the forced trading session.
- Transactions reported more than 24 hours after execution. The Commission believes that there is price discovery value in disseminating the transaction report, particularly

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460 This applies only to transactions resulting from netting or compression exercises other than through a registered clearing agency. Security-based swaps resulting from netting or compression exercises carried out by a registered clearing agency are not subject to public dissemination. See Rule 902(c)(6). See also supra Section VI(D)(1) (explaining Rule 902(c)(6)); Section VI(D)(2)(v) (explaining why the Commission believes that transactions resulting from portfolio compression—other than clearing transactions—should be publicly disseminated).

461 Entities that the Commission previously exempted from certain Exchange Act requirements, including clearing agency registration, have informed the Commission that they undertake "forced trading" sessions in order to promote accuracy in the end-of-day valuation process. See, e.g., Securities Exchange Act Release No. 59527 (March 6, 2009), 74 FR 10791, 10796 (March 12, 2009) (Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE U.S. Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments) (describing "forced trading sessions" conducted by a clearing agency as follows: "ICE Trust represents that, in connection with its clearing and risk management process, it will calculate an end-of-day settlement price for each Cleared CDS in which an ICE Trust Participant has a cleared position, based on prices submitted by ICE Trust Participants. As part of this mark-to-market process, ICE Trust will periodically require ICE Trust Participants to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Trust Participants to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Trust Participant's best assessment of the value of each of its open positions in Cleared CDS on a daily basis").

in cases where there are few or no other recent last-sale reports in that product. However, all market observers should understand that the report is no longer timely and thus may not reflect the current market at the time of dissemination.

- Transactions resulting from default of a clearing member. The Commission believes that the fact that the transaction was necessitated by a clearing agency's need to have surviving clearing members assume the positions of a defaulting clearing member is important information about understanding the transaction and market conditions generally.
- Package trades. "Package trade" is a colloquial term for a multi-legged transaction of which a security-based swap constitutes one or more legs. Market observers should be made aware that the reported price of a security-based swap that is part of a package trade might reflect other factors—such as the exchange of an instrument that is not a security-based swap—that are not reflected in the transaction report of the security-based swap itself.

This list is by way of example and not of limitation. There are likely to be other types of transactions or circumstances associated with particular transactions that may warrant a condition flag. The Commission anticipates that each registered SDR will revise its list over time as the security-based swap market evolves and registered SDRs and market participants gain greater insight into how to maximize the effectiveness of publicly disseminated transaction reports.

VII. Block Trades and the Interim Phase of Regulation SBSR

Section 13m(1)(E) of the Exchange Act[462] requires the Commission rule for real-time public dissemination of security-based swap transactions to: (1) "specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts" and (2) "specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public." In addition, Section 13m(1)(E)(iv) of the Exchange Act[463] requires the Commission rule for real-time public dissemination of security-based swap transactions to contain provisions that "take into account whether the public disclosure [of transaction and pricing data for security-based swaps] will materially reduce market liquidity."[464]

As discussed further below, the Commission is neither proposing nor adopting rules relating to block trades at this time. However, the rules, as adopted, establish an interim phase of Regulation SBSR. During this first phase, as described below, reporting sides—with certain minor exceptions—will have up to 24 hours ("T+24 hours") after the time of execution to report a transaction. The registered SDR that receives the transaction information would then be required to publicly disseminate a report of the transaction immediately thereafter.

The Commission recognizes that the introduction of mandated post-trade transparency in the security-based swap market could have a significant impact on market participant behavior

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462 15 U.S.C. 78m(m)(1)(E).

463 15 U.S.C. 78m(m)(1)(E)(iv).

464 These statutory mandates apply only with respect to <u>cleared</u> security-based swaps. The Dodd-Frank Act does not require the Commission to specify block thresholds or dissemination delays or to take into account how public disclosure will materially reduce market liquidity with respect to <u>uncleared</u> security-based swaps. For security-based swaps that are not cleared but are reported to an SDR or the Commission under Section 3C(a)(6) of the Exchange Act, "the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person." 15 USC 78m(1)(C)(iii).

and the provision of liquidity. The interim phase is designed, among other things, to generate information about how market participants behave in an environment with post-trade transparency. Furthermore, once the first phase is implemented, reporting sides will be required under Regulation SBSR to report, among other things, the time of execution of their security-based swap transactions. As described in a staff analysis of the inventory management of dealers in the market for single-name CDS based on transaction data from DTCC-TIW, security-based swap transaction data currently stored in DTCC-TIW include the time of reporting, but not the time of the execution.[465] Having the execution time instead of only the reporting time will enable staff to perform a more robust and granular analysis of any hedging that may or may not occur within the first 24-hour period after execution. After collecting and analyzing data that are more granular and reflect the reactions of market participants to T+24 hour post-trade transparency, the Commission anticipates that it will undertake further rulemaking to propose and adopt rules related to block trades and the reporting and public dissemination timeframe for non-block trades.

A. Proposed Rules Regarding Block Trades

The Commission did not propose specific thresholds for block trades in the Regulation SBSR Proposing Release. Instead, the Commission described general criteria that it would consider when setting specific block trade thresholds in the future.[466] The Commission stated that it "preliminarily believes that the general criteria for what constitutes a large notional security-based swap transaction must be specified in a way that takes into account whether

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465 See "Inventory risk management by dealers in the single-name credit default swap market" (October 17, 2014) at 5, available at http://www.sec.gov/comments/s7-34-10/s73410-184.pdf ("Hedging Analysis").

466 See Regulation SBSR Proposing Release, 75 FR at 75228.

public disclosure of such transactions would materially reduce market liquidity, but presumably should be balanced by the general mandate of Section 13(m)(1) of the Exchange Act, which provides that data on security-based swap transactions must be publicly disseminated in real time, and in a form that enhances price discovery."[467] The Commission further stated: "For post-trade transparency to have a negative impact on liquidity, market participants would need to be affected in a way that either: (1) Impacted their desire to engage in subsequent transactions unrelated to the first; or (2) impacted their ability to follow through with further actions after the reported transaction has been completed that they feel are a necessary consequence of the reported transaction."[468]

The Commission noted, with respect to the first case, that post-trade dissemination of transaction prices could lead to narrower spreads and reduce participants' willingness to trade. However, the Commission noted that liquidity could be enhanced if market participants increased their trading activity as a result of the new information. Because it would be difficult, if not impossible, to estimate with certainty which factor would prevail in the evolving security-based swap market, the Commission was guided by the general mandate of Section 13(m)(1) and the Commission's preliminary belief that even in illiquid markets, transaction prices form the foundation of price discovery.[469] Therefore, the Commission proposed that prices for block trades be disseminated in the same fashion as prices for non-block transactions.

The Commission noted that, in the second case, counterparties may intend to take further action after an initial transaction for hedging purposes. The Commission believed that, for a

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467 Id. at 75228-29.

468 Id. at 75229.

469 See id.

transaction that was sufficiently large, disseminating the size of such a transaction could signal to the market that there is the potential for another large transaction in a particular security-based swap or related security.[470] Therefore, in order to give the market time to absorb any subsequent transactions, the Commission stated that it preliminarily believed that the size of a sufficiently large transaction should be suppressed for a certain period of time to provide time for subsequent transactions.[471]

In the Regulation SBSR Proposing Release, the Commission noted a variety of metrics that could be used to determine whether a security-based swap transaction should be considered a block trade.[472] They included: (1) the absolute size of the transaction; (2) the size of the transaction relative to other similar transactions; (3) the size of the transaction relative to some measure of overall volume for that security-based swap instrument; and (4) the size of the transaction relative to some measure of overall volumes for the security or securities underlying

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470 See id.

471 See id.

472 The Commission considered several tests including a percentage test (the top N-percent of trade would be considered block) and set forth data from the Depository Trust Clearing Corporation ("DTCC") regarding single-name corporate CDS and single name sovereign CDS. The Commission noted that the observed trade sizes would suggest certain cut-off points when considering single-name corporate CDS or sovereigns as a whole. The Commission also noted, however, that there may still be differences in liquidity between individual corporates and sovereigns, as well as linkages between the underlying cash markets and the CDS markets that a simple percentage or threshold test would not capture. In addition, the Commission's Division of Risk, Strategy, and Financial Innovation (which has been renamed the Division of Economic and Risk Analysis) prepared an analysis of several different block trade criteria in January 2011, based on the same DTCC data. The analysis examined fixed minimum notional amount thresholds; dynamic volume-based thresholds based on the aggregate notional amount of all executions in a CDS instrument over the past 30 calendar days; and a combination of dynamic volume-based thresholds and fixed minimum thresholds of $10 and $25 million, respectively. See id. at 75230-31.

the security-based swap.[473] The Commission stated that the metric should be chosen in a way that minimizes inadvertent signaling to the market of potential large follow-on transactions.[474]

Although the Commission did not propose block thresholds, the Commission did propose two "waves" of public dissemination of block trades for when it had adopted block thresholds. Rule 902(b), as proposed and re-proposed, would have required a registered SDR to publicly disseminate a transaction report of a security-based swap that constitutes a block trade immediately upon receipt of information about the block trade from the reporting party. The transaction report would have been required to consist of all the information reported pursuant to Rule 901(c)—except for the notional amount—plus the transaction ID and an indicator that the report represents a block trade. The second wave would have required the registered SDR to publicly disseminate a complete transaction report for the block trade (including the transaction ID and the full notional amount) between 8 and 26 hours after the execution of the block trade. Thus, under Rule 902(b), as proposed and re-proposed, market participants would have learned the price and all other primary trade information (except notional amount) about a block trade in real time, and the full notional amount of the transaction on a delayed basis.[475] Registered SDRs would have been responsible for calculating the specific block thresholds based on the formula established by the Commission and publicizing those thresholds, but the Commission

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473 See id.

474 See id.

475 Rule 902(b)(3), as proposed and re-proposed, would have provided that, if a registered SDR was closed when it otherwise would be required to disseminate information concerning a block trade, the registered SDR would be required to disseminate the information immediately upon re-opening.

emphasized that a registered SDR would be performing "mechanical, non-subjective calculations" when determining block trade thresholds.[476]

The Commission proposed and re-proposed a variety of other provisions related to block trades. Proposed Rule 900 defined "block trade" to mean a large notional security-based swap transaction that satisfied the criteria in Rule 907(b). Proposed Rule 907(b) would have required a registered SDR to establish and maintain written policies and procedures for calculating and publicizing block trade thresholds for security-based swaps in accordance with the criteria and formula for determining block size specified by the Commission. Proposed Rule 907(b)(2) also would have provided that a registered SDR should not designate as a block trade: (1) any security-based swap that is an equity total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based; or (2) any security-based swap contemplated by Section 13(m)(1)(C)(iv) of the Exchange Act.[477]

B. Potential Impact on Liquidity

The Commission received several comments addressing the issue of timing for public dissemination and the potential impact of public dissemination on liquidity. The commenters vary significantly in their views on this issue. One commenter stated that the proposed timeframes for publicly disseminating security-based swap transaction reports would not materially reduce market liquidity.[478] Another commenter, however, expressed the view that

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476 See Regulation SBSR Proposing Release, 75 FR at 75228.

477 15 USC 78m(m)(1)(C)(iv) ("With respect to security-based swaps that are determined to be required to be cleared under section 78c–3(b) of this title but are not cleared, the Commission shall require real-time public reporting for such transactions").

478 See Barnard I at 2.

"[t]here is insufficient liquidity in the single-name credit default swap market to support real-time public dissemination of non-block transaction data for all but a handful of instruments without creating price moving events."[479] A third commenter expressed concern that real-time security-based swap reporting, "if implemented without adequate safeguards, could unnecessarily increase the price of entering into a derivatives contract to hedge risk"[480] and cautioned that requiring real-time reporting of thinly traded products in illiquid markets in an effort to compel derivatives to trade similarly to exchange-listed products represented "a fundamentally flawed approach that demonstrates a lack of understanding of the existing market structure."[481] A fourth commenter expressed concern about the impact of real-time post-trade transparency for illiquid security-based swaps on pre-trade transparency that currently exists in the form of indicative prices provided by dealers to their clients (known as "runs").[482] This commenter requested that the Commission provide illiquid security-based swaps with an exception from real-time reporting and instead allow for delays roughly commensurate with the trading frequency of the security-based swap.[483]

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479 UBS Letter at 1.

480 Bachus/Lucas Letter at 2.

481 Id.

482 See ISDA IV at 14 (expressing concern that the combination of name-attributed runs and a rapidly disseminated set of post-trade information would make it relatively easy for many participants to reconstruct the identity of parties to a particular transaction, which might reduce dealers' willingness to disseminate pre-trade price information in the form of runs, thereby reducing pre-trade transparency).

483 See id., note 21 (stating, for example, that a 24-hour delay would be appropriate for a security-based swap that trades, on average, once per day, and security-based swap that trades 10 times per day could be reported in real time).

In addition, several commenters raised concerns about the effect of an improperly designed block trade regime.[484] One commenter stated that an appropriate block exemption is critical to the successful implementation of Title VII.[485] Several commenters expressed the view that improper block thresholds or definitions would adversely impact liquidity.[486] One commenter noted that the SEC and CFTC's proposed block trade rules would adversely impact liquidity.[487] By contrast, one commenter recommended that the Commission consider that increased transparency of trades that are large relative to the liquidity of the product may attract new entrants to the market and may result in increased liquidity.[488]

The Commission has considered these comments as well as the statutory requirement that the Commission rule for public dissemination of security-based swap transactions contain provisions that "take into account whether the public disclosure [of transaction and pricing data

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484 See Barclays Letter at 8; BlackRock Letter at 8, note 10; Cleary I at 10-11; Cleary II at 2; Institutional Investors Letter at 4; ISDA/SIFMA I at 2; ISDA/SIFMA Block Trade Study at 6; ISDA/SIFMA II at 8; J.P. Morgan Letter at 5; WMBAA I at 3.

485 See ISDA/SIFMA I at 2.

486 See Barclays Letter at 8 (stating that overly broad block trade thresholds could adversely impact the liquidity and pricing of security-based swaps); J.P. Morgan Letter at 5 (stating that liquidity may be significantly reduced if too few trades receive block treatment); BlackRock Letter at 8, note 10 (expressing concern that it could become infeasible for market participants to enter into block trades for some products if the Commissions fail to balance liquidity and price transparency correctly); Institutional Investors Letter at 4 (noting, with specific reference to the CFTC's proposed rules, that the benefits of large trades could be negated, and institutional investors' costs increased, if block trade sizes were set too high); ISDA/SIFMA II at 8 (stating that an overly restrictive definition of block trade has great potential to adversely affect the ability to execute and hedge large transactions); WMBAA I at 3 (expressing the view that block trade thresholds "be set at such a level that trading may continue without impacting market participants' ability to exit or hedge their trades").

487 See Cleary II at 2.

488 See GETCO Letter at 1-2.

for security-based swaps] will materially reduce market liquidity."[489] The Commission is adopting these final rules for regulatory reporting and public dissemination of security-based swaps with a view toward implementing additional rules in one or more subsequent phases to define block thresholds and to revisit the timeframes for reporting and public dissemination of block and non-block trades. This approach is designed to increase post-trade transparency in the security-based swap market—even in its initial phase—while generating new data that could be studied in determining appropriate block thresholds after the initial phase. The Commission also considered several comments related to the timing of public dissemination and believes that at present the commenters' concerns are appropriately addressed by the Commission's adoption of T+24 hour reporting during the interim phase.

During this phase, the reporting side will have up to 24 hours after the time of execution of a security-based swap transaction to report it to a registered SDR, regardless of its notional amount.[490] The registered SDR will be required, for all dissemination-eligible transactions,[491] to publicly disseminate a report of the transaction immediately upon receipt of the information. Even with the T+24 reporting of transactions, the Commission anticipates being able to collect significant new information about how market participants behave in an environment with post-

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489 15 U.S.C. 78m(m)(1)(E). However, this mandate applies only with respect to cleared security-based swaps. No provision of Title VII requires the Commission to specify block thresholds or dissemination delays, or to take into account how public disclosure will materially reduce market liquidity, for uncleared security-based swaps.

490 For a security-based swap that is subject to regulatory reporting and public dissemination solely by operation of Rule 908(a)(1)(ii), however, a reporting side is required to report the information required under Rules 901(c) and 901(d) within 24 hours of acceptance for clearing. See Rule 901(j); Section XV(C)(4), infra.

491 See Rule 902(c) (setting forth certain types of security-based swaps that are not to be publicly disseminated).

trade transparency, which will inform the Commission's analysis and effort to determine what block thresholds and time delays may be appropriate.

In developing a regulatory regime for post-trade transparency in the security-based swap market, the Commission is cognizant of rules adopted by the CFTC to provide for post-trade transparency in the swap market. Commission staff analyzed the effect of the adoption of post-trade transparency in the swap market, which is regulated by the CFTC.[492] That analysis shows no discernible empirical evidence of economically meaningful effects of the introduction of post-trade transparency in the swap market at this time. In particular, the study did not find negative effects such as reduced trading activity. Based on this analysis, the Commission believes that post-trade transparency does not seem to have a negative effect on liquidity and market activity in the swap market.[493]

1. T+24 Hour Reporting for All Transactions

The Commission initially proposed to require reporting to a registered SDR of the primary trade information of all security-based swaps "as soon as technologically practicable, but in no event later than 15 minutes after the time of execution of the security-based swap transaction."[494] For all dissemination-eligible transactions other than block trades, the registered

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492 See "Analysis of post-trade transparency under the CFTC regime" (October 17, 2014), available at http://www.sec.gov/comments/s7-34-10/s73410-183.pdf ("Analysis of Post-Trade Transparency"). See also infra Sections XXII(C)(2)(b), XXII(C)(2)(c), XXII(C)(3)(a), and XXII(D)(4)(b). The one comment that the Commission received on the Analysis of Post-Trade Transparency did not directly address the staff's analysis. This comment is discussed in notes 688 and 1011, infra.

493 See Analysis of Post-Trade Transparency at 1 ("While we acknowledge that there are significant differences between the index [credit default swap] market and the security-based swap market, the data analysis presented here may enhance the Commission's understanding of the potential economic effects of mandated post-trade transparency in the security-based swap market").

494 See Rules 901(c) and 900 (definition of "real time"), as originally proposed.

SDR would have been required to publicly disseminate a report of the transaction immediately and automatically upon receipt of the transaction. As proposed, block trades would have been subject to two-part dissemination: (1) an initial report with suppressed notional amount disseminated in real-time; and (2) a full report including notional amount disseminated between 8 to 26 hours after execution.[495]

Commenters expressed mixed views regarding the proposed reporting timeframes. Two commenters generally supported them.[496] However, several commenters stated that, at least in the near term, it would be difficult to comply with the reporting timeframes as proposed.[497] One of these commenters argued, for example, that the benefits of providing security-based swap information within minutes of execution did not outweigh the infrastructure costs of building a

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495 Rule 902(b)(1), as proposed and re-proposed, would have provided: "If the security-based swap was executed on or after 05:00 UTC and before 23:00 UTC of the same day, the transaction report [for the block trade] (including the transaction ID and the full notional amount) shall be disseminated at 07:00 UTC of the following day." Proposed Rule 902(b)(2) would have provided: "If the security-based swap was executed on or after 23:00 UTC and up to 05:00 UTC of the following day, the transaction report (including the transaction ID and the full notional size) shall be disseminated at 13:00 UTC of that following day." Those block trades executed at the end of each window would receive an 8 hour dissemination delay and those blocks executed at 5:00 UTC would receive a 26 hour dissemination delay. The delay for all other block trades would vary between 8 and 26 hours, depending on the time of execution.

496 See FINRA Letter at 2 (supporting the Commission's proposal to require reporting as soon as technologically practicable, but in no event later than 15 minutes after the time of execution); Barnard I at 3 (recommending full post-trade transparency as soon as technologically and practicably feasible, with an exemption permitting delayed reporting for block trades).

497 See DTCC II at 9-10; ICI I at 4-5; ISDA III at 1 ("Not all market participants have the ability to report within 15 or 30 minutes of execution"); MarkitSERV I at 9 ("complying with a strict 15-minute deadline even for non-electronically executed or confirmed trades will require significant additional implementation efforts by the industry at a time when resources are already stretched in order to meet other requirements under the [Dodd-Frank Act]"); MFA I at 5.

mechanism to report in real time, particularly given the likelihood of errors.[498] Another commenter expressed concern that "the 15 minute limit is not technologically practicable under existing communications and data infrastructure."[499]

Commenters also advocated that the Commission phase-in reporting deadlines over time, similar to the implementation model for TRACE, to allow regulators to assess the impact of post-trade transparency on the security-based swap market.[500] One commenter noted that phased-in implementation would allow regulators to assess the impact of transparency on the security-based swap market and make adjustments, if necessary, to the timing of dissemination and the data that is disseminated.[501] Other commenters echoed the belief that a phased approach would allow the Commission to assess the impact of public reporting on liquidity in the security-based swap market, monitor changes in the market, and adjust the reporting rules, if necessary.[502]

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498 See MFA I at 5.

499 ICI I at 4.

500 See Barnard I at 4; CCMR I at 2; Cleary II at 18-21; DTCC II at 9-10, 24-25; DTCC III at 10; DTCC IV at 8-9; Roundtable Letter at 4-9; FINRA Letter at 4-5; Institutional Investors Letter at 3; ISDA/SIFMA I at 9-10; ISDA/SIFMA Block Trade Study at 2, 7; MarkitSERV I at 9-10; MFA Recommended Timeline at 1; UBS Letter at 2-3; WMBAA III at 4-6. Based on its experience with industry-wide processes, one commenter suggested that there could be a "shake-out" period during which problems with reported data could surface. The commenter urged the Commission to consider this possibility and provide a means to assure that information is of high quality before dissemination is permitted. See DTCC II at 9-10.

501 See FINRA Letter at 5. See also ISDA/SIFMA Block Trade Study at 2 (stating that phased implementation would provide regulators with time to test and refine preliminary standards).

502 See CCMR I at 2; Cleary II at 19; ISDA/SIFMA Block Trade Study at 2; UBS Letter at 2.

Three commenters recommended a 24-hour delay for reporting block trades,[503] and one recommended a delay of at least five days with an indefinite delay of full notional size.[504] Of those commenters, two also suggested that the delay could be reduced or refined after the Commission gathers additional information about the security-based swap market.[505] In contrast, two commenters recommended block delays as short as 15 minutes.[506] In addition, several commenters opposed two-part transaction reporting for block trades. These commenters believed that all information about a block trade, including the notional amount of the transaction, should be subject to a dissemination delay to provide liquidity providers with

[503] See ICI I at 3; SIFMA I at 5 ("a 24-hour delay would better ensure that block liquidity providers are able to offset their risk regardless of the time during the trading day at which the block is executed"); Vanguard Letter at 4; Viola Letter at 2 ("At a minimum, the data in question should be delayed from the public reporting requirements at least one (1) day after the trade date"). Cf. Phoenix Letter at 4 (recommending end-of-day dissemination of block trades).

[504] See ISDA IV at 16.

[505] See ICI I at 3-4; Vanguard Letter at 4, note 3.

[506] See Better Markets I at 5-6 and at 4-5 (stating that no compelling economic justification exists for delaying the immediate public dissemination of any data regarding block trades, and that the minimum duration of any delay in reporting block trades should be "far shorter" than the delays included in Regulation SBSR); Better Markets III at 4-5; SDMA Letter at 2.

adequate time to hedge their positions.[507] Two commenters recommended initially setting block sizes low and over time collecting data to determine an appropriate block trade size.[508]

In addition, Commission staff has undertaken an analysis of the inventory management of dealers in the market for single-name CDS based on transaction data from DTCC-TIW.[509] The analysis, in line with prior studies of hedging in this market,[510] shows that, after most large transactions between a dealer and customer are executed, dealers do not appear to hedge resulting exposures by executing offsetting transactions (either with other dealers or other customers) in the same single-name CDS. In instances where dealers appear to hedge resulting exposures following a large trade in single-name CDS written on the same reference entity, they generally do so within a maximum of 24 hours after executing the original trade.

One commenter responded to this analysis, asserting that dealers, rather than hedging security-based swap exposures using offsetting transactions in the same instruments, might

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507 See Cleary II at 12 (even without disclosure of the notional amount, observers may be able to infer information about a trade and predict subsequent hedging activity); Goldman Sachs Letter at 6 (disclosure of the fact that a block trade occurred could still impact liquidity); ICI I at 2 (recommending a delay of all block trade information); ISDA/SIFMA I at 3 (delaying disclosure of notional amount is only a "partial solution"); SIFMA I at 3-4 (all block trade information should be delayed, otherwise immediate trade signaling could harm end users); Vanguard Letter at 2, 4 (all block trades should be delayed 24 hours, and establishment of a block regime should be delayed until the Commission has had time to assess how reporting affects the market).

508 See Institutional Investors Letter at 4; MFA Recommended Timeline at 4.

509 See Hedging Analysis.

510 See Kathryn Chen, et al., Federal Reserve Bank of New York Staff Report, An Analysis of CDS Transactions: Implications for Public Reporting (September 2011), available at http:// www.newyorkfed.org/research/staff_reports/sr517.html, last visited September 22, 2014. See also http://www.dtcc.com/repository-otc-data.aspx, last visited September 22, 2014. This study uses an earlier sample of DTCC-TIW transaction data to identify hedging of transactions in single-name CDS. They find little evidence of hedging via offsetting trades in the same instrument and conclude by saying that "requiring same day reporting of CDS trading activity may not significantly disrupt same day hedging activity, since little such activity occurs in the same instrument."

choose instead to hedge their security-based swap exposures in related assets, and that these types of hedging behaviors were not measured in the Commission staff analysis. The commenter further suggested that the use of cross-market hedges could be particularly important for transactions in single-name CDS that are especially illiquid.[511] The Commission acknowledges that the staff's analysis was limited to same-instrument hedging.[512] However, the Commission notes that, to the extent that security-based swap positions can be hedged using other assets—as the commenter suggests—these additional opportunities would suggest that dealers would likely need less time to hedge than if hedging opportunities existed only within the security-based swap market.

In view of these comments and the staff analysis, the Commission is modifying Regulation SBSR's timeframes for reporting security-based swap transaction information as follows. First, Rules 901(c) and 901(d), as adopted, require reporting sides to report the information enumerated in those rules "within the timeframe specified in paragraph (j) of this section"—i.e., by Rule 901(j). Rule 901(j), as adopted, provides that the reporting timeframe for Rules 901(c) and 901(d) shall be "within 24 hours after the time of execution (or acceptance for

511 See ISDA IV at 15 (stating that "participants may enter into risk mitigating transactions using other products that are more readily available at the time of the initial trade (for example CD index product [sic], CDS in related reference entities, bonds or loans issued by the reference entity or a related entity, equities or equity options)"). In addition, the commenter stated that it "interprets the data in the study to imply that such temporary hedges in other asset classes (rather than offsetting transactions in the precise reference entity originally traded) are the norm for an illiquid market." See id.

512 See Chen et al., supra note 510, at 6. Like the Chen et al. report, which was cited by the commenter, the Commission staff analysis did not incorporate data that would allow it to identify hedging in corporate bonds or equities, because appropriate data were not available. The commenter did not provide any analysis, rationale, or data demonstrating how public dissemination of a single-name CDS transaction within 24 hours would negatively impact a dealer from being able to hedge this exposure in another market, such as a broad-based CDS index.

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 for clearing, 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." Under Rule 902(a), as adopted, the registered SDR that receives the transaction report from the reporting side is required, as proposed and re-proposed, to publicly disseminate a report of that transaction immediately upon receipt. The Commission believes that this approach will improve post-trade transparency and respond to commenters' concerns. In particular, the Commission believes that this approach addresses concerns relating to potential market impact, the ability to report in real time, and the length of delay for dissemination of block trade information.[513] Thus, the T+24 hour approach is designed to improve post-trade transparency in the security-based swap market in the near term, while generating additional data that the Commission can evaluate in considering appropriate treatment of block trades.

At this time, the Commission is not adopting the provisions of proposed and re-proposed Rule 902 that would have provided for real-time public dissemination of non-block trades. However, the Commission is adopting, substantially as proposed and re-proposed, what was originally designed to be the second wave of block dissemination—i.e., disseminating the full trade details, including the true notional amount, at one of two points in the day (either 07:00 or 13:00 UTC) after an initial report of the transaction (without the notional amount) had been

513 Although two commenters advocated shorter block trade delays, the Commission believes that it would be prudent to allow for the accumulation of additional data about the effect of post-trade transparency on the security-based swap market before considering shorter reporting and dissemination timeframes for block trades. The Commission may consider shorter timeframes in the future but believes that it is neither necessary nor appropriate to adopt these commenters' recommendations at this time.

disseminated in real time.[514] The Commission is now simplifying that approach by eliminating the idea of "batch dissemination" at two points during the day, and instead allowing for T+24 hour reporting for all transactions, regardless of the time of execution. Furthermore, in the absence of a standard to differentiate block from non-block transactions, the Commission believes that it is appropriate to require the same T+24 hour reporting for all transactions.[515]

This interim phase is designed to allow the accumulation of empirical data and is consistent with various comments that emphasized the need for further study and analysis of empirical data prior to establishing block trading rules.[516] Several commenters noted that

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514 See Rule 902(b), as proposed and re-proposed.

515 As discussed in more detail in Section VII(B)(3), infra, if 24 hours after the time of execution would fall on a non-business day (i.e., a Saturday, Sunday, or U.S. federal holiday), reporting would instead be required by the same time on the next business day.

516 See ABC Letter at 7-8; CCMR I at 4 ("The Commission should set the thresholds low at first in order to collect data that will enable them to make informed decisions about the final delay and threshold determinations"); Institutional Investors Letter at 4-5 (stating, in reference to the CFTC's proposed rules, that the marketplace currently lacks sufficient collection and analysis of swap trading data to establish block trade thresholds); ICI II at 8 ("We agree with the SEC that it should defer its proposed rulemaking regarding block thresholds until after SDRs register with the SEC and the SEC begins to receive and analyze data required to be reported under the final rules or until after SB swap transaction information begins to be publicly reported"); MFA I at 4 (recommending that the Commission study and obtain empirical evidence to determine block trade definitions for each asset class to assure that the final rules do not disrupt the markets or reduce liquidity); ISDA/SIFMA I at 4-5 (recommending significant detailed research, including independent academic research, before determining block size thresholds and reporting delays for particular security-based swap transactions); ISDA/SIFMA II at 8 (stating that market-based research and analysis should be employed to provide the basis for the determination of well-calibrated block trading exemption rules); SIFMA II at 8 ("Until a liquid SBS trading market develops on SB-SEFs and exchanges, the Commission will not be able to make informed decisions on the definition of a block or an appropriate public reporting time frame. For the same reason, real-time reporting should be implemented gradually. Block trade thresholds should be set at a low level at first, such that many trades are treated as blocks, and raised slowly by the Commission when doing so is supported by market data"). But see SDMA Letter at 3 (stating that swap transaction data are available today and block trade thresholds could be established without delay).

implementing the rules requiring reporting to registered SDRs prior to the block trading rules would provide security-based swap transaction data (in addition to historical data) that could be used in the formation of block trade thresholds.[517] One of these commenters stated, for example, that it would be premature to adopt block trade thresholds prior to the commencement of reporting to registered SDRs because SDR reporting would increase the amount of information available across various markets and asset classes.[518] Commenters also recommended several methods for obtaining and analyzing empirical data,[519] including independent academic research[520] and a review of a statistically significant data set for each security-based swap category.[521]

Although more data and analyses about executed transactions are now available than when the Commission originally issued the Regulation SBSR Proposing Release,[522] these data provide limited insights into how post-trade transparency might affect market behavior if executed transactions were to become publicly known on a real-time or near-real-time basis.[523]

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517 See Institutional Investors Letter at 4 (recommending that the CFTC collect market data for one year before adopting rules relating to block trades); MFA II, Recommended Timeline at 4; WMBAA III at 6; FIA/FSF/ISDA/SIFMA Letter at 6.

518 See FIA/FSF/ISDA/SIFMA Letter at 6, note 6.

519 See ISDA/SIFMA I at 4; Goldman Sachs Letter at 5.

520 See ISDA/SIFMA I at 4.

521 See Goldman Sachs Letter at 5 (stating that the Commission could obtain the necessary data by asking large dealers to provide information on a confidential basis and supplementing that information with data obtained from a survey of other market participants).

522 See, e.g., Chen et al., supra note 510.

523 See ICI II at 8 ("Any data on which the SEC could rely currently to develop a methodology for determining minimum block trade sizes will not adequately represent or reflect the swaps market once the Dodd-Frank requirements (including public reporting of swap data) are fully implemented"). Two commenters pointed to evidence suggesting negative effects of post-trade transparency in other securities markets. See ISDA/SIFMA

The Commission has information from DTCC-TIW about most CDS trades over the past few years[524] and can analyze the frequency of execution and the notional trade sizes. However, the Commission believes that these data permit only speculative inferences about the potential market impact of those trades being made public. Currently, there is little post-trade transparency in the security-based swap market, so the current trading generally is informed only imperfectly, if at all, about earlier trading.

Several aspects of the Commission's adopted rules are designed to help facilitate the collection of data relating to how post-trade transparency affects market behavior. The Commission is adopting, as re-proposed, the requirement that the trade report include the time of execution and the requirement that the registered SDR mark the time that it receives the trade report. These requirements are designed to help inform the Commission as to the length of time between the execution of a transaction and when the transaction is reported to a registered SDR, which should provide useful data to the Commission in analyzing trends in reporting timeframes. These timeframes would provide some insight into the beliefs of market participants regarding the length of the reporting delay that they deem necessary to minimize the market impact of a transaction. Observing trades being reported to a registered SDR with varying delays after execution could provide the Commission with greater insight as to what market participants consider to be market-impacting trades. Further, the Commission believes that this approach

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Block Trade Study at 4-5 (stating that some studies had concluded that transparency had negatively impacted markets, including the Canadian stock markets and the London Stock Exchange); J.P. Morgan Letter at 2-4 (stating that anecdotal evidence reported in one study supported the view that institutional customers experienced less deep markets as a result of TRACE reporting, and that adverse impacts could be more substantial for CDS).

524 See http://www.dtcc.com/repository-otc-data.aspx (last visited September 22, 2014) for a description of aggregated data disseminated by DTCC. See also infra Section XXII(B)(1) for a description of transaction data obtained by the Commission.

would address, during the interim phase, the concerns of the commenters who believed that a public dissemination regime with inappropriately low block trade thresholds could harm market liquidity, and those who argued that market participants would need an extended period of time to comply with the requirements to report within shorter timeframes.

Although any participant could take the full 24 hours to report a given trade, there may be incentives to submit trade reports in substantially less than 24 hours. The Commission understands that, in some cases, entities that are likely to become SB SEFs ("pre-SEFs") may want to broadcast trades executed electronically across their platforms to all subscribers in order to catalyze trading by other counterparties at the same price.[525] This "work-up" process, according to a commenter, is designed to foster liquidity in the security-based swap market and to facilitate the execution of larger-sized transactions.[526] If pre-SEFs and their participants want to continue their current practices and broadcast a subset of their executed trades across the platform in real time to facilitate work-ups, they will be subject to Rule 902(d), which embargos transaction information until the information is transmitted to a registered SDR.[527] Therefore, any pre-SEF or user of a pre-SEF that wants to continue to have real-time information about a completed trade broadcast as part of a work-up must ensure that the initial transaction is reported to a registered SDR no later than the time at which it is broadcast to users of the pre-SEF.

In response to commenters who advocated shorter reporting time frames or block trade delays, the Commission notes that it anticipates further refining the reporting timeframes when it proposes and implements final block trade rules, at which point reporting sides will have had

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525 See supra Section VI(F) (discussing Embargo Rule).

526 See GFI Letter at 3.

527 See supra Section VI(F).

more time to test and implement their reporting systems and processes. This approach was recommended by several commenters.[528]

2. Reporting Timeframe for Trades Executed Prior to Weekends or U.S. Federal Holidays

While most transactions will have 24 hours within which to be reported, Rule 901(j) also provides that, "if 24 hours after the time of execution would fall on a day that is not a business day, [the transaction must be reported] by the same time on the next day that is a business day." The Commission's intent is to afford security-based swap counterparties—during the interim phase—the equivalent of at least an entire business day to hedge their positions, if they so desire, before the transaction must be reported and publicly disseminated. Without clarifying that, during the interim phase, reporting requirements fall only on business days, for a transaction executed on the day before a weekend or holiday, the counterparties would have less than the number of business hours of a regular business day to hedge a transaction if reporting were required within 24 hours of execution.

The Commission is also adopting a definition of "business day" to clarify the "not a business day" provision. "Business day" is defined in Rule 900(f) as "a day, based on U.S. Eastern Time, other than a Saturday, Sunday, or a U.S. federal holiday." Counterparties to the

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528 See Institutional Investors Letter at 4 (recommending that the CFTC collect market data for one year before adopting rules relating to block trades); MFA II, Recommended Timeline at 4; WMBAA III at 6; FIA/FSF/ISDA/SIFMA Letter at 6 (appropriate block trade thresholds, and therefore real-time reporting requirements, can be established only after the commencement of SDR reporting to regulators and careful analysis of security-based swap market transaction data). This approach is also broadly consistent with the implementation of the TRACE system, which shortened reporting requirements over time. Several commenters recommended a phased reporting approach analogous to TRACE. See CCMR I at 2; Cleary II at 20; DTCC II at 9-10; FINRA Letter at 4-5; ISDA/SIFMA I at 10; ISDA/SIFMA Block Trade Study at 2; UBS Letter at 2-3; WMBAA II at 5.

trade may be in different time zones and/or jurisdictions; in the absence of Rule 900(f) there could be confusion about whether the "not a business day" provision referred to the jurisdiction and time zone of one side or the jurisdiction and time zone of the other. Because Regulation SBSR is designed to implement Title VII's regulatory reporting and public dissemination requirements for the U.S. security-based swap market, the Commission is designating U.S. Eastern Time (which may be either Eastern Standard Time or Eastern Daylight Time) as the time zone on which the reporting side should base its reporting for purposes of Rules 900(f) and 901(j). The Commission also is excluding U.S. federal holidays from the definition of "business day." The following examples are designed to help explain the application of this provision:

- Example 1. A trader executes a trade at 04:59 UTC on Friday (11:59 p.m. EST on Thursday). This particular Friday is not a U.S. federal holiday. The reporting side must report by 04:59 UTC on Saturday (11:59 p.m. EST on Friday).
- Example 2. A trader executes a trade at 05:01 UTC on Friday (12:01 a.m. EST on Friday). The reporting side must report by 05:01 UTC on Monday (12:01 a.m. EST on Monday), provided that this particular Monday is not a U.S. federal holiday.
- Example 3. A trader executes a trade at 14:42 UTC on Friday (9:42 a.m. EST on Friday). The reporting side must report by 14:42 UTC on Monday (9:42 a.m. EST on Monday), provided that this particular Monday is not a U.S. federal holiday.
- Example 4. A trader executes a trade at 13:42 UTC on Friday (9:42 a.m. EDT on Friday). The following Monday is Labor Day, a U.S. federal holiday. The

reporting party must report by 13:42 UTC on Tuesday (9:42 a.m. EDT on Tuesday).

- Example 5. A trader executes a trade at 16:45 UTC on Wednesday, November 26, 2014 (11:45 a.m. EST on Wednesday, November 26, 2014). Thursday, November 27, 2014 is Thanksgiving, a U.S. federal holiday. The reporting party must report by 16:45 UTC on Friday, November 28, 2014 (11:45 a.m. EST on Friday, November 28, 2014).
- Example 6. A trader executes a trade at 16:45 UTC on a Wednesday (11:45 a.m. EST on Wednesday). Thursday is not a U.S. federal holiday, but a large blizzard causes emergency closures in New York City and several other U.S. cities. The reporting party must report by 16:45 UTC on Thursday (11:45 a.m. EST on Thursday).

3. Other Revisions to Accommodate the Interim Phase

In addition to the changes noted above, the Commission is adopting the following technical changes to Regulation SBSR to implement the interim phase of reporting and public dissemination. First, the Commission is not adopting certain sections of rule text that referred to block trades and marking those sections as "Reserved." Rule 900(c), as re-proposed, would have defined a "block trade" as a large notional security-based swap transaction that meets the criteria set forth in proposed Rule 907(b). Rule 907(b), as proposed and re-proposed, would have required a registered SDR to establish and maintain policies and procedures "for calculating and publicizing block trade thresholds for all security-based swap instruments reported to the registered security-based swap data repository in accordance with the criteria and formula for determining block size as specified by the Commission." Rule 907(b), as proposed and re-proposed, also would have excluded equity TRS instruments and any security-based swap contemplated by Section 13(m)(1)(C)(iv) of the Exchange Act[529] from the definition of "block trade." Because the Commission anticipates soliciting public comment on block thresholds and other rules related to block trades—including what role (if any) registered SDRs should play in calculating those thresholds—the Commission is not at this time defining the term "block trade" in Rule 900(c) or adopting Rule 907(b). Similarly, because the Commission is not at this time adopting the requirement to report in real time, the Commission is not adopting a definition of "real time" in Rule 900.

Second, the Commission has determined not to utilize the term "security-based swap instrument"[530] in Regulation SBSR. The Commission devised the original definition of "security-based swap instrument" in connection with its overall analysis of the block trade issue. In the Regulation SBSR Proposing Release, the Commission stated its preliminary belief that it would not be appropriate to establish different block trade thresholds for similar instruments with different maturities. Thus, the proposed definition of "security-based swap instrument" did not include any distinction based on tenor or date until expiration.[531]

One commenter discussed the concept of security-based swap instruments in the context of its overall discussion of block trade issues.[532] The commenter argued that a different block size threshold would have to be calculated for each category of security-based swap instrument,

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529 15 U.S.C. 78m(m)(1)(C)(iv).

530 Proposed Rule 900 would have defined "security-based swap instrument" to mean "each security-based swap in the same asset class, with the same underlying reference asset, reference issuer, or reference index." This definition was included, without change, in re-proposed Rule 900(dd).

531 <u>See</u> 75 FR at 75231.

532 <u>See</u> CCMR I at 3.

so the boundaries of those categories would greatly impact market participants' ability to engage in block trading. The commenter recommended, therefore, that instruments be classified in as few categories as possible.[533] Another commenter argued that the definition of "security-based swap instrument" "should provide for more granular distinctions between different types of transaction within a single asset class to avoid grouping together transactions with quite different characteristics."[534]

The Commission anticipates soliciting public comment on block trade thresholds at a later date. Because the initial intent of the term "security-based swap instrument" was to delineate separate categories of security-based swaps that could have separate block trade thresholds, the Commission is not adopting the term "security-based swap instrument" at this time. The Commission anticipates soliciting public comment on whether and how to establish different categories of security-based swaps—and what, if any, block thresholds and dissemination delays will apply to those different categories—when it solicits comment on block thresholds.

Further, proposed Rule 902(b) would have specified the delay for dissemination of certain information about block trades to the public as well as what information a registered SDR should disseminate immediately. Because the Commission anticipates that it will re-propose all aspects of Regulation SBSR as they pertain to block trades, the Commission is not adopting Rule 902(b) at this time.

Rules 901(j), as adopted, require the reporting of both primary and secondary trade information, respectively, for a security-based swap no later than 24 hours after the time of

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533 See id.

534 ISDA/SIFMA I at 10.

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 Rule 908(a)(1)(ii)), or, if 24 hours after the time of execution or acceptance for clearing, 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. Re-proposed Rule 901(d)(2) would have required the reporting side to report what final Rule 901(d) now terms the "secondary trade information" promptly, but in any event, no later than: (1) 15 minutes after the time of execution for a security-based swap that is executed and confirmed electronically; (2) 30 minutes after the time of execution for a security-based swap that is confirmed electronically but not executed electronically; or (3) 24 hours after the time of execution for a security-based swap that is not executed or confirmed electronically. In proposing these reporting timeframes, the Commission recognized that the amount of time required for counterparties to report the information required under proposed Rule 901(d)(1) depended upon, among other things, the extent to which the security-based swap was customized and whether the security-based swap was executed or confirmed electronically or manually.[535]

Generally, commenters' views regarding the regulatory reporting timeframes in proposed Rule 901(d)(2) were mixed. While some commenters expressed concerns that the proposed timeframes were too lenient or incentivized slower technologies,[536] other commenters expressed

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535 See Regulation SBSR Proposing Release, 75 FR at 75219. The Commission believed that the information required under Rule 901(d)(1) would be available relatively quickly for a security-based swap that was executed and confirmed electronically because most of the required information would already be in an electronic format. On the other hand, the Commission recognized that, for security-based swaps that are not executed or confirmed electronically, additional time might be needed to systematize the information required under Rule 901(d)(1) and put it into the appropriate format. See id.

536 See Better Markets I at 9 (noting that technology that would permit reporting within much shorter timeframes is widely available, and that market participants routinely adhere to much shorter timeframes for their own business and internal reporting);

the view that the reporting timeframes in proposed Rule 901(d)(2) were not practicable.[537] One of these commenters noted the likelihood of errors if reporting timeframes were too short.[538] Another commenter urged the Commission to strike an appropriate balance between speed and accuracy in establishing timeframes for regulatory reporting.[539] One commenter suggested that, initially, the Rule 901(d) regulatory reporting timeframes should be set closer to current market capability, with electronically confirmable trades reported within 24 hours.[540] This commenter recommended a phase-in period to allow reporting parties to develop the necessary reporting capabilities, after which time shorter timeframes could be implemented.[541]

The Commission is not adopting the reporting timeframes proposed in Rule 901(d)(2), and is therefore renumbering Rule 901(d)(1) as Rule 901(d).[542] Because Rule 901(j), as adopted, allows reporting sides up to 24 hours to report the primary trade information pursuant to Rule 901(c) (or until the same time on the next business day if the trade occurs less than 24 hours before a weekend or federal holiday), the Commission believes that it is appropriate also to modify the timeframe for reporting the secondary trade information set forth in Rule 901(d) to harmonize with the Rule 901(c) requirement. Although both the primary and secondary trade

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Tradeweb Letter at 5 (different reporting timeframes based on the method of execution potentially could create incentives for market participants not to take advantage of available technology); SDMA I at 3 (stating, with reference to the CFTC's proposed rules, that different reporting timeframes based on method of execution could create a 'race to the slowest' among swap execution facilities, with market participants favoring slower-reporting swap execution facilities over more efficient and transparent facilities).

537 See MFA Letter at 5; DTCC II at 12.

538 See MFA Letter at 5.

539 See ISDA/SIFMA I at 9.

540 See DTCC II at 12.

541 See id.

542 See supra Section II(C)(2).

information must be reported within 24 hours of the time of execution or acceptance for clearing, as applicable (or until the same time on the next business day if the trade occurs less than 24 hours before a weekend or federal holiday), Rule 901 does not require that all of the information enumerated in Rules 901(c) and 901(d) be provided in a single trade report. Thus, a reporting side could, if permitted by the policies and procedures of the relevant registered SDR, make an initial report of the primary trade information followed by a subsequent report containing secondary trade information, so long as both reports were provided within the timeframe prescribed by Rule 901(j).[543]

The Commission acknowledges the issues raised by the commenters regarding the proposed reporting timeframes, and, in particular, the concerns that unreasonably short reporting timeframes would result in the submission of inaccurate transaction information. The Commission believes that the 24-hour reporting timeframe being adopted in Rule 901(j) strikes an appropriate balance, for the interim phase, between the need for prompt reporting of security-based swap transaction information and allowing reporting entities sufficient time to develop fast and robust reporting capability. The Commission notes that some commenters supported a 24-hour reporting timeframe as consistent with existing industry reporting capability,[544] and believes

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[543] However, the registered SDR's policies and procedures adopted under Rule 907(a)(1) generally should explain to reporting sides how to report if all the security-based swap transaction data required by Rules 901(c) and 901(d) is being reported simultaneously, and how to report if responsive data are being provided at separate times. In the latter case, the registered SDR should provide the reporting side with the transaction ID after the reporting side reports the information required by Rule 901(c). The reporting side would then include the transaction ID with its submission of data required by Rule 901(d), thereby allowing the registered SDR to match the Rule 901(c) report with the subsequent Rule 901(d) report.

[544] See DTCC II at 12; MFA at 5.

that this timeframe addresses commenters' concerns that some elements of the required information might not be available within the initially proposed reporting timeframes.[545]

Finally, Rule 901(d)(2), as proposed and re-proposed, would have established reporting timeframes based on whether a security-based swap is executed and/or confirmed electronically. The term "confirm" appeared only in Rule 901(d)(2), as proposed and re-proposed.[546] Because this term does not appear in Rule 901(d)(2), as adopted, the Commission has determined not to adopt a definition for the term "confirm" in final Rule 900.[547]

4. Dissemination of Notional Amount

The Commission is mindful of comments expressing concern about dissemination of the full notional amount for block trades.[548] For example, two commenters expressed the view that disseminating the notional amount of a block trade could jeopardize the anonymity of the

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545 See Cleary II at 15-16.

546 Rule 900(e), as re-proposed, defined "confirm" as "the production of a confirmation that is agreed to by the parties to be definitive and complete and that has been manually, electronically, or, by some other legally equivalent means, signed."

547 One commenter suggested that the Commission use the term "issued," rather than "confirm" to better reflect existing market practice with respect to confirming the terms of a security-based swap. See ISDA IV at 10. The deletion of the term "confirm" from Regulation SBSR, as adopted, addresses this concern.

548 See Cleary II at 13 ("we would recommend that the SEC gather further data on the costs and benefits of disclosing notional size before requiring such disclosure for all transactions"); ISDA/SIFMA I at 5 (size of a block trade transaction should not be disclosed at any time); ISDA/SIFMA II at 8 (same); ISDA/SIFMA Block Trade Study at 26-27 (noting that reporting of notional amounts of block trades will hamper the execution of large-sized trades and recommending dissemination of capped volume information); Phoenix Letter at 3; SIFMA I at 5; UBS Letter at 2 (arguing actual notional amount of an illiquid security-based swap would provide information to the market about potential hedging activity); WMBAA II at 7 (arguing that dissemination of the full notional amount could jeopardize the anonymity of counterparties to the trade).

counterparties.[549] One commenter, who noted that TRACE never requires the dissemination of the exact notional amount of block transactions, suggested that the Commission had not fully explained its rationale for not adopting this approach for security-based swaps.[550] Numerous commenters supported dissemination of the notional amount of block trades through a "masking" or "size plus" convention comparable to that used by TRACE, in which transactions larger than a specified size would be reported as "size plus."[551]

Under Rule 902(a), as adopted, a registered SDR is required to publicly disseminate (for all dissemination-eligible transactions[552]), immediately upon receipt of the transaction report, all of the elements required by Rule 901(c), including the true notional amount of the transaction (as opposed to a "capped" or "bucketed" notional amount). The Commission believes the T+24 hour approach during the interim phase should address commenters' concerns about disseminating the true notional amount of a transaction, including concerns about preserving the anonymity of counterparties.[553] One commenter expressed concern about reporting blocks and non-blocks in the same timeframe, which, the commenter stated, would prevent market

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549 See WMBAA II at 7 (also noting that the result may be that counterparties are less willing to engage in large transactions); Phoenix Letter at 3 (stating that reporting block trades at the same time as non-block trades could jeopardize the anonymity of the block trade).

550 See Cleary II at 13.

551 See WMBAA II at 7; ISDA/SIFMA I at 5; ISDA/SIFMA Block Trade Study at 2, 26-27; Vanguard Letter at 5; Goldman Sachs Letter at 6; SIFMA I at 5; J.P. Morgan Letter at 12-13; MFA I at 4; MFA III at 8; UBS Letter at 2; FIA/FSF/ISDA/SIFMA Letter at 6; Phoenix Letter at 3; ISDA IV at 16.

552 See Rule 902(c) (requiring that certain types of security-based swaps not be publicly disseminated).

553 One commenter appears to agree generally with this approach. See J.P. Morgan Letter at 14 ("'un-masked' trade-by-trade notional amounts should eventually be disseminated . . . in order to facilitate analysis of market trends by market participants and the academic community").

participants from being able to hedge the trade.[554] The Commission believes that a 24-hour timeframe for reporting of transaction information should address any concerns about disseminating the true notional amount of any transaction and allow market participants who choose to hedge adequate time to accomplish a majority of their hedging activity before transaction data is publicly disseminated.[555] During the interim phase when no transaction must be reported in less than 24 hours after execution, the Commission will be able to collect and analyze transaction information to develop an understanding of how market participants are reacting to the introduction of mandated post-trade transparency. The Commission expects to study, among other things, the frequency with which security-based swap market participants transact in non-standard notional amounts, and will attempt to observe whether the market reacts differently to last-sale prints of any non-standard sizes versus more conventional sizes. Based on such data and analysis, the Commission anticipates considering whether it may be appropriate to establish notional caps or rounding conventions in disseminated reports.

5. Analysis Period

As discussed in Section XXII(C)(3)(a), infra, during the interim phase, the Commission will have access to more useful data about how different security-based swap trades of different sizes and with different reporting delays might be affecting subsequent behavior in the market, as well as any additional data and analysis that might be submitted by third parties.[556] Furthermore,

554 See Phoenix Letter at 3.

555 The Commission further notes that equity total return swaps are synthetic substitutes for positions in the underlying equity security or securities; therefore, the Commission believes that it would not be appropriate to allow masking for a synthetic substitute when there is no masking exceptions to public dissemination in the cash equities markets.

556 See ICI II at 7 ("We also support the SEC re-opening for comment certain issues related to block trades—such as the required time delays—in connection with the future SEC proposal regarding how to define block trades").

once implemented, reporting sides will be required under Regulation SBSR to submit their security-based swap execution times to a registered SDR. As noted above, security-based swap transaction data currently stored in DTCC-TIW includes the time of reporting but not the time of the execution.[557] Having the execution time instead of only the reporting time will allow a more robust and granular analysis of any hedging that may or may not occur within the first 24-hour period after execution.

The Commission is directing its staff to use data collected during the interim phase to publish a report for each asset class of security-based swaps assessing the impact of post-trade transparency on that asset class. Appendix A to Rule 901 of Regulation SBSR sets forth the guidelines for these reports, which must be completed no later than two years following the initiation of public dissemination of SBS transaction data by the first registered SDR in each asset class.[558]

The completion of the staff's report for an asset class will mark the beginning of an analysis period, during which the Commission anticipates considering the report, any public comments received on the report, and any other relevant data and information, including the Commission's original proposal to define "real time" in the context of Section 13(m) of the Exchange Act to mean "as soon as technologically practicable, but in no event later than 15 minutes after the time of execution of a security-based swap transaction."[559] Based on this analysis, the Commission anticipates that it will prepare a proposal that would address, among other things: (1) the criteria for determining what constitutes a large notional security-based

557 See Hedging Analysis at 5.

558 See infra Section XXII(C)(3)(a) (describing the importance of conducting additional data analysis during the interim phase).

559 See Regulation SBSR Proposing Release, 75 FR at 75284.

swap transaction (block trade) for particular markets and contracts; and (2) the appropriate time delay for disseminating large notional security-based swap transactions (block trades) to the public.[560] The Commission believes that the approach of studying security-based swap market activity once post-trade transparency is implemented, but before adopting block trade rules, accords with the recommendations of several commenters.[561]

VIII. Reporting and Public Dissemination of Security-Based Swaps Involving Allocation

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560 See 15 U.S.C. 78m(m)(1)(E)(ii)-(iii). The Commission anticipates that these proposed rules also would address certain issues raised by commenters during the comment period for Regulation SBSR. For example, several commenters proposed calculation methodologies for block trade thresholds. See, e.g., Goldman Sachs Letter at 4-6; ISDA/SIFMA I at 4; Better Markets I at 6; WMBAA II at 3; ISDA/SIFMA Block Trade Study at 26; Cleary II at 14 (supporting various tests or methodologies for establishing block trade thresholds). Commenters suggested various approaches for how often block thresholds should be updated. See ISDA/SIFMA I at 5 (stating that block trade thresholds should be updated at least every three months because liquidity in the OTC markets may change quickly); ISDA/SIFMA II at 8 (stating that the block trading exemption rules should be updated quarterly); ISDA/SIFMA Block Trade Study at 2 (stating that the reporting rules should be re-evaluated regularly to ensure that they reflect the changing characteristics of the market); ICI I at 3 (stating that block trade thresholds would need to be reviewed more than once a year to remain meaningful); WMBAA II at 5 (recommending that block trade thresholds be updated at appropriate intervals); MFA III at 8 (stating that an SB SEF's swap review committee should periodically determine what constitutes a "block" for each security-based swap or security-based swap class that the SF SEF trades). See also Barclays Letter at 5 (generally supporting a 30-calendar-day look-back for determining block size thresholds).

561 See Institutional Investors Letter at 4 (recommending that the CFTC collect market data for one year before adopting rules relating to block trades); MFA II, Recommended Timeline at 4; WMBAA III at 6; FIA/FSF/ISDA/SIFMA Letter at 6 (appropriate block trade thresholds, and therefore real-time reporting requirements, can be established only after the commencement of SDR reporting to regulators and careful analysis of security-based swap market transaction data). This approach is also broadly consistent with the implementation of the TRACE system, which shortened reporting requirements over time. Several commenters recommended a phased reporting approach analogous to TRACE. See CCMR I at 2; Cleary II at 20; DTCC II at 9-10; FINRA Letter at 4-5; ISDA/SIFMA I at 10; ISDA/SIFMA Block Trade Study at 2; UBS Letter at 2-3; WMBAA II at 5.

This section explains the application of Regulation SBSR to certain security-based swaps executed by an asset manager on behalf of multiple clients—transactions involving what are sometimes referred to as "bunched orders."[562] To execute a bunched order, an asset manager negotiates and executes a security-based swap with a counterparty, typically a security-based swap dealer, on behalf of multiple clients. The bunched order could be executed on- or off-platform. The asset manager would allocate a fractional amount of the aggregate notional amount of the transaction to each client, either at the time of execution or some time after execution. Allocation results in the termination of the executed bunched order and the creation of new security-based swaps between the security-based swap dealer and the accounts managed by the asset manager.[563] By executing a bunched order, the asset manager avoids having to negotiate the account-level transactions individually, and obtains exposure for each account on the same terms (except, perhaps, for size).

A. Discussion of Comments Received and Application of Regulation SBSR

In response to the Regulation SBSR Proposing Release, one commenter stated that asset managers commonly use bunched orders and allocations in the OTC derivatives market, and recommended that publicly disseminating the execution of a bunched order—without the allocation information—would satisfy the transparency objective of Title VII and be consistent

562 The Commission recognizes that market participants may use a variety of other terms to refer to such transactions, including "blocks," "parent/child" transactions, and "splits." The Commission has determined to use a single term, "bunched orders," for purposes of this release, as this appears to be a widely accepted term. See, e.g., "Bunched orders challenge SEFs," MarketsMedia (March 25, 2014), available at http://marketsmedia.com/bunched-orders-challenge-sefs/ (last visited September 22, 2014); "Cleared bunched trades could become mandatory rule," Futures and Options World (October 31, 2013) (available at http://www.fow.com/3273356/Cleared-bunched-trades-could-become-mandatory-rule.html (last visited September 22, 2014).

563 In aggregate, the notional amount of the security-based swaps that result from the allocation is the same as the notional amount of the executed bunched order.

with TRACE reporting.[564] The commenter also expressed the view that the reporting party for a bunched order execution should be obligated to report allocation information, which would be necessary to indicate the final placement of risk derived from the initial trade.[565] The discussion below explains how Regulation SBSR's regulatory reporting and public dissemination requirements apply to executed bunched orders that are subject to the reporting hierarchy in Rule 901(a)(2)(ii) and the security-based swaps that result from the allocation of these transactions, to the extent that the resulting security-based swaps are not cleared. The Regulation SBSR Proposed Amendments Release is proposing guidance for reporting platform-executed bunched orders that will be submitted to clearing and security-based swaps that result from the allocation of a bunched order if the resulting security-based swaps are cleared.

Regulation SBSR requires bunched order executions to be reported like other security-based swaps. The reporting side for a bunched order execution subject to the reporting hierarchy in Rule 901(a)(2)(ii)[566] must report the information required by Rules 901(c) and 901(d) for the bunched order execution, including the notional amount of the bunched order execution, to a registered SDR.[567] The information described in final Rule 901(c) will be publicly disseminated under final Rule 902(a), like any other security-based swap transaction that does not fall within

564 See ISDA/SIFMA I at 7-8. See also ISDA IV at 10, 13 (asserting that the bunched order execution could be disseminated publicly, but that post-allocation activities should be excluded from public dissemination).

565 See id. at 8.

566 See supra Section V. A bunched order execution will be subject to this reporting hierarchy unless it is executed on a platform and submitted to clearing.

567 Rule 901(d)(1) requires the reporting side for a security-based swap to report "the counterparty ID or the execution agent ID of each counterparty, as applicable." The Commission notes that an asset manager acts as an execution agent for the clients that receive allocations of an executed bunched order.

the enumerated exceptions to public dissemination in Rule 902(c).[568] The Commission believes that it is appropriate to enhance price discovery, and thus consistent with the statutory provisions governing public dissemination of security-based swaps, to require public dissemination of a single transaction report showing the aggregate notional amount of the bunched order execution (i.e., the size prior to allocation).[569] The public thereby will know the full size of the bunched order execution and that this size was negotiated at a single price. The reporting side for a bunched order execution also must report life cycle events for the bunched order execution—including the termination of the executed bunched order that result from its allocation—to the registered SDR that receives the initial report of the transaction.

When a bunched order execution is allocated, new security-based swaps are created that must be reported to a registered SDR pursuant to Rule 901(a). To clarify that point, the introductory language to final Rule 901(a) states that 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 provided in the rest of the rule.[570] Reporting of the security-based swaps resulting from the allocation of a bunched order execution should assure that the Commission and other relevant authorities know the final placement of risk that results from the bunched order execution.[571] As with any other security-based swap, the

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568 See supra Section VI.

569 See 15 U.S.C. 13(m)(1)(B) (authorizing the Commission to make security-based swap transaction and pricing data available to the public "in such form and at such times as the Commission determines appropriate to enhance price discovery").

570 See supra Section V(C)(5).

571 As stated above, allocation also results in the termination of the bunched order execution, which is a life cycle event of the original transaction. This life cycle event must be reported, in accordance with Rule 901(e), to the registered SDR that receives the report of the original bunched order execution.

reporting side for a security-based swap resulting from an allocation is determined by Rule 901(a). Also, as with any other security-based swap, the reporting side must make the required report within 24 hours of the time that the new security-based swap is created—not within 24 hours of the time of execution of the original bunched order.[572] Under Rule 901(d)(10), the reporting side for a security-based swap resulting from an allocation must report the transaction ID of the executed bunched order as part of the report of the new security-based swap.[573] This requirement will allow the Commission and other relevant authorities to link a report of a bunched order execution to the smaller security-based swaps that result from the allocation of the bunched order execution. Because these related transactions can be linked across registered SDRs using the transaction ID of the bunched order execution, the Commission believes that it is not necessary or appropriate to require that the security-based swaps resulting from the allocation be reported to the same registered SDR that received the transaction report of the original transaction.

The Commission agrees with the commenters who recommended that publicly disseminating the execution of a bunched order—without the allocation information—would

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572 If 24 hours after the time of allocation would fall on a day that is not a business day, the report of the security-based swaps resulting from the allocation would be due by the same time on the next day that is a business day. See Rule 901(j). One commenter requested that Regulation SBSR reflect that the timeframe for reporting security-based swaps resulting from a bunched order execution commence upon receipt of the identity of the counterparties to the bunched order execution by the reporting party during its own business hours. See ISDA IV at 10. The Commission believes that the requirement that the reporting side make the required report within 24 hours of the time that the new security-based swap is created is responsive to this comment.

573 Rule 901(d)(10), as adopted, provides that, if a "security-based swap arises from the allocation, termination, novation, or assignment of one or more existing security-based swaps," the reporting side must report "the transaction ID of the allocated, terminated, assigned, or novated security-based swap(s)," subject to one exception that would not apply to an allocation that is not submitted for clearing.

satisfy the transparency objective of Title VII.[574] Therefore, Regulation SBSR does not require a registered SDR to publicly disseminate reports of the new security-based swaps that result from an allocation. In fact, as described above, Rule 902(c)(7), as adopted, prohibits a registered SDR from disseminating "[a]ny information regarding the allocation of a security-based swap."[575] This approach also accords with the recommendation of the commenter who urged that the aggregate notional amount prior to allocation be disseminated, rather than the individual transaction sizes, in order to preserve anonymity of the asset manager and its clients.[576]

The Commission notes that Rule 907(a)(1), as adopted, requires a registered SDR to establish and maintain policies and procedures that, among other things, enumerate the specific data elements of a security-based swap that must be reported. Registered SDRs should consider describing, as part of these policies and procedures, the means by which persons with a duty to report bunched order executions—and the new security-based swaps that result from the allocation—must report the information required by Rules 901(c) and 901(d).

B. Example: Reporting and Public Dissemination for an Uncleared Bunched Order Execution

The following example demonstrates how Regulation SBSR applies to a bunched order execution that will not be cleared and the security-based swaps that result from the allocation of that bunched order execution. Assume that an asset manager, acting on behalf of several investment fund clients, executes a bunched order with a registered security-based swap dealer.

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574 See ISDA/SIFMA I at 7-8; ISDA IV at 10, 13.

575 See supra Section VI(D).

576 See MFA I at 2-3 ("Counterparties are often aware of an investment manager's standard fund allocation methodology and therefore, reporting transactions at the allocated level . . . will make evident an allocation scheme that other participants can easily associate with a particular investment manager").

Assume that the transaction is not submitted to clearing and there are no indirect counterparties on either side. The execution of the bunched order could occur either on a platform or not.

1. Reporting the Executed Bunched Order

Under Rule 901(a)(2)(ii), as adopted, the registered security-based swap dealer is the reporting side for the bunched order execution because only one side of the transaction includes a registered security-based swap dealer. Under final Rules 901(c) and 901(d), the registered security-based swap dealer has up to 24 hours after the time of execution of the bunched order to report all applicable primary and secondary trade information to a registered SDR. The registered security-based swap dealer must report the entire notional amount of the executed bunched order as part of the Rule 901(c) primary trade information.[577] Rule 902(a) requires the registered SDR to publicly disseminate a single last-sale print showing the aggregate notional amount of the bunched order execution immediately upon receiving the report from the registered security-based swap dealer.

2. Reporting the Allocations

Regulation SBSR also requires reporting to a registered SDR of the security-based swaps that result from allocation of the bunched order execution.[578] As the reporting side for the executed bunched order, the registered security-based swap dealer must make a life cycle event report, in accordance with Rule 901(e), to notify the registered SDR that received the report of the executed bunched order that the trade has been allocated, which terminates the security-based swap. Pursuant to Rule 901(a)(2)(ii), the registered security-based swap dealer also is the

577 See Rule 901(c)(4) (requiring reporting of the notional amount of a security-based swap and the currency in which the notional amount is denominated).

578 See Rule 901(a) (requiring that 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 provided in the rest of the rule).

reporting side for each security-based swap resulting from allocation of the bunched order execution because only one side of the transaction includes a registered security-based swap dealer.[579] If the asset manager provides the allocation information to the registered security-based swap dealer prior to or contemporaneous with the bunched order execution, the registered security-based swap dealer could report the bunched order execution and the security-based swaps that result from its allocation to a registered SDR at the same time.[580] If the asset manager does not provide the allocation information to the registered security-based swap dealer until some time after execution of the bunched order, the registered security-based swap dealer must report each security-based swap resulting from the allocation within 24 hours of the allocation. In either case, the reports of the security-based swaps resulting from the allocation of the bunched order execution must include the counterparty IDs of each investment fund and the notional amount of each security-based swap resulting from the allocation. In either case, Rule 901(d)(10) requires each report of a security-based swap resulting from the allocation to include the transaction ID of the bunched order execution so that the Commission and other relevant authorities will have the ability to link each resulting transaction with the initial bunched order execution.

IX. Inter-Affiliate Security-Based Swaps

A. Background and Summary of Final Rule

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579 The Commission assumes that the investment funds would not be registered security-based swap dealers for purposes of these examples.

580 Even though the reports could be made at the same time, Rule 901(a) requires a report of a bunched order execution and an associated allocation to be maintained as separate records by a registered SDR because the execution of the bunched order and the allocations are separate reportable security-based swap transactions.

Regulation SBSR, as initially proposed, did not contemplate any exception from reporting for inter-affiliate security-based swaps. In the Regulation SBSR Proposing Release, the Commission expressed the preliminary view that a report of an inter-affiliate security-based swap should be publicly disseminated with an indicator identifying the transaction as an inter-affiliate security-based swap.[581] The Commission noted that, for such transactions, "there might not be an arm's length negotiation over the terms of the [security-based swap] transaction, and disseminating a report of the transaction without noting that fact would be inimical to price discovery."[582] Rule 907(a)(4), as proposed, would have required a registered SDR to establish and maintain written policies and procedures describing, among other things, how reporting parties would report—and consistent with the enhancement of price discovery, how the registered SDR would publicly disseminate—security-based swap transactions that do not involve an opportunity to negotiate any material terms, other than the counterparty.[583]

The Commission received several comments regarding inter-affiliate security-based swaps in response to the Regulation SBSR Proposing Release and discussed those comments in the Cross-Border Proposing Release.[584] Although the Cross-Border Proposing Release did not propose to revise any portion of Regulation SBSR with regard to the treatment of inter-affiliate security-based swaps, the Commission provided some preliminary thoughts on how Regulation SBSR could be applied to them, particularly as regards to public dissemination, in a manner that could address commenters' concerns without taking the step of suppressing all inter-affiliate

581 See 75 FR at 75214-15.

582 Id. at 75215.

583 See id. at 75237.

584 See 78 FR at 31069-72.

transactions from public dissemination.[585] In response to the Cross-Border Proposing Release, the Commission received additional comments, described below, regarding the application of Regulation SBSR to inter-affiliate security-based swaps.

Regulation SBSR, as adopted, applies to all security-based swaps, including inter-affiliate security-based swaps. The Commission has considered, but is not adopting, any exemption from Regulation SBSR's regulatory reporting or public dissemination requirements for inter-affiliate security-based swaps. Therefore, Rules 901(c) and 901(d) require reporting of inter-affiliate security-based swaps; Rule 901(i) requires reporting of historical inter-affiliate security-based swaps; and Rule 902 requires public dissemination of inter-affiliate security-based swaps. Furthermore, Rule 907(a)(4) requires a registered SDR to establish and maintain policies and procedures that, among other things, identify characteristics of or circumstances associated with the execution or reporting of a security-based swap that could, in the fair and reasonable estimation of the registered SDR, cause a person without knowledge of such characteristics or circumstances to receive a distorted view of the market. As discussed in Section VI(G), supra, the Commission generally believes that a registered SDR should establish a flag for inter-affiliate security-based swaps to help market observers better understand the information that is publicly disseminated.

B. Discussion of Comments

1. Regulatory Reporting of Inter-Affiliate Security-Based Swaps

Most of the comments relating to inter-affiliate security-based swaps, in response to both the initial proposal and the Cross-Border Proposing Release (which re-proposed Regulation SBSR in its entirety), pertained to public dissemination. However, one commenter stated that,

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585 See id. at 31071-72.

because inter-affiliate transactions should not be publicly disseminated, it also should be unnecessary to "collect" information about them.[586] Another commenter on the Regulation SBSR Proposing Release argued that, for a foreign entity registered as a bank holding company and subject to the consolidated supervision of the Federal Reserve System, the reporting of inter-affiliate transactions would be superfluous because the Federal Reserve has "ample authority to monitor transactions among affiliates,"[587] suggesting that even regulatory reporting of inter-affiliate security-based swaps should not be necessary.[588] In the Cross-Border Proposing Release, the Commission specifically asked whether commenters believed that cross-border inter-affiliate security-based swaps should be excluded from the regulatory reporting requirements of Regulation SBSR and, if so, under what circumstances such security-based swaps should be excluded.[589] No commenters on the Cross-Border Proposing Release responded to this particular question pertaining to regulatory reporting.

The Commission continues to believe that the Commission and other relevant authorities should have ready access to information about the specific counterparties that hold positions in all security-based swaps subject to Regulation SBSR. While it is true that the Federal Reserve or perhaps another relevant authority might exercise consolidated supervision over a group, such supervision might not provide the Commission and other relevant authorities with current and specific information about security-based swap positions held by the group's subsidiaries. As a

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586 Cravath Letter at 9.

587 Japanese Banks Letter at 5.

588 See also Multiple Associations IV at 6 (stating that "many of the transaction-based requirements in Title VII, such as. . . trade reporting rules, generally do not further legislative or regulatory purposes when applied to inter-affiliate swaps," but without specifying whether the comment was with respect to regulatory reporting, public dissemination, or both).

589 See 78 FR at 31072.

result, it would likely be more difficult for relevant authorities to conduct general market analysis or surveillance of market behavior, and could present difficulties during a crisis, when ready access to accurate and timely information about specific risk exposures might be crucial. Furthermore, the statutory provisions that require regulatory reporting of security-based swap transactions state that "each" security-based swap shall be reported; these statutory provisions do not by their terms limit the reporting requirement to transactions having particular characteristics (such as being negotiated at arm's length).[590] Even absent these constraints, for the reasons described above, the Commission does not believe that an exemption from regulatory reporting for these transactions would be appropriate. Therefore, Regulation SBSR subjects inter-affiliate security-based swaps to regulatory reporting.[591]

2. Public Dissemination of Inter-Affiliate Security-Based Swaps

As discussed below, some commenters raised concerns regarding the public dissemination of inter-affiliate security-based swaps. After carefully considering the issues raised by these commenters, the Commission has determined to adopt Regulation SBSR with no

590 Section 13A(a)(1) of the Exchange Act, 15 U.S.C. 78m-1(a)(1), provides that each security-based swap that is not accepted for clearing shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act, 15 U.S.C. 78m(m)(1)(G), provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR.

591 In addition, one group of commenters acknowledged that "a number of rules that apply to the core operations of a registered entity will perforce apply to such entity's inter-affiliate swap transactions and could further Dodd-Frank policy purposes." Multiple Associations Letter at 9. These commenters stated that inter-affiliate transactions would need to be taken into account in calculating an entity's capital requirements, and that internal recordkeeping requirements are essential to the oversight of the security-based swap business. See id. The Commission notes that regulatory reporting of all security-based swaps, including inter-affiliate security-based swaps, will assist the Commission and other relevant authorities in overseeing compliance with these capital and recordkeeping requirements, as the regulatory report of an entity's security-based swap activity could provide an external check of the internal records of such entities' positions and activities.

exemption from the public dissemination requirements for inter-affiliate security-based swaps.

As a preliminary matter, the Commission notes that, once a security-based swap transaction has been reported to a registered SDR, the counterparties assume no additional burdens associated with public dissemination of the transaction. That function will be carried out solely by the registered SDR. Thus, requiring registered SDRs to publicly disseminate security-based swaps, including inter-affiliate security-based swaps, will not increase the compliance burden on security-based swap counterparties.

One commenter argued that inter-affiliate security-based swaps should not be subject to public dissemination because "public reporting could confuse market participants with irrelevant information" and suggested that "the Commissions collect data on these transactions but not require dissemination to the public at large."[592] Another commenter stated that an inter-affiliate transaction "does not contain any additional price information beyond that contained in the transaction with the customer."[593] One group of commenters argued that publicly disseminating inter-affiliate transactions "will distort the establishment of position limits, analysis of open interest, determinations of block trade thresholds and performance of other important regulatory analysis, functions and enforcement activities that require an accurate assessment of the [security-based] swaps market."[594] These commenters stated, further, that inter-affiliate security-based swaps "could be required to be publicly reported in multiple jurisdictions, even though

592 Cleary II at 17. See also SIFMA/FIA/Roundtable Letter at A-44 (stating that "real-time reporting of inter-affiliate [security-based swaps] ... would distort market information and thus have a detrimental market and commercial impact").

593 ISDA/SIFMA I at 13. See also ISDA IV at 13 (recommending that inter-affiliate trades should not be subject to public dissemination).

594 Multiple Associations Letter at 11-12. See also ISDA I at 5 (stating, in the context of pre-enactment security-based swaps, that inter-affiliate security-based swaps should not be subject to reporting).

they are not suitable for reporting in any jurisdiction."[595]

An accurate assessment of the security-based swap market will be necessary for a wide range of functions, potentially including—as noted by this group of commenters—analysis of open interest and the establishment of block trade thresholds.[596] The Commission believes that users of security-based swap market data—whether regulators, SDRs, market participants, or the public at large—should have an accurate and undistorted view of the market. However, it does not follow that public dissemination of inter-affiliate security-based swaps will necessarily prevent an accurate assessment of the security-based swap market.

The need to distinguish reports of initial transactions from subsequent inter-affiliate transactions exists whether or not the latter are publicly disseminated. As noted above, the Commission is requiring each registered SDR to adopt, among others, policies and procedures for flagging transaction reports that have special circumstances.[597] This flagging mechanism is designed to provide regulators with a more accurate view of the security-based swap market, and the same mechanism can be applied to publicly disseminated last-sale reports to give market

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595 Multiple Associations Letter at 16.

596 See id. at 11-12.

597 These policies and procedures could address not only reporting of whether a security-based swap is an inter-affiliate transaction, but also whether the initial security-based swap was executed in a jurisdiction with public dissemination requirements. This could be either the United States or another jurisdiction that imposes last-sale transparency requirements similar to those in Regulation SBSR. Further, these policies and procedures also could address whether to indicate the approximate time when the initial security-based swap was executed. For example, there could be condition flags for the initial security-based swap having been executed within the past 24 hours, between one and seven days before, or longer than seven days before. An indication that the initial trade was executed less than 24 hours before could provide significant price discovery value, while an indication that the initial trade was executed over a week before could, all things being equal, have less. However, even information about a trade executed over a week ago (or more) could have price discovery value for security-based swaps that trade infrequently.

observers the same view. The Commission continues to believe that the commenters' concerns about the potentially limited price discovery value of inter-affiliate security-based swaps can be addressed through the public dissemination of relevant data that flags such limitations, rather than suppressing these transactions from public dissemination entirely. Additionally, even if the report of an initial security-based swap transaction has been publicly disseminated in another jurisdiction, the Commission believes that it would be preferable to disseminate a report of the subsequent inter-affiliate transaction with an appropriate condition flag rather than suppressing a report of the inter-affiliate transaction from public dissemination through a registered SDR. Public dissemination of such a transaction by a registered SDR would help to assure that information concerning the transaction was readily available to participants in the U.S. market and other market observers.

One group of commenters argued that "use of inter-affiliate [security-based swaps] not only allows risks to reside where they are more efficiently managed, but it also has a net positive effect on an institution's assets and liquidity, as well as on its efficiency in deploying capital. For these reasons, we believe that there should be an inter-affiliate exemption from the public dissemination requirements."[598] Another commenter raised similar concerns, arguing that "public reporting of inter-affiliate transactions could seriously interfere with the internal risk management practices of a corporate group" and that "[p]ublic disclosure of a transaction between affiliates could prompt other market participants to act in a way that would prevent the corporate group from following through with its risk management strategy by, for instance, causing adverse price movements in the market that the risk-carrying affiliate would use to

598 SIFMA/FIA/Roundtable Letter at A-44.

hedge."[599] The Commission agrees generally that corporate groups should engage in appropriate risk management practices. However, the Commission does not agree that Regulation SBSR, as adopted, is inimical to effective risk management. The Commission notes that, during the first phase of Regulation SBSR, all security-based swaps—regardless of size—must be reported within 24 hours from the time of execution and—except with regard to transactions falling within Rule 902(c)—immediately publicly disseminated. As discussed in Section VII, supra, this reporting timeframe is designed, in part, to minimize any potential for market disruption resulting from public dissemination of any security-based swap transaction during the interim phase of Regulation SBSR. The Commission anticipates that, during the interim period, it will collect and analyze data concerning the sizes of transactions that potentially affect liquidity in the market. If the Commission ultimately determines that some form of block trade exception to real-time public dissemination is appropriate, an inter-affiliate security-based swap of block size would be able to avail itself of that exception. The Commission sees no basis for concluding, at this time, that inter-affiliate security-based swaps are more difficult to hedge than other types of security-based swaps, or that the hedging of these transactions presents unique concerns that would not also arise in connection with the hedging of a security-based swap that was not an inter-affiliate transaction. Therefore, the Commission does not agree with the commenters' concern that public dissemination of inter-affiliate security-based swaps will impede the ability of corporate groups to hedge.

Another group of commenters argued that "affiliates often enter into these swaps on terms linked to an external trade being hedged. If markets have moved before the inter-affiliate trade is entered into on the SEF or reported as an off-exchange trade, market participants could

[599] Cleary II at 17.

also misconstrue the market's true direction and depth."[600] This comment suggests that last-sale reports of transactions that appear out of the order in which the transactions in fact occurred could mislead market observers. The Commission shares this concern but does not conclude that the appropriate response is to suppress all inter-affiliate transactions from public dissemination. The Commission believes instead that this issue can be addressed by requiring the dissemination of the date and time of execution on the last-sale report.[601] This requirement is designed to allow market observers to construct a time-sequenced record of all transactions in the security-based swap market and thereby counteract the possibility that certain transactions could be reported and publicly disseminated out of the order in which they were in fact executed.

Some commenters stated that inter-affiliate security-based swaps "are typically risk transfers with no market impact."[602] This statement does not exclude the possibility that some inter-affiliate security-based swaps might have a market impact. The Commission sees no basis to conclude at this time that inter-affiliate security-based swaps do not provide price discovery value or other useful information to market observers. Market observers might be able to discern useful information from the last-sale reports of some inter-affiliate security-based swaps, and the Commission believes that market observers should be given the opportunity to do so—particularly given the Title VII mandate that all security-based swaps shall be publicly disseminated. The value of this information to market observers is unknown at this time, because market observers have never before had the opportunity to view comprehensive last-sale information from the security-based swap market. Suppressing all inter-affiliate security-based

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600 See Multiple Associations Letter at 12.

601 See Rule 901(c)(2).

602 SIFMA/FIA/Roundtable Letter at A-44; Multiple Associations Letter at 11 (emphasis added).

swaps from public dissemination would eliminate any potential that market observers could develop ways to utilize this information. Thus, under the final rules, market observers who wish to evaluate the entire record of transactions, including inter-affiliate transactions, will have the opportunity to do so. As discussed above, the Commission disagrees with the commenters who argued that "[r]equiring real-time reporting of inter-affiliate [security-based swaps] . . . would distort market information and thus have a detrimental market and commercial impact."[603] Because such transactions will be flagged, market observers can simply—if they wish—remove from their analysis any transactions having an inter-affiliate flag.

The Commission sees one circumstance where public dissemination of an inter-affiliate transaction could have significant price discovery value: when the initial transaction is effected in a foreign jurisdiction without a public dissemination requirement and is not otherwise subject to public dissemination under Regulation SBSR, and the subsequent inter-affiliate transaction—between one of the original counterparties and one of its affiliate—would be publicly disseminated if it fell within Rule 908(a)(1). Commenters' views that public dissemination of an inter-affiliate transaction would be duplicative and distorting are premised on the view that the initial transaction is, in fact, publicly disseminated, which may not always be the case.[604] Therefore, public dissemination of the subsequent inter-affiliate transaction might be the only way for the market to obtain any pricing information about the related pair of transactions.[605] In

603 SIFMA/FIA/Roundtable Letter at A-44.

604 See Multiple Associations Letter at 12 ("The market-facing swaps already will have been reported and therefore, to require that inter-affiliate swaps also be reported will duplicate information").

605 In addition, even if the initial transaction is publicly disseminated, the Commission does not believe that publicly disseminating the second, inter-affiliate transaction would cause observers to obtain a distorted view of the market, as long as the second transaction is flagged as an inter-affiliate transaction. See supra Section VI(G).

the Cross-Border Proposing Release, the Commission specifically noted this circumstance and requested comment on it.[606] No commenters responded.

Finally, one commenter on the Cross-Border Proposing Release argued that the Commission should propose a comprehensive rule regarding inter-affiliate security-based swaps "before finalizing the substantive underlying rules governing the SBS markets."[607] The commenter reasoned that "a separate proposed rule, like the Cross-Border Proposal, is necessary to ensure that market participants are accorded sufficient opportunity to comment on the interplay between the Commission's proposed rules and inter-affiliate trades."[608]

The Commission notes that Regulation SBSR, as initially proposed, did not contemplate any exception for inter-affiliate security-based swaps, and the Regulation SBSR Proposing Release discussed at various points how proposed Regulation SBSR would apply to inter-affiliate transactions.[609] The Commission received comments regarding the reporting of inter-affiliate transactions in response to both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release. Commenters on the Cross-Border Proposing Release's discussion of the application of Regulation SBSR to inter-affiliate security-based swaps did not raise any new issues that had not already been raised in response to the Regulation SBSR Proposing Release. In addition, as noted above, the Commission discussed in the Cross-Border Proposing Release the comments regarding inter-affiliate transactions submitted in response to the Regulation SBSR Proposing Release.[610] After carefully considering all of these comments, the Commission

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606 See 78 FR at 31072.

607 SIFMA/FIA/Roundtable Letter at A-28.

608 Id. at A-30.

609 See 75 FR at 75215, 75234, 75237.

610 See 78 FR at 31069-72.

believes that commenters had sufficient opportunity to present their views on inter-affiliate transactions in Regulation SBSR and therefore it is appropriate at this time to adopt final rules relating to regulatory reporting and public dissemination of security-based swaps, including inter-affiliate security-based swaps.

X. Rule 903—Use of Codes

Regulation SBSR, as adopted, permits or, in some instances, requires security-based swap counterparties to report coded information to registered SDRs. These codes, known as unique identification codes ("UICs"), will be used to identify products, transactions, and legal entities, as well as certain business units and employees of legal entities.[611] Rule 903 of Regulation SBSR establishes standards for assigning and using coded information in security-based swap reporting and dissemination to help ensure that codes are assigned in an orderly manner and that regulators, market participants, and the public are able to interpret coded information stored and disseminated by registered SDRs.

A. Proposed Treatment of Coded Information

As initially proposed, Regulation SBSR would have established a process for assigning UICs in Rule 900 and addressed the standards for using coded information in Rule 903. Proposed Rule 900 would have provided that a "unique identification code" or "UIC" would be the unique code assigned to a person, unit of a person, or product by or on behalf of an internationally recognized standards-setting body ("IRSB") that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. The proposed definition of "UIC" further would have provided that, if there existed no IRSB meeting these

[611] See supra Section II (describing UICs that must be reported to registered SDRs pursuant to Regulation SBSR).

criteria, a registered SDR would have been required to assign all necessary UICs using its own methodology. Similarly, if an IRSB meeting the criteria existed but had not assigned a relevant UIC, the registered SDR would have been required to assign that UIC using its own methodology. When the Commission re-proposed Regulation SBSR as part of the Cross-Border Proposing Release, it designated the definition of "UIC" as re-proposed Rule 900(nn) but made no changes to the substance of the definition.[612]

Rule 903, as originally proposed, would have permitted the use of codes in place of certain data elements for purposes of reporting and publicly disseminating the information required under proposed Rules 901 and 902 of Regulation SBSR, provided that the information to interpret such codes is "widely available on a non-fee basis." When the Commission re-proposed Rule 903, it replaced the term "reporting party" with "reporting side" but otherwise made no substantive revisions to the rule.[613]

B. Comments Received and Final Rule 903

1. Relocation of UIC Provisions into Rule 903

Final Rule 903 is divided into paragraphs (a) and (b). Rule 903(a) sets out the requirements that registered SDRs must follow when assigning UICs. Similar requirements were initially proposed as part of the definition of "UIC" in Rule 900, and re-proposed without revision in Rule 900(nn). The Commission now believes that it would be more consistent with the overall structure of Regulation SBSR to move any substantive requirements from the definitions rule (Rule 900) and into an operative rule. Therefore, the Commission's substantive

612 See 78 FR at 31211-12.

613 See id. at 31213.

requirements for a registered SDR's use of UICs are now located in final Rule 903.[614] As described below, the Commission is adopting these requirements substantially as proposed, but with certain changes as described below. In particular, Rule 903(a), as adopted, includes new language regarding Commission recognition of international systems for assigning UICs. In addition, final Rule 903(a) provides that, if the Commission has recognized such a system that assigns UICs to persons, each participant of a registered SDR 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 Rule 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.

Final Rule 903(b) imposes certain restrictions on how coded information may be reported and publicly disseminated. Rule 903(b) substantially incorporates the earlier versions of Rule 903, with certain conforming and technical changes described below.

2. Comments Regarding UICs and Final Rule 903(a)

The Commission received several comments on the proposed rules relating to UICs and the development of internationally recognized LEIs generally. One commenter expressed concern that, absent a methodology outlined by a standard-setting body, multiple UICs could be assigned by different regulators to the same financial entity, thereby creating compliance

614 Accordingly, the Commission is now adopting a simplified definition of "UIC." See Rule 900(qq) (defining "UIC" as "a unique identification code assigned to a person, unit of a person, product, or transaction"). See also infra Section X(B)(2) (discussing final Rule 903(a)).

burdens, operational difficulties, and opportunities for confusion.[615] Another commenter believed that, absent internationally recognized LEIs, requiring SDR-specific UICs would create inconsistencies among different SDRs.[616] This commenter recommended that the Commission postpone this requirement until an international taxonomy exists that can be applied consistently.[617] A third commenter stated that it is imperative that a single source of reference data and unambiguous identifiers be established.[618] A fourth commenter argued that "[s]ignificant progress in establishing the GLEIS has been made to date, and the time for further expanding the use of the LEI through rulemaking is favorable."[619] A fifth commenter noted that the CFTC's swap reporting rules require the use of LEIs and urged the Commission, for the sake of clarity and consistency, to replace its reference to "unique counterparty identifiers" with "Legal Entity Identifiers," unless the Commission's rule was intended to include identifiers beyond LEIs.[620] A sixth commenter suggested that the rules reflect primary use of the LEI as a

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615 See ICI I at 6.

616 See DTCC V at 14 (also noting that, while global standards for identification codes are likely to exist for some data fields, certain global identifiers will not exist).

617 See id. See also Bloomberg Letter at 1 ("an identifier system should be comprehensive and global").

618 See Benchmark Letter at 1.

619 See letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA, to the Honorable Jacob J. Lew, Chairman, Financial Stability Oversight Council, dated April 11, 2014, available at http://www.sifma.org/newsroom/2014/sifma_pushes_for_broad_use_of_leis_to_promote_financial_stability/ (last visited January 13, 2015). In a prior comment letter, this commenter recommended that "industry utilities" be considered for assigning unique IDs for legal entities/market participants, as well as for transactions and products. See ISDA/SIFMA I at 8. See also SWIFT Letter at 2 (expressing support for a global standard for identifying security-based swap market participants); DTCC X (stating that there has been significant adoption globally on transaction ID, product ID, and LEI standards).

620 See Levin Letter at 4.

party identifier and the need to use an LEI "when available," recognizing that a reporting party may request but cannot compel its counterparties to obtain an LEI.[621]

The Commission is adopting in Rule 903(a) the provisions relating to the process for assigning UICs largely as proposed and re-proposed, but—reflecting the comments described above—is including two new requirements: (1) that the Commission recognize an IRSS before the use of UICs from that IRSS becomes mandatory under Regulation SBSR; and (2) that, if the Commission has recognized an IRSS that assigns UICs to persons, each participant of a registered SDR shall obtain a UIC from or through that IRSS. As noted below, the Commission is recognizing the GLEIS as an IRSS for assigning LEIs. Final Rule 903(a) states: "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 requirements 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

621 See ISDA IV at 12. Regulation SBSR, as adopted, does not compel a counterparty on a reporting side to a security-based swap to obtain an LEI for a counterparty on the other side of the transaction.

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."[622]

The Commission shares commenters' desire to have identifiers that are widely recognized, which would increase efficiency at both the SDR and market participant level. To avoid confusion about when an IRSS meets the standards of Rule 903, the Commission has modified the rule to provide that UICs issued by a particular IRSS would not become mandatory under Regulation SBSR unless the Commission has recognized the IRSS. As detailed below, the Commission is recognizing the GLEIS, applying the standards provided in Rule 903. The Commission will apply the standards provided in Rule 903 to any future assessment of whether an IRSS should be recognized as a provider of UICs for purposes of Regulation SBSR. Specifically, the Commission will consider whether the IRSS imposes fees and usage restrictions on persons that obtain UICs for their own usage that are fair and reasonable and not unreasonably discriminatory, and whether the information necessary to interpret the codes assigned by or through the IRSS is widely available to users of the information on a non-fee basis and without usage restrictions.[623]

Since Regulation SBSR was initially proposed in 2010, significant strides have been made in the development of a globally recognized LEI. The Commission hereby recognizes the

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622 See infra Section X(B)(3) (explaining the Commission's rationale for adopting final Rule 903(a)).

623 See infra Section X(B)(3) (discussing final Rule 903(b)).

GLEIS, which operates under a regulatory oversight committee ("ROC"), as an internationally recognized standards-setting system ("IRSS")[624] that meets the requirements of Rule 903 of Regulation SBSR. The Commission notes that the LEI Regulatory Oversight Committee ("LEI ROC") currently includes members that are official bodies from over 40 jurisdictions.[625] LEIs are being issued by over 30 pre-local operating units ("pre-LOUs") around the globe, including the Global Markets Entity Identifier ("GMEI") Utility in the United States.[626] Furthermore, the Commission believes that the GLEIS imposes fees and usage restrictions on persons that obtain UICs for their own usage that are fair and reasonable and not unreasonably discriminatory under Rule 903(a).[627] The Commission also understands that the GLEIS does not impose any fees for usage of or access to its LEIs, and that all of the associated reference data needed to understand,

624 Regulation SBSR, as proposed and re-proposed, would have employed the term "internationally recognized standards-setting body" rather than "internationally recognized standards-setting system," which is used in Regulation SBSR, as adopted. The Commission made this revision to better reflect the process of LEI issuance. LEIs are being assigned by a number of different bodies in different jurisdictions being coordinated through a global system, rather than by a single body.

625 The Commission is a member of the Executive Committee of the LEI ROC. The LEI ROC is a stand-alone committee established pursuant to recommendations by the Financial Stability Board ("FSB") that was subsequently endorsed by the Group of 20 nations. See Financial Stability Board ("FSB"), A Global Legal Entity Identifier for Financial Markets (June 8, 2012), available at http://www.leiroc.org/publications/gls/roc_20120608.pdf (last visited September 22, 2014); http://www.treasury.gov/resource-center/international/g7-g20/Documents/G20%20Ministerial%20Communique%20November%204-5-2012-Mexico%20City.pdf (last visited September 22, 2014).

626 See https://www.gmeiutility.org/index.jsp.

627 See FSB, A Global Legal Entity Identifier for Financial Markets, at 20 ("Fees, where and when imposed, should be modest and set on a non-profit cost-recovery basis") and at 20, note 20 ("It is possible that some jurisdictions could be willing to fund the LEI issuance from public sources and provide LEIs to its local entities free of charge"). As of December 26, 2014, the cost of obtaining an LEI from the GMEI Utility was $200, plus a $20 surcharge for the LEI Central Operating Unit. The annual cost of maintaining an LEI from the GMEI Utility was $100, plus a $20 surcharge for the LEI Central Operating Unit. See https://www.gmeiutility.org/frequentlyAskedQuestions.jsp.

process, and utilize the LEIs are widely and freely available and not subject to any usage restrictions.[628] Therefore, the Commission believes that the LEIs issued by or through the GLEIS meet the standards of Rule 903(b), which are discussed in the section immediately below. The Commission also notes that it would expect to revisit its recognition of the GLEIS if the GLEIS were to modify its operations in a manner that causes it no longer to meet the standards of Rule 903. The Commission believes that the provisions of Rule 903—coupled with the Commission's recognition of the GLEIS—will facilitate the reporting and analysis of security-based swap transaction data, because (1) each participant of a registered SDR must be identified using the same LEI for all transactions reported pursuant to Regulation SBSR, and regardless of which registered SDR holds records of its transactions, and (2) a participant, when it acts as guarantor of a direct counterparty to a security-based swap that is subject to Rule 908(b), is required to obtain an LEI from or through the GLEIS if the direct counterparty does not already have an LEI and if the system permits third-party registration without a requirement to obtain prior permission of the direct counterparty.[629]

As noted above, one commenter recommended that, for clarity and consistency with the CFTC's swap reporting rules, the Commission refer to LEIs, rather than UICs, unless the

[628] See, e.g., http://www.financialstabilityboard.org/wp-content/uploads/r_120608.pdf?page_moved=1, at 9 ("Access to the LEI and associated reference data will be free and open to all users, and there should be no 'bundling' of other services alongside the LEI by providers which forces users to pay directly or indirectly for the LEI"). In addition, LEI information can be downloaded at no cost from pre-LOU websites. See, e.g., https://www.gmeiutility.org/ (providing a link for downloading an FTP file containing LEI information).

[629] The Commission understands that the GLEIS permits one firm to register a second firm when the first firm has a controlling interest over the second. See https://www.gmeiutility.org/frequentlyAskedQuestions.jsp ("Who can register an entity for the LEI?").

Commission intended to include identifiers beyond LEIs.[630] Although the Commission agrees that the use of the term "LEI" would provide greater consistency with the CFTC's rules, Regulation SBSR continues to refer to UICs, rather than LEIs, for two reasons. First, as the commenter suggested, the term "UIC" in Regulation SBSR includes identifiers in addition to LEIs, such as identifiers for products, transactions, business units of legal entities (i.e., branches and trading desks), and individual traders.[631] Second, the GLEIS does not extend to natural persons or sub-legal entity business units, such as a branches and trading desks. Because at present the Commission has not recognized an IRSS for these types of UICs, a registered SDR is required to assign UICs to these entities using its own methodology. Thus, because Regulation SBSR refers to identifiers in addition to LEIs, Regulation SBSR continues to refer to UICs rather than LEIs.

The Commission acknowledges that, under final Rule 903(a), different registered SDRs could, in theory, assign different UICs to the same person, unit of a person, or product. Inconsistent UICs could require the Commission and other relevant authorities to map the UICs assigned by one registered SDR to the corresponding UICs assigned by other registered SDRs to obtain a complete picture of the market activity pertaining to a particular person or business unit.[632] Although mapping may present certain challenges, the Commission believes that this

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630 See Levin Letter at 4.

631 Rule 900(qq), as adopted, defines UIC to mean "a unique identification code assigned to a person, unit of a person, product, or transaction."

632 To avoid this possibility with respect to the identification of legal persons that are participants of at least one registered SDR, the Commission has recognized the GLEIS—by or through which LEIs are issued—as an IRSS that meets the criteria of Rule 903. The Commission is requiring that, if the Commission has recognized such a system that assigns UICs to persons, each participant of a registered SDR shall obtain a UIC from or through that system. The Commission notes that a single person may act in various capacities in the security-based swap market. For example, a person could be a direct

approach is better than the likely alternative of having market participants assign UICs to identify persons, units of persons, or products according to their own methodologies.[633] In other words, the Commission believes that UICs, even if they are SDR-specific, will provide a streamlined way of reporting, disseminating, and interpreting security-based swap information.[634] The Commission believes that requiring registered SDRs to develop their own UICs—but only for UICs that are not assigned by or through an IRSS that has been recognized by the Commission—will result in less confusion than the currently available alternatives, such as allowing each reporting side to utilize its own nomenclature conventions, which would subsequently have to be normalized by registered SDRs themselves or by the Commission.

The Commission further understands that, at this time, neither the GLEIS nor any other IRSS has assigned product IDs or established a methodology for assigning transaction IDs. Therefore, a registered SDR also is required under Rule 903(a) to assign, or endorse a methodology for assigning, product IDs and transaction IDs. One commenter recommended that "industry utilities" be considered for assigning unique IDs, including transaction IDs and product IDs.[635] With respect to product IDs, Rule 903(a) provides a registered SDR with flexibility to

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counterparty with respect to some transactions while acting as a broker with respect to other transactions. If that person is a participant of a registered SDR, that person must obtain an LEI from or through the GLEIS to identify itself in all applicable security-based swap transaction reports, regardless of the capacity in which the person acted with respect to a particular transaction.

633 The Commission notes, however, that Regulation SBSR does not prohibit one registered SDR from utilizing the UICs that were originally assigned by another SDR.

634 See infra Section XIX (discussing regulatory implications of having multiple registered SDRs).

635 See ISDA/SIFMA I at 8. See also ISDA IV at 12 (requesting that the Commission acknowledge the ISDA OTC Taxonomy as an acceptable product ID for reporting under Regulation SBSR and recognize that reporting parties, as opposed to SDRs, are generally best positioned to assign these values). In the context of the development of product IDs,

assign a product ID created by an industry utility, in the absence of an IRSS recognized by the Commission that issues product IDs. Thus, if an industry utility developed product IDs,[636] a registered SDR could endorse that industry utility as the means for assigning such product IDs, and require use of those product IDs for reporting and publicly dissemination transaction information in its policies and procedures required by Rule 907(a).

With respect to transaction IDs, a registered SDR—in the absence of an IRSS recognized by the Commission that has endorsed a methodology for assigning transaction IDs—is required to assign transaction IDs or endorse a methodology for assigning transaction IDs.[637] A number of commenters recommended that Regulation SBSR permit transaction IDs generated by persons other than a registered SDR.[638] The Commission generally agrees with these comments, and has revised the UIC provisions relating to transaction IDs as follows. Although Rule 900, as proposed and re-proposed, would have defined "transaction ID" as "the unique identification code assigned by registered security-based swap data repository to a specific security-based swap," the definition of "UIC" in proposed Rule 900(nn) did not mention transaction IDs. The final definition of "UIC" includes transaction IDs in addition to identification codes for persons, units of persons, and products. The final definition of "transaction ID" is "the UIC assigned to a specific security-based swap transaction," without the limitation that it be assigned by a

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the Commission is not at this time making any determination as to whether the ISDA OTC Taxonomy system constitutes an IRSS under Regulation SBSR, or whether the product IDs issued under the ISDA OTC Taxonomy system meet the criteria of Rule 903.

636 See id.

637 See Rule 903(a). See also supra Section III(B)(2) (discussing transaction IDs).

638 See DTCC V at 14 (recommending that the Commission allow flexibility for a registered SDR to accept transaction IDs already generated by the reporting side or to assign transaction IDs where such request is made); ISDA III at 2; ISDA IV at 11; Tradeweb Letter at 5 (arguing that SB SEFs and exchanges should be permitted to assign transaction IDs).

registered SDR. The Commission agrees with these commenters that requiring a registered SDR to use transaction IDs assigned only by a registered SDR would not be practical. The Commission believes that it would be more efficient and consistent with current practice in the security-based swap market to allow transaction IDs to be assigned at or shortly after execution, by a counterparty, platform, or post-trade processor. Final Rule 903(a) includes language that contemplates that an IRSS or registered SDR may "endorse a methodology for assigning transaction IDs." This formulation makes clear that transaction IDs need not be assigned by an IRSS or registered SDR itself, but can be assigned by security-based swap counterparties, platforms, or post-trade processors using the IRSS's or registered SDR's methodology. Any entity that assigns the transaction ID must do so in accordance with the methodology endorsed by a recognized IRSS or, in the absence of a recognized IRSS that has endorsed a methodology for assigning transaction IDs, by the registered SDR that will receive the report of the transaction.[639]

Two commenters addressed the types of entities that can act as IRSSs. One of these commenters recommended that for-profit entities be permitted to act as reference data registration authorities,[640] while the other commenter argued that LEIs should be issued by a not-for-profit entity that operates on the principle of cost recovery, and that the industry should determine the appropriate model for cost recovery.[641] The Commission does not believe that it is necessary or appropriate to specify the type of entity—for-profit or non-profit—that can establish

639 See Rule 903(a). Thus, for example, a counterparty or platform must not generate 40-character transaction IDs if the registered SDR requires and can accept only 32-character transaction IDs.

640 See GS1 Proposal at 53.

641 See ISDA/SIFMA I at 8.

or operate an IRSS. Whichever the case, final Rule 903(a) specifies that the UICs issued by an IRSS may be used under Regulation SBSR only if the IRSS that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory and that meets the criteria of Rule 903(b) has been recognized by the Commission. In other words, the overall character of the IRSS's operation does not matter for purposes of compliance with Regulation SBSR (i.e., whether it is a for-profit or non-profit entity) so long as any fees and usage restrictions imposed with respect to UICs meets the requirements of Rule 903(a). In addition, any codes used as, or as part of, UICs under Regulation SBSR must meet the standards of Rule 903(b), which are described below.

3. Comments on Proposed Rule 903 and Final Rule 903(b)

Commenters expressed differing views regarding whether the providers of UICs—and product IDs in particular—should be able to charge fees for the codes or for the information necessary to interpret the codes. One commenter supported the proposed requirement that information necessary to interpret reported or publicly disseminated codes be available free of charge.[642] However, a second commenter—a provider of product identification codes for security-based swaps—stated that Regulation SBSR should not require product identifiers to be freely available.[643] This commenter noted that maintaining a reliable identification system for security-based swaps requires a substantial level of investment, and recommended that the providers of product identification codes be permitted to charge commercially reasonable fees

642 See Barnard I at 3 (noting that making this information available for free could eliminate confusion).

643 See Markit I at 6 (stating that identifier systems provided on an automated basis and/or for free "generally are not adequate for the intended goals").

for developing and maintaining the codes.[644] A third commenter recommended that existing licensing codes be used for product IDs to the extent possible, because using existing codes would be easier for registered SDRs; the use of new codes would require ongoing maintenance and the development of specific processes for reporting, which could result in poorer quality data submissions.[645]

After careful consideration of these comments, the Commission continues to believe that the information necessary to interpret any codes used by registered SDRs must be "widely available on a non-fee basis." Thus, the Commission is adopting this key feature of Rule 903(b) as proposed and re-proposed. A primary goal of Title VII is to use reporting and public dissemination of security-based swap data as a means of monitoring risks and increasing transparency, both to regulators and the public, of the security-based swap markets. If the transaction data that are reported and publicly disseminated contain codes and the information necessary to interpret such codes is not widely available on a non-fee basis, these Title VII goals could be frustrated. In the absence of Rule 903(b), a registered SDR could require—or acquiesce in the use of—proprietary, fee-based identification codes, thereby requiring all users of the security-based swap market data to pay the code creator, directly or indirectly, for the

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644 See id.

645 See DTCC II at 16. The commenter supported the continued use of existing license codes, including the Markit Reference Entity Database ("RED")™ codes currently used in trade confirmations for credit derivatives and the Reuters Instrument Codes ("RIC") used in electronic messages for equity derivatives. The commenter further noted that without RED codes, the description of a reference entity in submitted data could vary, even in minor ways (e.g., the punctuation used in an abbreviation), creating difficulties for the SDR that would be required to correctly identify the reference entity. This commenter also suggested that the Commission adopt a rule that would provide existing licensing codes at a reduced cost for small volume market participants. As described below, final Rule 903(b) permits the use of codes in security-based swap reports under Regulation SBSR only if the information necessary to interpret the codes is widely available on a non-fee basis.

information necessary to interpret the codes. Users of the data also might be subject to usage restrictions imposed by the code creator.

Currently, the security-based swap market data typically include fee-based codes, and all market participants and market observers must pay license fees and agree to various usage restrictions to obtain the information necessary to interpret the codes. The Commission believes that allowing continuation of the status quo would not satisfy the Title VII mandate to increase security-based swap market transparency through public dissemination. If information to understand embedded codes is not widely available on a non-fee basis, information asymmetries would likely continue to exist between large market participants who pay for the codes and others market participants. One commenter suggested that alternatives could be developed to the status quo of using fee-based codes in security-based swap market data.[646] The Commission welcomes the development of such alternatives, and believes that Rule 903(b), as adopted, will likely encourage such development.

Furthermore, the Commission believes that the public dissemination requirements in Title VII should allow observers of the market to incorporate the information contained in public reports of security-based swaps into any decisions they might take regarding whether and how to participate in the market (or even to avoid participation), and for intermediaries in the market to incorporate this information to provide better advice to their clients about the market. The Commission does not believe that these objectives would be advanced if the ability of market participants to understand public reports of security-based swap transactions were conditioned on

646 See Bloomberg Letter at 2. This commenter stated that it would be possible to develop a public domain symbology for security-based swap reference entities that relied on products in the public domain to "provide an unchanging, unique, global and inexpensive identifier." According to this commenter, its proprietary symbology product for securities could provide a starting point for a security-based swap symbology product.

agreeing to pay fees to a code creator. The Commission similarly believes that subjecting the public's use of this information to restrictions imposed by a code creator also could frustrate the objectives of public dissemination. In addition, allowing continuation of the status quo would retard the ability of the Commission and other relevant authorities to obtain and analyze comprehensive security-based swap information.

The Commission recognizes the usefulness of codes. They make reporting more efficient because providing just one code—a product ID, for example—can eliminate the need to report multiple data elements individually. Codes also facilitate the standardized representation of security-based swap data and thereby make reporting (and understanding reported data) more reliable and efficient.[647] With respect to product IDs specifically, the Commission believes that unless an IRSS has been recognized by the Commission and can assign product IDs, registered SDRs should be free to choose between using an existing mechanism for assigning product IDs—assuming it is consistent with Rule 903(b)—and developing a new product classification system. If all existing product identification codes require users of the transaction information to pay a fee, then a registered SDR may not require or permit use of those codes for reporting and public dissemination. The registered SDR would be required to issue UICs using its own methodology and make the information necessary to interpret those codes available on a non-fee basis.

In light of the requirement in Rule 903(b) that the information necessary to interpret coded information be widely available on a non-fee basis, it would be inconsistent with the rule

647 For example, in the absence of an LEI, different persons might refer to a particular legal entity as "XYZ," "XYZ Corp.", or "XYZ Corporation." Confusion about whether all of these terms refer to same entity would be minimized, if not wholly eliminated, if all parties referred to the entity using the same code (e.g., "ABCD12345").

for a registered SDR to permit information to be reported pursuant to Rule 901, or to publicly disseminate information pursuant to Rule 902, using codes in place of certain data elements if the registered SDR imposes, or permits the imposition of, any usage restrictions on the disseminated information. The purpose of Rule 903(b) is to help ensure that the public is able to utilize the last-sale information provided by Regulation SBSR without limitation or expense.

The commenter that provides product identification codes for security-based swaps also noted that proposed Regulation SBSR would allow an IRSB that develops counterparty identifiers to charge fees, and believed that providers of product IDs should receive comparable treatment.[648] In response to this comment, the Commission believes that it is appropriate to make minor revisions to the rule language to clarify its original intent and thereby eliminate any apparent contradiction between the two paragraphs of Rule 903. When the Commission originally proposed that an IRSB could impose fees and usage restrictions as long as they were fair and reasonable and not unreasonably discriminatory, the Commission intended that language to apply to persons that obtain UICs for their own usage (such as a legal entity that seeks to identify itself as a counterparty when engaging in security-based swap transactions), not ultimate users of the information (such as third parties who might wish to enter into a security-based swap with that entity as the reference entity). The Commission believes that this distinction is consistent with international efforts to develop a global LEI.[649]

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648 See Markit Letter at 6.

649 See Charter of the Regulator Oversight Committee for the Global Legal Entity Identifier (LEI) System (November 5, 2012), http://www.leiroc.org/publications/gls/roc_20121105.pdf (last visited September 22, 2014) ("ROC Charter"). The ROC Charter provides that the mission of the ROC is "to uphold the governance principles of and to oversee the Global LEI System, in the broad public interest." Id. at 1. The ROC Charter further provides that, in protecting the broad public interest, the objectives of the ROC include "open and free access to publicly

In Rule 903(a), as adopted, the Commission is inserting after the words "fees and usage standards" the new words "on persons that obtain UICs for their own usage."[650] This language clarifies that it is consistent with Rule 903(a) for a registered SDR to accept codes for which the code creator assesses fair and reasonable fees on market participants that need to identify themselves, their agents, or parts of their organizations when engaging in financial activities. For example, Rule 903(a) would permit a registered SDR to charge participants that need to acquire UICs that are assigned by registered SDRs, such as counterparty IDs, ultimate parent IDs, branch IDs, trading desk IDs, and trader IDs.

In Rule 903(b), as adopted, the Commission is inserting the words "to users of the information" immediately after the phrase "widely available."[651] The users of information

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available data from the Global LEI System," and specifically includes the following principle: "all public data should be readily available on a continuous basis, easily and widely accessible using modern technology, and <u>free of charge</u>." <u>Id.</u> at 2 (emphasis added). At the same time, the ROC Charter states that "any entities required, or eligible, to obtain an LEI [must be] able to acquire one under open and non-discriminatory terms." <u>Id.</u> One such term is that "fees, where and when imposed by the [Central Operating Unit], are set on a non-profit cost-recovery basis." <u>Id.</u>

650 Final Rule 903(a) thus provides: "If an internationally recognized standards-setting system that imposes fees and usage restrictions <u>on persons that obtain UICs for their own usage</u> that are fair and reasonable and not unreasonably discriminatory 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)" (emphasis added).

651 Final Rule 903(b) thus provides: "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 <u>to users of the information</u> on a non-fee basis" (emphasis added).

referred to in final Rule 903(b) could include the Commission, other relevant authorities, or any person who wishes to view or utilize the publicly disseminated security-based swap transaction data for any purpose. As noted above, the Commission does not believe that access to this information should be impeded by having to pay fees or agree to usage restrictions in order to understand any coded information that might be contained in the transaction data.

The Commission notes that Rule 903(b) prevents registered SDRs and code creators from impeding a person's ability to obtain the information necessary to interpret coded information used in reporting or public dissemination under Regulation SBSR. Rule 903(b) is not intended to prevent a registered SDR from charging for its SDR services. To the contrary, registered SDRs are expressly permitted to charge fees for their SDR services that are fair and reasonable and not unreasonably discriminatory.[652]

The Commission notes that it is making an additional revision to the language in re-proposed in Rule 903 to conform final Rule 903(b) to the Commission's original intent and to avoid any potential conflict with final Rule 901(h). Rule 901(h), as adopted, provides that the reporting side shall electronically transmit the information required under Rule 901 to a registered SDR "in a format required by the registered [SDR]." Under re-proposed Rule 903, the reporting side could "provide information to a registered [SDR]...using codes in place of certain data elements."[653] This language in re-proposed 903 could have been read to give the reporting

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652 See Rule 13n-4(c)(1)(i) under the Exchange Act, which is part of the SDR Adopting Release. But see Regulation SBSR Proposed Amendments Release, Section VI (proposing to prohibit SDRs from charging fees for publicly disseminating regulatorily mandated transaction data).

653 Specifically, re-proposed Rule 903 provided that "The reporting side may provide information to a registered security-based swap data repository pursuant to § 242.901 and a registered security-based swap data repository may publicly disseminate information

side discretion to select what codes it could use for reporting transaction information to a registered SDR. , The Commission has revised final Rule 903(b) to more clearly reflect its original intent: that reporting sides shall report information in a format required by the registered SDR.[654] Thus, Rule 903(b), as adopted, provides that a registered SDR "may permit information to be reported . . . using codes in place of certain data elements." The Commission believes that final Rule 903(b), read together with final Rule 901(h), makes clear that a reporting side may provide coded information to a registered SDR only to the extent permitted by the registered SDR and only in a format required by the SDR. Therefore, the reporting side may not exercise its own discretion when selecting codes to use in its reports to the registered SDR, regardless of whether the codes otherwise comport with Rule 903.

Finally, one commenter expressed concern that, although Regulation SBSR, as initially proposed, would have required that the information necessary to interpret codes be made available for free, the proposal would not have prevented a code creator from charging for other uses.[655] In this commenter's view, "[a] widely used identifier can become a de facto standard for anyone doing business in the relevant marketplace. This creates the potential for abuse, defeating the entire purpose of promoting the broad availability of identifiers."[656] This commenter believed instead that, "[a]s long as all market participants have the unfettered

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pursuant to § 242.902 using codes in place of certain data elements, provided that the information necessary to interpret such codes is widely available on a non-fee basis."

654 See supra Section IV (discussing Rule 901(h)). See also Rule 907(a)(5) (requiring a registered SDR to establish and maintain policies and procedures for assigning UICs in a manner consistent with Rule 903); Rule 907(a)(2) (requiring a registered SDR to establish and maintain policies and procedures that specify, among other things, protocols for submitting information, including but not limited to UICs).

655 See Bloomberg Letter at 2.

656 Id.

freedom to introduce alternative identifiers and to map those identifiers to the standard, however, multiple, competing identifiers can provide an inexpensive solution."[657] The Commission shares the commenter's concern that identification codes not become a tool for monopolistic abuse. This is why the Commission is requiring in Rule 903(b) that, if such codes will be used for reporting or publicly disseminating security-based swap transaction data, "the information necessary to interpret such codes [must be] widely available to users of the information on a non-fee basis." Thus, the Commission does not believe it will be necessary for market participants to introduce alternative identifiers, although Regulation SBSR would not prohibit them from doing so.

C. Policies and Procedures of Registered SDRs Relating to UICs

As proposed and re-proposed, Rule 907(a)(5) would have required a registered SDR to establish and maintain written policies and procedures for assigning: (1) a transaction ID to each security-based swap that is reported to it; and (2) UICs established by or on behalf of an IRSB that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory (or, if no standards-setting body meets these criteria or a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, assigning a UIC using its own methodology).

The Commission received several comments, noted above, that discussed utilization of UICs generally and considered them in connection with Rule 907(a)(5).[658] The Commission also received a comment that generally encouraged the Commission to adopt a convention for

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657 Id.

658 See supra notes 615 to 618 and accompanying text.

assigning unique IDs and incorporating a pilot or early adopter program for certain products and participants that would allow for end-to-end testing and proof of concept.[659]

As discussed above, the Commission believes that UICs—even if utilized on an SDR-specific basis in the absence of UICs issued by a recognized IRSS—will create a more consistent and transparent system for reporting and analyzing security-based swap transactions. Therefore, the Commission continues to believe that it is important for registered SDRs to have policies and procedures providing for the issuance of such UICs and is adopting a modified version of Rule 907(a)(5) that requires registered SDRs to establish written policies and procedures "[f]or assigning UICs in a manner consistent with [Rule 903]." This is a conforming change to be consistent with the Commission's decision to locate the substantive requirements for the assignment of UICs in Rule 903.[660] With respect to the comment received, the Commission believes that market participants can work with entities that are likely to register with the Commission as SDRs on pilot programs for certain products and conventions for assigning UICs. However, the Commission does not believe it would be appropriate for the Commission itself to adopt such conventions; the Commission believes instead that greater expertise in coding data will reside in the industry and, in particular, at registered SDRs. The Commission further believes that Rule 900(qq), which defines "UIC," and Rule 903, which establishes standards for the use of UICs provide adequate parameters for the development of a UIC system. The Commission believes that allowing the industry to develop conventions for assigning UICs will likely result in a more efficient and flexible UIC regime than if the Commission were to adopt such conventions itself.

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659 See ISDA/SIFMA I at 8.

660 See supra Section X(B)(1).

XI. Operating Hours of Registered SDRs—Rule 904

Title VII of the Dodd-Frank Act does not explicitly address or prescribe the hours of operation of the reporting and public dissemination regime that it requires. The security-based swap market is global in nature, and security-based swaps are executed throughout the world and at any time of the day. In light of the global nature of the security-based swap market, the Commission believes that the public interest is served by requiring near-continuous reporting and public dissemination of security-based swap transactions, no matter where or when they are executed (subject to the cross-border rules discussed in Section XV, infra). Furthermore, having a near-continuous reporting and public dissemination regime would reduce the incentive for market participants to defer execution of security-based swap transactions until after regular business hours to avoid post-trade transparency. Accordingly, the Commission proposed Rule 904, which would have required a registered SDR to design its systems to allow for near-continuous receipt and dissemination of security-based swap data. A registered SDR would have been permitted to establish "normal closing hours" and to declare, on an ad hoc basis, "special closing hours," subject to certain requirements. Rule 904 was not revised as part of the Cross-Border Proposing Release, and was re-proposed in exactly the same form as initially proposed.

As discussed below, three commenters addressed proposed Rule 904. The Commission has carefully reviewed the comments received and has determined to adopt Rule 904, as proposed and re-proposed, subject to one conforming change, as discussed below.[661]

Rule 904, as adopted, requires a registered SDR to have systems in place to receive and disseminate information regarding security-based swap data on a near-continuous basis, with

661 In addition, the Commission is making a technical conforming change to revise the title of the rule to refer to "registered" SDRs.

certain exceptions. First, under final Rule 904(a), a "registered SDR may establish normal closing hours when, in its estimation, the U.S. market and major foreign markets are inactive." Second, under final Rule 904(b), a registered SDR "may declare, on an ad hoc basis, special closing hours to perform system maintenance that cannot wait until normal closing hours." Rule 904(b) further provides that a registered SDR 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." Rules 904(a) and 904(b) each require the registered SDR to provide participants and the public with reasonable advance notice of its normal closing hours and special closing hours, respectively.

Rule 904(c) specifies requirements for handling and disseminating reported data during a registered SDR's normal and special closing hours. During normal closing hours and, to the extent reasonably practicable during special closing hours, a registered SDR is required to "have the capability to receive and hold in queue" the transaction data that it receives. Pursuant to Rule 904(d), immediately upon system re-opening following normal closing hours or special closing hours (assuming it was able to hold incoming data in queue), the registered SDR is required to publicly disseminate any transaction data required to be reported under Rule 901(c) that it received and held in queue. Finally, pursuant to Rule 904(e), if the registered SDR could not, while it was closed, receive and hold in queue reported information, it would be required, immediately upon resuming normal operations, to send a notice to all participants that it had resumed normal operations but could not, while closed, receive and hold in queue such transaction information. Therefore, any participant that had an obligation to report information—but was unable to do so because of the registered SDR's inability to receive and hold data in queue—would be required upon notification by the registered SDR to promptly report the information to the registered SDR.

As proposed and re-proposed, Rule 904(e) would have provided that if a participant could not fulfil a reporting obligation due to a registered SDR's inability to receive and hold data in queue, the participant would be required to report the information "immediately" upon receiving a notification that the registered SDR has resumed normal operations. The Commission has decided to replace the word "immediately" with the word "promptly" in the final rule because "promptly" emphasizes the need for information to be submitted without unreasonable delay while affording participants a practical degree of flexibility. In general, the Commission believes that submitting a required report "promptly" implies "as soon as practicable."

The three commenters that addressed Rule 904 were generally supportive of the goal of promoting transparency and price discovery though a regime of continuous reporting and public dissemination,[662] although one of these commenters pointed out the need for registered SDRs to close periodically to perform necessary system maintenance.[663] Two of these commenters also suggested alternative operating hours and procedures for registered SDRs.[664] One commenter stated that the requirements that a registered SDR have normal closing hours only when neither U.S. nor international markets are active, and should continue to receive the relevant transaction data and hold them in queue even when the registered SDR is closed for normal or ad hoc special closing hours, exceeded the capabilities of currently existing reporting infrastructures. The

662 See Barnard I at 3; Markit I at 1; DTCC II at 1.

663 See Markit I at 4.

664 See Markit I at 4-5; DTCC II at 19-20; DTCC IV at 4 (recommending that SDRs operate on a 24/6.5 basis to reflect the global nature of the financial markets and process transactions in real time, while also maintaining multiple levels of operational redundancy and data security).

commenter argued that such requirements would increase the risk of infrastructure failure because SDRs would not have adequate time to maintain and update their systems.[665] This commenter suggested that, if systems are required to be available on a 24-hour basis, the Commission should define operating hours to be 24 hours from Monday to Friday, and consider allowing additional closing hours either "when markets are less active" or "when only less active markets are open."[666]

The Commission believes there are compelling reasons to implement a system of reporting and public dissemination that, in general, operates near-continuously. As discussed above, the Commission believes that requiring near-continuous reporting and public dissemination of security-based swaps—except for when, in the estimation of a registered SDR, the U.S. market and major foreign markets are inactive—will serve the public interest and reduce incentives for market participants to trade outside of regular business hours. The Commission, however, recognizes the need for a registered SDR to have closing hours to maintain and update its systems, and Rules 904(a) and 904(b), as adopted, specifically allow registered SDRs to have normal and special closing hours. Further, while Rule 904(b) states that a registered SDR should avoid scheduling special closing hours during a time when, in its estimation, the U.S. and major foreign markets are most active, the Commission notes that a registered SDR is required to do so only "to the extent reasonably possible under the circumstances." As such, the Commission believes that Rules 904(a) and 904(b) provide sufficient flexibility to registered SDRs in determining their closing times to perform the necessary maintenance procedures. The Commission does not believe it would be appropriate to require registered SDRs to operate 24

665 See Markit I at 4.

666 Markit I at 4-5.

hours only from Monday to Friday, as the commenter suggests, as certain major foreign markets may be active during hours that fall within the weekend in the United States.

The Commission recognizes the commenter who asserted that the proposed requirement for a registered SDR to receive and hold in the queue the data required to be reported during its closing hours "exceeds the capabilities of currently-existing reporting infrastructures."[667] The Commission notes that this comment was submitted in January 2011. Since that time, however, provisionally registered CFTC SDRs that are likely also to register as SDRs with the Commission appear to have developed the capability of receiving and holding data in queue during their closing hours.[668] Accordingly, the Commission believes that it is appropriate to require registered SDRs to hold data in queue during their closing hours should help to prevent market disruptions by enabling reporting sides for security-based swaps to report transactions at all times.

XII. Subsequent Revisions to Reported Security-Based Swap Information

A. Reporting Life Cycle Events—Rule 901(e)

1. Description of Proposal and Re-proposal

Rule 901(e), as proposed and re-proposed, would have required the reporting of certain life cycle event information. "Life cycle event" was defined in the proposal and re-proposal to mean "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,

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667 Markit I at 4.

668 See, e.g., DDR Rulebook, Section 7.1 (DDR System Accessibility) ("Data submitted during DDR System down time is stored and processed once the service has resumed"), available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/DDR_Rulebook.pdf (last visited October 7, 2014).

including a counterparty change resulting from an assignment or novation; 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 cleared, any change to the collateral agreement; or a corporate action affecting a security or securities on which the security-based swap is based (e.g., 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 rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap."

Re-proposed Rule 901(e) would have provided that "For any life cycle event, and any adjustment due to a life cycle event, that results in a change to information previously reported pursuant to Rule 901(c), 901(d), or 901(i), the reporting side shall promptly provide updated information reflecting such change to the entity to which it reported the original transaction, using the transaction ID," subject to two exceptions. Under Rule 901(e)(1), as re-proposed, if the reporting side ceased to be a counterparty to the security-based swap due to any assignment or novation and if the new side included a U.S. person, a security-based swap dealer, or a major security-based swap participant, the new side would be the reporting side following the assignment or novation. Under re-proposed Rule 901(e)(2), if the new side did not include a U.S. person, a security-based swap dealer, or a major security-based swap participant, the other side would be the reporting side following the assignment or novation.

In proposing Rule 901(e), the Commission preliminarily believed that the reporting of life cycle event information would provide regulators with access to information about significant changes that occur over the duration of a security-based swap.[669] The Commission also stated that the reporting of life cycle event information would help to assure that regulators have accurate and up-to-date information concerning outstanding security-based swaps and the current obligations and exposures of security-based swap counterparties.[670]

In determining the entity that would be required to report life cycle event information, the Commission's approach in proposing and re-proposing Rule 901(e) was that, generally, the person who originally reported the initial transaction would have the responsibility to report any subsequent life cycle event.[671] However, if the life cycle event were an assignment or novation that removed the original reporting party, either the new counterparty or the remaining original counterparty would have to be the reporting party.[672]

In re-proposing Regulation SBSR, the Commission included the new concept of a "reporting side," which would have included the direct counterparty and any indirect counterparty. The Cross-Border Proposing Release also proposed to impose greater duties to report transactions on non-U.S. person security-based swap dealers or major security-based swap participants. Accordingly, the Commission re-proposed Rule 901(e) to provide that the duty to report would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap

669 See Regulation SBSR Proposing Release, 75 FR at 75220.

670 See id. In a separate rulemaking, the Commission is adopting a rule that will require a registered SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the SDR maintains records. See SDR Adopting Release (adopting Rule 13n-5(b)(2) under the Exchange Act).

671 See Cross-Border Proposing Release, 78 FR at 31068.

672 Rule 901(e), as initially proposed, would have provided that the new counterparty would be the reporting party if it is a U.S. person; the other original counterparty would become the reporting party if the new counterparty is not a U.S. person.

participant. The Commission preliminarily believed that, if the new side included a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. This approach was designed to align reporting duties with the market participants that the Commission believed would be better suited to carrying them out, because non-U.S. person security-based swap dealers and major security-based swap participants likely would have taken significant steps to establish and maintain the systems, processes and procedures, and staff resources necessary to report security-based swaps.[673]

2. Final Rules Relating to Life Cycle Events and Response to Comments

a. General Comment and Definition of "Life Cycle Event"

One commenter expressed support for the requirement to report life cycle event information, stating that the reporting of life cycle event information was necessary for detailed market regulation and for prudential and central bank regulation.[674] The commenter noted that "[m]any life cycle events are price-forming or significantly change the exposures under a trade...."[675] In subsequent comment letters, this commenter stated that the definition of "life cycle event" was overly broad, and that life cycle events should be limited to those that impact the counterparties to or the pricing of the security-based swap.[676] Specifically, the commenter suggested that the Commission define "life cycle event" to mean "an event that would result in a change in the counterparty or price of a security-based swap reported to the registered [SDR]."[677]

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673 See Cross-Border Proposing Release, 78 FR at 31068.

674 See DTCC II at 13.

675 See id.

676 See DTCC V at 11; DTCC VI at 9.

677 DTCC VI at 9.

However, another commenter believed that the proposed definition was "clear, sufficient, and complete."[678]

After careful consideration, the Commission is adopting the definition of "life cycle event" in Rule 900(q) substantially as re-proposed, but with certain minor modifications to respond to comments and to clarify the original intent of the rule.[679] First, the Commission is making a technical change to the definition to indicate that a life cycle event refers to any event that would result in a change in the information reported "under § 242.901(c), (d), or (i)," rather than any event that would result in a change in the information reported "under § 242.901" (as re-proposed). This technical change will conform the definition of "life cycle event" to the requirements of Rule 901(e), as re-proposed and as adopted, which requires the reporting of a change to information previously reported pursuant to paragraph (c), (d), or (i) of Rule 901. By defining "life cycle event" in this manner, the Commission aims to ensure that information reported pursuant to Rules 901(c), (d), and (i) is updated as needed, so that the data maintained by registered SDRs remains current for the duration of a security-based swap. This requirement should help to ensure that the data accessible to the Commission through registered SDRs

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678 Barnard I at 3.

679 Rule 900(q), as adopted, defines "life cycle event" to mean "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."

accurately reflects the current state of the market. Therefore, the Commission does not believe that it is appropriate to limit the definition of "life cycle event" to post-execution events that impact the counterparties to or the pricing of a security-based swap, as suggested by the commenter.[680] Although the final definition of "life cycle event" encompasses these types of events, it also encompasses other information reported pursuant to Rules 901(c), 901(d), or 901(i).

One commenter asked that the Commission remove the reference to "dividends" in the definition of "life cycle event" because dividends "are contract intrinsic events that do not result in a change to the contractual terms of the SBS and therefore, should not be defined as reportable life cycle events."[681] The Commission does not believe that it is necessary to revise the definition of "life cycle event" as the commenter suggests. As indicated above, the definition of "life cycle event" provides, in relevant part, that a life cycle event includes "any event that would result in a change in the information reported to a registered [SDR] . . . including. . . 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)" (emphasis added). Thus, a regular payment of a dividend that does not require a restatement of the terms of the security-based swap would not constitute a life cycle event. However, other actions involving dividends could be life cycle events. For example, the distribution of a stock dividend that required an adjustment to the notional terms of an equity security-based swap—or any other corporate action related to dividends that resulted in

680 See DTCC VI at 9. See also DTCC II at 13 (stating that "[m]any life cycle events are price-forming or significantly change the exposures under a trade. . . . The current definition supports reporting of these events").

681 ISDA IV at 11.

a modification of one or more terms of the security-based swap—would be a life cycle event and therefore would have to be reported pursuant to Rule 901(e).

Second, the Commission is clarifying that a life cycle event includes "an assignment or novation of the security-based swap," instead of "a counterparty change resulting from an assignment or novation." The Commission notes that, while assignments and novations necessarily include a counterparty change, assignments and novations also may involve modifications to other terms of the security-based swap reported pursuant to paragraphs (c), (d), or (i) of Rule 901. These modifications are the type of changes that the Commission believes should be reported to a registered SDR; therefore, the Commission is modifying the definition of "life cycle event" to clarify this view.

Third, the Commission is making a technical change to the definition to indicate that a life cycle event includes, 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." As re-proposed, the definition of "life cycle event" would have included, "for a security-based swap that is not cleared, any change to the collateral agreement." One commenter questioned the need to include a reference to a change in the collateral agreement in the definition of "life cycle event" because "collateral agreement terms are not among the data required to be reported upon execution."[682] The Commission agrees with the commenter that collateral agreement terms are not required to

[682] DTCC VI at 9. Another commenter stated that the parties to a collateral agreement rarely modify their agreement over its life, and that any change to a collateral agreement would require extensive negotiation between the counterparties. Accordingly, the commenter believed that the cost of establishing reporting processes to detect and report changes to a collateral agreement would outweigh the usefulness of reporting them. See ISDA/SIFMA I at 16.

be reported, and the definition of "life cycle event" in final Rule 900(q) no longer refers to changes in the collateral agreement. To assure that Rule 901(e) operates as intended, the Commission has modified the definition of "life cycle event" in final Rule 900(q) to reference, with respect to a security-based swap that is not a clearing transaction, the same terms that must be reported pursuant to Rule 901(d)(4).[683] Thus, if there were a change in the title or date of a master agreement, collateral agreement, margin agreement, or other agreement incorporated by reference into a security-based swap contract, such a change would be a "life cycle event" as defined in final Rule 900(q), and final Rule 901(e) would require reporting of that change.

Finally, two commenters argued that the "Commission's classification of a swap being accepted for clearing as a life cycle event is inconsistent with the operations of a Clearing Agency" because clearing may require the "termination of the pre-existing alpha swap in order to create two new, unique swaps."[684] The Commission agrees that any security-based swap that results from clearing an alpha should not be considered a life cycle event of the alpha, although the termination of the alpha would be such a life cycle event.[685] The Commission believes that

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683 Final Rule 901(d)(4) requires, for a security-based swap that is not a clearing transaction, reporting of the title and date of any master agreement, collateral agreement, margin agreement, or other agreement incorporated by reference in the security-based swap contract.

684 CME/ICE Letter at 3. As discussed in Section V, supra, in the agency model of clearing, and sometimes in the principal model as well, acceptance of an alpha for clearing terminates the alpha.

685 See Securities Exchange Act Release No. 66703 (March 30, 2012), 77 FR 20536-37 (April 5, 2012) (noting that "when a security-based swap between two counterparties . . . is executed and submitted for clearing, the original contract is extinguished and replaced by two new contracts where the [clearing agency] is the buyer to the seller and the seller to the buyer"). This treatment also would be consistent with CFTC regulations. See 17 CFR 39.12(b)(6) (CFTC rule providing that derivatives clearing organizations that clear swaps must have rules providing that, among other things, "upon acceptance of a swap by the derivatives clearing organization for clearing: (i) The original swap is extinguished; [and] (ii) The original swap is replaced by an equal and opposite swap between the

the new term "clearing transaction" makes clear that security-based swaps that result from clearing (e.g., betas and gammas in the agency model) are independent security-based swaps, not life cycle events of the security-based swap that is submitted to clearing (e.g., alpha security-based swaps).

b. Final Rule 901(e)(1)

As described above, re-proposed Rule 901(e) would have required the reporting side to promptly report any life cycle event, or any adjustment due to a life cycle event, that resulted in a change to information previously reported pursuant to Rule 901(c), (d), or (i) to the entity to which it reported the original transaction, using the transaction ID. Rule 901(e), as proposed and re-proposed, also included provisions for determining which counterparty would report the life cycle event. The Commission is adopting a modified version of Rule 901(e) to address comments received and to implement certain technical changes. The Commission also has changed the title of the rule from "Duty to report any life cycle event of a security-based swap" in the re-proposal to "Reporting of life cycle events" in the final rule. In addition, final Rule 901(e) provides that a life cycle event or adjustment due to a life cycle event must be reported within the timeframe specified in Rule 901(j).

Although the definition of "life cycle event" would encompass the disposition of a security-based swap that has been submitted to clearing (e.g., whether, under the agency model of clearing, the alpha security-based swap has been accepted for clearing or rejected by the clearing agency), the Commission believes that it is appropriate to address the reporting of this specific type of life cycle event in the context of the Regulation SBSR Proposed Amendments

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derivatives clearing organization and each clearing member acting as principal for a house trade or acting as agent for a customer trade").

Release, which address a number of topics regarding the reporting of security-based swaps that will be submitted to clearing or that have been cleared. Accordingly, final Rule 901(e)(1)(i) indicates that the reporting side shall not have a duty to report whether or not a security-based swap has been accepted for clearing or terminated by a clearing agency, and instead provides that "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."

c. Final Rule 901(e)(2)

Re-proposed Rule 901(e) would have required the reporting side to include the transaction ID in a life cycle event report, and to report life cycle event information to the entity to which it reported the original transaction. Final Rule 901(e)(2) retains both of these requirements.[686] The Commission believes that including the transaction ID in a life cycle event report will help to ensure that it is possible to link the report of a life cycle event to the report of the initial security-based swap of which it is a life cycle event. One commenter supported the requirement to report life cycle events to the same entity that received the original transaction report.[687] The commenter stated that requiring a single registered SDR to receive, store, and report, where appropriate, all relevant information related to a given security-based swap throughout its life cycle would help to prevent fragmentation and ensure that corrections to

[686] Final Rule 901(e)(2) provides that "All reports of life cycle events and adjustments due to life cycle events shall be reported within 24 hours of the time of occurrence of the life cycle event to the entity to which the original security-based swap transaction was reported and shall include the transaction ID of the original transaction."

[687] See MarkitSERV I at 8.

previously reported data could be easily identified by the public.[688] The Commission generally agrees with these views, and final Rule 901(e)(2) retains the requirement to report life cycle events to the same entity to which the original transaction was reported.

d. Reporting Timeframe for Life Cycle Events

Rule 901(e), as proposed and re-proposed, would have required life cycle events to be reported by the reporting side "promptly." Two commenters believed that it was appropriate to require that life cycle events be reported "promptly."[689] One of these commenters also stated that life cycle events could require different processing times based on the nature of the event, and asked the Commission to clarify the meaning of "promptly" with respect to life cycle event reporting.[690] In particular, the commenter stated that "the term 'promptly,'... without further explanation, may be interpreted by reporting parties differently for similar events and processes, particularly in a market where certain processes have historically taken a number of days to effect."[691] This commenter also suggested that the Commission revise Rule 901(e) to allow for the flexibility of reporting life cycle events either event-by-event or through one daily submission that would include multiple events.[692] Another commenter stated that the required

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688 See id. See also DTCC IX at 2.

689 See Barnard I at 3; DTCC II at 13.

690 See DTCC II at 13. The commenter stated that life cycle events that are price-forming events subject to confirmation could be reported within the same timeframes as initial reports of these events. However, the commenter indicated that life cycle events resulting from other processes, such as corporate actions or credit events, "where many trades will be impacted simultaneously and processing may be manual or automated," would require different amounts of time to report. See id.

691 DTCC II at 13.

692 See DTCC V at 11. See also ISDA III (requesting that "reporting parties be allowed to report lifecycle events either intra-day or as an end-of day [sic] update to the terms of the [security-based swap]"). Further, one commenter noted that the CFTC rules allow a life cycle event to be reported either as event data on the same day as the event occurs or

time for reporting both life cycle events and corrections should be stronger and more specific than the proposed requirement that they be reported "promptly."[693]

After careful consideration, the Commission does not believe that it would be appropriate to require life cycle events or adjustments due to life cycle events to be reported more quickly than the time within which information relating to the original transaction must be reported. As noted in Section VII(B)(3), supra, final Rule 901(j) provides that the transaction information required by Rules 901(c) and 901(d) generally must be reported within 24 hours of the time of execution. Similarly, Rule 901(j) provides that the reporting timeframe for Rule 901(e) shall be 24 hours after the occurrence of the life cycle event or the adjustment due to the life cycle event. The Commission believes that 24 hours should provide sufficient time to report life cycle events even if the processing of some of these events is not yet fully automated.[694] The Commission

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daily as "state data," and that non-swap dealers or non-major swap participants may report these events either as life cycle event data or as state data no later than the end of the first business day following the event. See ISDA IV at 11. This commenter requested that the Commission confirm in its rules that the same approach and timelines may be applied to meet the requirements of Regulation SBSR. The Commission notes that Rules 901(e) and 901(j), as adopted, provide for reporting of a life cycle event or an adjustment due to a life cycle event within 24 hours after the occurrence of the life cycle event or the adjustment due to the life cycle event. The Commission notes, further, that Rule 901(e)(1) requires the reporting of a life cycle event, and any adjustment due to a life cycle event, that results in a change to information previously reported pursuant to Rule 901(c), 901(d), or 901(i). Thus, Rule 901(e)(1) contemplates the reporting of the specific changes to previously reported information. Reports of life cycle events, therefore, must clearly identify the nature of the life cycle event for each security-based swap. It is not sufficient merely to re-report all of the terms of the security-based swap each day without identifying which data elements have changed. However, Regulation SBSR would not prevent a registered SDR from developing for its members a mechanism or other service that automates or facilitates the production of life cycle events from state data.

693 See Better Markets I at 9.

694 See DTCC II at 13. The Commission also believes that the 24-hour timeframe for reporting life cycle events will allow reporting sides to determine whether to report life cycle events on an intra-day or end-of-day basis. See DTCC V at 11; ISDA III. Reports

believes, further, that specifying a time within which life cycle event information must be reported will address the commenter's concern that reporting sides could adopt different interpretations of the reporting timeframe. The Commission notes that it anticipates soliciting comment on the timeframe for reporting life cycle events, adjustments, and clearing transactions in the future, when it considers block thresholds and time delays.

e. Re-proposed Rule 901(e)(2)

The Commission has determined not to adopt re-proposed Rule 901(e)(2), which would have specified the reporting side following an assignment or novation of the security-based swap.[695] One commenter noted that, under the current market practice for reporting novations, the reporting party is re-determined based on the current status of the parties.[696] This commenter noted that the current practice allows the reporting party logic to be consistent for new as well as novated trades, and recommended that the Commission use a consistent methodology for reporting of new trades and novations. The Commission agrees that using a single methodology for assigning reporting obligations would be administratively easier than using one methodology when a security-based swap is first executed and a different methodology when the counterparties change as a result of an assignment or novation. As the Commission explained

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of life cycle events, however, must clearly identify the nature of the life cycle event for each security-based swap. It is not sufficient merely to re-report all of the terms of the security-based swap each day without identifying which data elements have changed. See also note 692 supra.

695 Re-proposed Rule 901(e)(2) would have provided that the duty to report life cycle event information following an assignment or novation would switch to the other side only if the new side did not include a U.S. person (as in the originally proposed rule) or a security-based swap dealer or major security-based swap participant. As the Commission explained in the Cross-Border Proposing Release, if the new side included a security-based swap dealer or major security-based swap participant, the new side should retain the duty to report. See 78 FR at 31068.

696 See ISDA III.

above,[697] it has determined that the reporting side following an assignment or novation will be determined using the procedures in Rule 901(a).

f. Additional Comments Regarding Life Cycle Event Reporting

One commenter believed that life cycle events should be reported using standard market forms, such as the trade confirmation for novations and early terminations, and the exercise notice for an exercise.[698] Contrary to the commenter's suggestion, the Commission believes that registered SDRs should be responsible for specifying the precise manner and format for reporting data. Moreover, the Commission understands that standard market forms may exist for some, but not all, of the life cycle events that must be reported under Regulation SBSR. Therefore, the Commission has determined not to prescribe a format for reporting sides to report life cycle event information. Instead, Rule 907(a)(3), as adopted, requires a registered SDR to establish and maintain written policies and procedures that specify how reporting sides are to report life cycle events and corrections to previously submitted information, for making corresponding updates or corrections to transaction records, and for applying an appropriate flag to these transaction reports.[699]

One commenter stated that it was critical for the SEC and the CFTC to adopt consistent regulatory approaches "[i]n the life cycle event model across asset classes."[700] The Commission agrees that would be useful for the Commissions to adopt consistent approaches to the reporting of life cycle event information to the extent possible. The Commission believes that Regulation

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697 See supra Section V(C)(5).

698 See DTCC II at 13.

699 See infra Section XII(C).

700 ISDA/SIFMA I at 6.

SBSR's approach to life cycle event reporting is broadly consistent with the approach taken by the CFTC. For example, because the agencies have adopted similar definitions, the life cycle event information required to be reported under the rules of both agencies is substantially similar.[701] In addition, both agencies' rules require that life cycle events be reported to the same entity that received the report of the original transaction, and both agencies' rules require the entity that reports the initial transaction to also report life cycle events for the transaction. The Commission notes that a registered SDR that accepts transaction reports for both swaps and security-based swaps could establish policies and procedures for reporting life cycle events of security-based swaps that are comparable to its policies and procedures for reporting life cycle events of swaps, provided that its policies and procedures for reporting life cycle events of security-based swaps comply with the requirements of Regulation SBSR.

Another commenter expressed the view that Regulation SBSR "should clarify what shall be reported as the time of execution for a life cycle event for purposes of public dissemination."[702] The commenter stated that the CFTC requires market participants to report the execution time of the original trade as the execution time for a life cycle event for the trade. The commenter suggested that, under this approach, "the data that is publicly disseminated for lifecycle events may not be that meaningful to the public as it does not include any indication of the point in time the reported price has been traded."[703] The commenter stated, further, that the

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701 See CFTC Rule 45.1, 17 CFR 45.1. The Commissions' ongoing reporting requirements differ, however, with respect to the reporting of valuation information. The CFTC's rules require reporting of valuation data as well as life cycle event data. As discussed in above in Section II(B)(3)(k), the Commission is not requiring reporting of valuation data for security-based swaps.

702 ISDA IV at 13 (emphasis in original).

703 Id.

time of execution for a life cycle event for purposes of public dissemination "should be the date and time such price-forming event is agreed."[704]

As discussed in Section VII(B)(3), supra, final Rule 901(j) provides that the reporting timeframe for a life cycle event shall be 24 hours after the occurrence of the life cycle event or the adjustment due to the life cycle event. Final Rule 902(a) requires a registered SDR to publicly disseminate a transaction report of a life cycle event, or adjustment due to a life cycle event, immediately upon receipt of the information. Thus, under Regulation SBSR, a life cycle event, or an adjustment due to a life cycle event, must be reported and publicly disseminated within 24 hours after the occurrence of the life cycle event or adjustment due to the life cycle event. The Commission believes that together these requirements will provide market observers with certain information concerning the time when the life cycle event occurred. However, the Commission notes that Regulation SBSR, as proposed and re-proposed, did not require the reporting or public dissemination of the time of execution of a life cycle event, and Regulation SBSR, as adopted, likewise includes no such requirements.

B. Error Corrections—Rule 905

As the Commission noted in the Regulation SBSR Proposing Release, any system for transaction reporting must accommodate the possibility that certain data elements may be incorrectly reported.[705] Therefore, the Commission proposed Rule 905 to establish procedures for correcting errors in reported and disseminated security-based swap information.

In the Cross-Border Proposing Release, the Commission modified proposed Rule 905 slightly to correspond with certain new provisions in re-proposed Rule 908, which contemplated

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704 Id. at 13-14.

705 See 75 FR at 75236.

that certain types of cross-border security-based swaps would be required to be reported but not publicly disseminated. Rule 905 was re-proposed to clarify that, if a registered SDR receives corrected information relating to a previously submitted transaction report, it would be required to publicly disseminate a corrected transaction report only if the initial security-based swap were subject to the public dissemination requirement.[706] The Commission also made certain other technical and conforming changes,[707] but otherwise re-proposed Rule 905 was substantially similar to proposed Rule 905.

As discussed below, the Commission received several comments on proposed Rule 905. After consideration of the comments, the Commission has determined to adopt Rule 905 with certain minor editorial revisions.[708]

Rule 905(a) applies to any counterparty to a security-based swap that discovers an error in the information reported with respect to that security-based swap. If a non-reporting side discovers the error, the non-reporting side shall promptly notify the reporting side of the error. Once the reporting side receives notification of the error from the non-reporting side, or if the

706 As discussed above in Section VI, Rule 902 requires a registered SDR to immediately publicly disseminate a transaction report of a security-based swap, or a life cycle event or adjustment due to a life cycle event. If a security-based swap falls into the category of regulatory reporting but not public dissemination, there would be no need to publicly disseminate the correction because the initial security-based swap was not publicly disseminated.

707 The Commission modified the language from "counterparty" or "party" to "side" in the re-proposal of Rule 905. Additional minor changes were made for clarification such as inserting "transaction" in Rule 905(a)(1) and changing an "a" to "the" in Rule 905(b)(1). Re-proposed Rule 905 also substitutes the word "counterparties"—which is a defined term in Regulation SBSR—for the word "parties," which was used in the initial proposal but was not a defined term.

708 For example, the title of final Rule 905(a) is "Duty to correct," rather than "Duty of counterparties to correct." In addition, the Commission is deleting a reference to "security-based swap transaction" from Rule 905(a)(2), as well as a reference to "reporting side" in Rule 905(b)(1)."

reporting side discovers the error on its own, the reporting side must promptly submit an amended report—containing corrected data—to the registered SDR that received the erroneous transaction report. The reporting side must submit the report required by Rule 905(a) in a manner consistent with the policies and procedures of the registered SDR that are contemplated by Rule 907(a)(3).[709]

Rule 905(b) details the responsibilities of a registered SDR to correct information and re-disseminate corrected information, where appropriate. If a registered SDR either discovers an error in the security-based swap information or receives notification of an error from a reporting side, the registered SDR is required to verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the information in its system. If the erroneous information contains any primary trade information enumerated in Rule 901(c) (and the transaction is dissemination-eligible[710]), the registered SDR must 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.[711]

Three commenters were generally supportive of the proposed error reporting procedures. One commenter believed that publicly disseminating error reports would "increase confidence in

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709 See infra Section XII(C).

710 See Rule 902(c) (listing certain transactions that a registered SDR may not publicly disseminate).

711 See Rule 905(b)(2). When verifying information pursuant to Rule 905(b), a registered SDR must comply with the standards of Rule 13n-5. In particular, Rule 13n-5(b)(1)(iii) provides that an SDR "shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate, and clearly identifies the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data."

the integrity of the markets."[712] Another commenter stated that it supported "the objective of prompt correction of errors by the reporting party."[713] A third commenter expressed support for requiring a reporting party to correct previously reported erroneous data, and agreed that it was appropriate for a non-reporting counterparty to have the obligation to notify the reporting party of an error of which it is aware.[714]

The third commenter also sought guidance regarding the application of Rule 905 if a dispute arose between a reporting side and non-reporting side concerning whether a report was, in fact, erroneous.[715] The commenter urged the Commission to provide in its final rule that, if corrected information is not promptly reported to the registered SDR because of a dispute over whether an error exists, the non-reporting party side may itself report the disputed data to the registered SDR; the commenter believed that, in such cases, the Commission should oblige the registered SDR to review promptly the disputed data with the counterparties.[716]

The Commission notes that, in a separate release, it is adopting Rule 13n-5(b)(6) under the Exchange Act, which requires an SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.[717] As the Commission notes in adopting that rule, only the parties to a dispute can resolve it. Thus, the SDR itself is not required to resolve the dispute, although the Commission believes that SDRs must provide processes to facilitate resolution,

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712 Barnard I at 3.

713 ISDA/SIFMA I at 9.

714 See MFA I at 5.

715 See id.

716 See id.

717 See SDR Adopting Release.

which would improve the quality and accuracy of the security-based swap data that the SDR holds. The Commission is interpreting the term "error" in final Rule 905 as one which both sides to the transaction would reasonably regard as such. If the counterparties dispute whether an error exists, then the counterparties can use an SDR's procedures and facilities established under Rule 13n-5(b)(6) to attempt to resolve the dispute. If the dispute-resolution process under Rule 13n-5(b)(6) yielded agreement that an error exists, then Rule 905 would require the counterparties to correct the error.[718]

The third commenter also asked the Commission, in the context of Rule 905, to clarify that the reporting is for informational purposes and does not affect the terms of the trade; otherwise, "[a]bsent some mechanism to make the report nonbinding pending a dispute, the correction mechanics in the Proposed Rule will result in the reporting party (typically the SBS dealer) prevailing in any dispute."[719] The Commission does not believe that reporting of an error in previously submitted security-based swap transaction information can change the terms of the trade. Reporting is designed to capture the terms of the trade, not to establish such terms. The Commission's expectation, however, is that the report of a security-based swap provided to and held by a registered SDR will reflect, fully and accurately, the terms of the trade agreed to by the counterparties. If a counterparty becomes aware that the record held by the registered SDR does

[718] In the context of trade reporting, one commenter stated: "Confirmation processes are designed to identify when economic terms to trades have changed, distinguishing between expected events under an existing confirmation and amendments of economic terms due to the modification in terms. . . . The trade confirmation is a bilateral process in which both parties agree to the confirmation, thereby ensuring any errors in the original data are corrected." DTCC II at 5. The Commission believes that this comment supports the approach taken above, that counterparties to a transaction do not incur duties under Rule 905 unless an error is detected that both sides would regard as such.

[719] Id. at 5-6.

not accurately reflect the terms of the trade, that counterparty incurs a duty under Rule 905 to take action to have that record corrected.

A fourth commenter argued that the specific root cause of such amendments (for example a booking error or a trade amendment between parties) could be omitted.[720] The Commission notes that Rule 905 does not require the reporting side to include the root cause of the error. This commenter also urged the Commission to clarify that reporting parties are not responsible for data that are inaccurately transcribed or corrupted after submission to the registered SDR. The Commission notes that the obligations under Rule 905 attach to a counterparty to a security-based swap only after that counterparty "discovers" the error or, if the counterparty is the reporting side, after it "receives notification" of the error from the non-reporting side.[721] Thus, a security-based swap counterparty incurs no duty under Rule 905 if its transaction data are inaccurately transcribed or corrupted after submission to the registered SDR unless the counterparty discovers the inaccurate transcription or corruption. Thus, under Rule 905, a counterparty would incur no duty to correct data errors of which it is unaware.[722]

Finally, a fifth commenter believed that Rule 905 should provide an error reporting timeframe that is stronger and more specific than the proposed requirement that such reports be submitted "promptly."[723] The Commission continues to believe that "promptly" is an appropriate standard because it emphasizes the need for corrections to be submitted without

720 See ISDA/SIFMA I at 9.

721 Rule 905(a).

722 The registered SDR, however, must comply with Rule 13n-5(b)(1)(iii) under the Exchange Act, which provides, in relevant part: "Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate."

723 See Better Markets I at 9.

unreasonable delay while affording reporting sides a practical degree of flexibility

C. Policies and Procedures for Reporting Life Cycle Events and Corrections

Rule 907(a)(3), as originally proposed, would have required a registered SDR to establish and maintain written policies and procedures for "specifying how reporting parties are to report corrections to previously submitted information in its records that is subsequently discovered to be erroneous, and applying an appropriate indicator to any transaction report required to be disseminated by [Rule 905(b)(2)] that the report relates to a previously disseminated transaction." Rule 907(a)(3), as re-proposed, would have required a registered SDR to establish and maintain written policies and procedures for "specifying how reporting sides are to report corrections to previously submitted information, making corrections to information in its records that is subsequently discovered to be erroneous, and applying an appropriate indicator to any report required to be disseminated by [Rule 905(b)(2)] that the report relates to a previously disseminated transaction."

The Commission received no adverse comment on Rule 907(a)(3) and is adopting it as re-proposed with a slight modification. Rule 907(a)(3), as adopted, requires a registered SDR to establish and maintain policies and procedures for "specifying procedures for reporting <u>life cycle events</u> 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 (i) is an error correction required to be disseminated by [Rule 905(b)(2)]; or (ii) <u>is a life cycle event, or any adjustment due to a life cycle event, required to be disseminated by [Rule 902(a)]</u>" (emphasis added). The Commission is adding to final Rule 907(a)(3) the explicit requirement that a registered SDR establish and maintain policies and procedures regarding the reporting and flagging of life cycle events. The Commission believes that these additions will improve the ability of the Commission and other relevant authorities to identify and analyze life cycle events of security-based swaps.

In the case of a life cycle event or error correction, the initial transaction has already been reported to the registered SDR, and the subsequent report involves some type of revision to the previously submitted report. The Commission seeks to have the ability to observe a security-based swap transaction throughout its life, which requires the ability to connect subsequently reported events to the original transaction. The Commission also seeks to avoid mistaking life cycle events or corrections of previously submitted reports for new transactions, which could result in overcounting the gross notional amount of the security-based swap market or subsets thereof. Therefore, the Commission believes that registered SDRs must have appropriate policies and procedures that stipulate how reporting sides must report such follow-on events, and how the registered SDR itself can distinguish them and record them properly.

Just as the Commission believes that a registered SDR should be given reasonable flexibility to enumerate specific data elements to be reported and the method for reporting them, the Commission also believes that a registered SDR should be given reasonable flexibility regarding the handling of corrections to previously submitted information. As discussed above, final Rule 905 does not require the reporting side to report the cause of an error.[724] Nor does Rule 905 set forth a specific procedure for how a registered SDR must accept a report of a life cycle event or error correction. Accordingly, a registered SDR's policies and procedures under Rule 907(a)(3) could require resubmission of the entire record with or without an indication of which elements in that record had been revised. Alternatively, a registered SDR's policies and procedures could require a submission of only the data element or elements that had been

724 See supra note 721 and accompanying text.

revised. The Commission notes, however, that Rule 905(b)(2) requires a registered SDR to publicly disseminate a corrected transaction report of a security-based swap, if erroneously reported information relates to a security-based swap that had been publicly disseminated and falls into any of the categories of information enumerated in Rule 901(c). Therefore, a registered SDR will need to have a means of identifying changes in reported data so that it can identify the changed element or elements in the publicly disseminated correction report.

The Commission notes that Rule 907(a)(3) requires a registered SDR's policies and procedures also to address how the registered SDR will apply an appropriate condition flag to any corrected transaction report that must be re-disseminated. Market observers should be able to understand that a transaction report triggered by Rule 905(b)(2) or Rule 902(a) does not represent a new transaction, but merely a revision to a previous transaction. Without an indication to that effect, market observers could misunderstand the true state of the market.[725] To provide observers with a clear view of the market, public reports of life cycle events should allow observers to identify the security-based swap subject to the life cycle event. The Commission notes, however, that registered SDRs may not use the transaction ID for this function because the transaction ID is not a piece of "information reported pursuant to [Rule 901(c)]" or a condition flag.[726] Moreover, the Commission believes that knowledge of the transaction ID should remain limited to counterparties, infrastructure providers, and their agents,

725 One such condition flag could be for voided trades. There may be scenarios in which a security-based swap is executed (or thought to be executed), subsequently reported to a registered SDR, and publicly disseminated by that SDR—but later voided or canceled for some reason. For example, a transaction might be submitted to clearing but rejected by the clearing agency, and the counterparties could deem their agreement to be void ab initio. In this situation, the Commission believes the registered SDR could satisfy its obligation to publicly disseminate under Regulation SBSR by including a condition flag that the previously disseminated transaction report had been voided or canceled.

726 See Rule 902(a).

and should not be widely known. Knowledge of the transaction ID by additional parties could raise data integrity issues, as such additional parties could accidentally or even intentionally submit "false corrections" to the registered SDR regarding transactions to which they were never a counterparty. This could damage the otherwise accurate record of the original transaction. Screening out improperly submitted "corrections"—or repairing damage to the registered SDR's records that a false correction might cause—could become a significant and unwanted burden on registered SDRs. Therefore, registered SDRs, in their policies and procedures under Rule 907(a)(3), will need to use some means other than the transaction ID to indicate that a publicly disseminated report triggered by Rule 905(b)(2) or Rule 902(a) pertains to a previously disseminated transaction.[727]

XIII. Other Duties of Participants

A. Duties of Non-Reporting Sides to Report Certain Information—Rule 906(a)

The Commission believes that a registered SDR generally should maintain complete information for each security-based swap reported to the registered SDR, including UICs for both sides of a transaction. Although Regulation SBSR generally takes the approach of requiring only one side to report the majority of the transaction information,[728] the Commission recognizes

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[727] For example, DTCC Data Repository, LLC ("DDR") utilizes an Event Identifier ("EID") to maintain the integrity of a transaction throughout its lifecycle and enable public identification of events, including corrections, which occur with respect to the transaction. See DDR Rulebook, Section 4.1 at http://dtcc.com/~/media/Files/Downloads/legal/rules/DDR_Rulebook.ashx, last visited September 22, 2014. The EID is separate from the Unique Swap Identifiers ("USI"), which is the CFTC-equivalent of the transaction ID. See also ISDA/SIFMA I at 10 (recommending that initial trades should carry a "primary reference number" when disseminated, "and all amendments of that trade would then produce iterations of the original reference number").

[728] Section 13A(a)(3) of the Exchange Act, 15 U.S.C. 78m-1(a)(1), stipulates which counterparty must report a security-based swap that is not accepted by any clearing

that it might not be feasible or desirable for the reporting side to report to a registered SDR all of the UICs of the non-reporting side. To address this issue, the Commission proposed Rule 906(a), which would provide a means for a registered SDR to obtain UICs from the non-reporting side.

Rule 906(a), as initially proposed, would have established procedures designed to ensure that a registered SDR obtains UICs for both direct counterparties to a security-based swap. As initially proposed, Rule 906(a) would have required a registered SDR to identify any security-based swap reported to it for which the registered SDR does not have the participant ID and (if applicable) the broker ID, desk ID, and trader ID of each counterparty. The registered SDR would have been required to send a report once a day to each of its participants identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered SDR lacks participant IDs and (if applicable) a broker ID, desk ID, or trader ID. The participant would have been required to provide the missing information within 24 hours of receiving this report from the registered SDR.

When the Commission re-proposed Regulation SBSR as part of the Cross-Border Proposing Release, it made conforming changes to Rule 906(a) to reflect the introduction of the "reporting side" concept and to clarify that the participant ID, broker ID, desk ID, and trader ID must be reported only for direct counterparties.[729]

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agency or derivatives clearing organization. That provision does not contemplate reporting by the other direct counterparty. Title VII does not stipulate who should report cleared security-based swaps. However, Section 13(m)(1)(F) of the Exchange Act, 15 U.S.C. 78m(m)(1)(F), provides that "[p]arties to a security-based swap (including agents of the parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission."

[729] See 78 FR at 31214.

The Commission has decided to adopt Rule 906(a) substantially as re-proposed, with conforming changes related to including branch ID and execution agent ID among the UICs that must be provided to the registered SDR[730] and other minor technical changes.[731]

The Commission received two comment letters from the same commenter addressing proposed Rule 906(a). The first letter, which responded to the initial proposal, stated that regulators must have the UICs of both counterparties to a security-based swap to accurately track

730 As discussed above, see supra Section II(C), the Commission has added "branch ID" and "execution agent ID" to the UICs required to be reported under Regulation SBSR. The Commission believes that reporting the branch ID and the execution agent ID for both counterparties to a security-based swap, if applicable, to a registered SDR will assist the Commission and other relevant authorities in overseeing the security-based swap market. Accordingly, the Commission has included branch ID and execution agent ID as UICs that registered SDRs must obtain pursuant to Rule 906(a).

731 The Commission has determined to use the term "counterparty ID" rather than "participant ID" and to use the term "trading desk ID" rather than "desk ID" throughout Regulation SBSR. See supra Sections II(B)(3)(b) and II(C)(3)(c). In addition, the Commission has inserted the word "direct" immediately before each instance of the word "counterparty." When the Commission re-proposed Rule 906(a), it made conforming changes to reflect the introduction of the "reporting side" concept and to clarify that relevant UICs for the non-reporting side must be reported only for direct counterparties. The word "counterparty" occurs in two places in final Rule 906(a), but the re-proposed rule inserted "direct" before "counterparty" only after the first occurrence. Final Rule 906(a) inserts "direct" before "counterparty" both times that the word "counterparty" is used. Final Rule 906(a) also includes modifications that clarify that the term "participant," as used in Rule 906(a), means a participant in a registered SDR. The Commission has made similar modifications throughout final Rule 906. The Commission also is revising the final sentence of Rule 906(a) to clarify that the participant referred to in that sentence is a participant of a registered SDR, and to clarify that a participant that receives a Rule 906(a) report from a registered SDR is responsible for providing missing UIC information for its side of each security-based swap referenced in the report. The participant is not responsible for providing any missing UIC information pertaining to the other side of the transaction. Accordingly, the last sentence of Rule 906(a) states: "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." In addition, the Commission is revising the rule to refer to execution agents to conform to Rule 901(d)(1)(i). Finally, to more accurately reflect the requirements of the rule, the Commission is changing the title of the rule to "Identifying missing UIC information."

exposures.[732] The commenter believed that, ideally, this process would be supported electronically and that the use of third-party services should meet this requirement.[733]

The Commission generally shares the commenter's view that registered SDRs should maintain UICs for both sides of a security-based swap.[734] The Commission notes that Rule 901(d) requires the reporting side to report the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID—as applicable—only for the direct counterparty on its side. Rule 901(d)(1) requires the reporting side to report only the counterparty ID or execution agent ID, as applicable, of a counterparty on the other side. The Commission could have required the reporting side to provide UIC information for both sides of the transaction, but this would obligate a non-reporting side to furnish its UIC information to the reporting side so that the additional UICs could be reported by the reporting side. There are circumstances where a non-reporting side might be unable or unwilling to provide its UIC information to the reporting side. Therefore, the Commission is instead requiring the registered SDR to obtain these UICs from the non-reporting side through the Rule 906(a) process.[735] Obtaining UICs for both sides will

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732 See DTCC II at 16. This commenter also suggested that desk IDs and trader IDs should not be required to be reported due to the fact that desk structures are changed relatively frequently and traders often rotate to different desks or transfer to different firms. See DTCC II at 11. This suggestion is addressed above in Section II(C)(3)(c).

733 See DTCC II at 16.

734 However, if the non-reporting side for the security-based swap does not meet the definition of "participant" in Rule 900(u), Rule 906(a) would not require the registered SDR to request UIC information from the non-reporting side. This result is consistent with the Regulation SBSR Proposing Release. See 75 FR at 75240 ("Thus, the Commission anticipates that there would be some SBSs reported to and captured by a registered SDR where only one counterparty of the SBS is a participant").

735 Rule 906(a) provides: "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

enhance the Commission's ability to carry out its responsibility to oversee the security-based swap market, because the Commission will be able to identify individual traders and business units that are involved in security-based swap transactions.[736]

In a subsequent comment letter, in response to the re-proposal of Regulation SBSR, the same commenter expressed concern that Rule 906(a) could require a registered SDR to send reports to and obtain information from persons who might not be participants of that registered SDR.[737] More generally, this commenter suggested that registered SDRs should not police security-based swap reports for deficiencies or unpopulated data fields in any manner that requires the registered SDR to take affirmative action to obtain information.[738]

The Commission disagrees with the commenter's suggestion that registered SDRs should have no duty to review the completeness of security-based swap reports or obtain missing

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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." Rule 900(u) defines "participant," with respect to a registered SDR, as "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)."

736 Nothing in Regulation SBSR prevents a non-reporting side from voluntarily providing all of its applicable UICs to the reporting side, so that the reporting side could, as agent, report all of the non-reporting side's UICs together with the rest of the data elements required by Rules 901(c) and 901(d). If this were to occur, the registered SDR would not need to send a Rule 906(a) report to the non-reporting side inquiring about the non-reporting side's missing UICs.

737 See DTCC V at 13. As noted above, however, Rule 906(a), as adopted, requires the registered SDR to obtain UIC information only from non-reporting sides that are participants of that registered SDR.

738 See DTCC V at 13.

information from participants. To the contrary, the Commission believes that registered SDRs are best situated to review reported data for completeness because they have a statutory and regulatory duty to accept and maintain security-based swap data, as prescribed by the Commission.[739] Imposing an affirmative duty on registered SDRs to verify the completeness of reported data and to obtain missing data should increase the reliability of data maintained by registered SDRs while decreasing the possibility of registered SDRs providing incomplete reports to relevant authorities. This, in turn, will facilitate oversight of the security-based swap market, which is a primary objective Title VII.

Rule 906(a) requires registered SDRs to communicate with participants that are not reporting sides under Regulation SBSR. As discussed above, these communications are required to ensure that a registered SDR maintains complete UIC information for both sides of each security-based swap transaction that is reported to the registered SDR. The Commission recognizes that some non-reporting sides may not wish to connect directly to a registered SDR because they may not want to incur the costs of establishing a direct connection. Rule 906(a) does not prescribe the means registered SDRs must use to obtain information from non-reporting sides. As a result, registered SDRs have broad discretion to establish a methodology for notifying non-reporting sides of missing UIC information and obtaining UIC reports from the non-reporting side. For example, a registered SDR could send notifications and receive reports via e-mail, in accordance with its policies and procedures.[740] Registered SDRs should consider allowing non-reporting sides to provide the information required by Rule 906(a) in a minimally-burdensome manner.

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739 See 15 U.S.C. 78m(n)(5).

740 See supra Section IV (discussing Rule 907(a)(2)).

Historical security-based swaps must be reported to a registered SDR pursuant to Rule 901(i). The Commission acknowledges that broker IDs, branch IDs, execution agent IDs, trading desk IDs, and trader IDs do not yet exist and will not exist until assigned by registered SDRs. Therefore, these UICs are not data elements applicable to historical security-based swaps. Accordingly, registered SDRs are not required under Rule 906(a) to identify these UICs as missing or to communicate to non-reporting side participants that they are missing, and non-reporting side participants are not required by Rule 906(a) to provide these UICs to a registered SDR with respect to any historical security-based swaps.

B. Duty to Provide Ultimate Parent and Affiliate Information to Registered SDRs—Rule 906(b)

To assist the Commission and other relevant authorities in monitoring systemic risk, a registered SDR should be able to identify and calculate the security-based swap exposures of its participants on an enterprise-wide basis.[741] Therefore, the Commission proposed Rule 906(b), which would have required each participant of a registered SDR to provide to the registered SDR information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered SDR. Proposed Rule 906(b) would have required a person to provide parent and affiliate information to a registered SDR immediately upon becoming a participant.[742] Proposed Rule 906(b) also would have required a participant to promptly notify the registered SDR of any changes to reported parent or affiliate information.

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741 The Commission notes that Rule 13n-5(b)(2) under the Exchange Act provides: "Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the security-based swap data repository maintains records."

742 The policies and procedures of a registered SDR will establish on-boarding procedures for participants.

The Commission also proposed rules to define the relationships that could give rise to reporting obligations under Rule 906(b). Proposed Rule 900 would have defined an "affiliate" as "any person that, directly or indirectly, controls, is controlled by, or is under common control with, a person" and "control" as "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."[743] The Commission also proposed definitions of "parent" and "ultimate parent" to identify particular categories of affiliated entities based on a person's ability to control an affiliate. Specifically, proposed Rule 900 would have defined "parent" to mean "a legal person that controls a participant" and "ultimate parent" as "a legal person that controls a participant and that itself has no parent." The Commission also proposed to define "ultimate parent ID" as "the UIC assigned to an ultimate parent of a participant."

The Commission re-proposed the definitions of "affiliate," "control," "parent," "ultimate parent," and "ultimate parent ID," and Rule 906(b) without change in the Cross-Border Proposing Release.[744]

After considering the comments received, which are discussed below, the Commission is adopting Rule 906(b), as proposed and re-proposed, subject to two clarifying changes.[745]

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743 Proposed Rule 900 further would have provided that a person would be presumed to control another person if the person: "(1) [i]s a director, general partner or officer exercising executive responsibility (or having similar status or functions); (2) [d]irectly 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 (3) [i]n the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital."

744 See 78 FR at 31210-11. The definition of "affiliate" was re-proposed as Rule 900(a). The definitions of "control," "parent," and "ultimate parent" were re-proposed as Rules 900(f), 900(r), and 900(ll), respectively. Re-proposed Rule 900(mm) contained the definition of "ultimate parent ID."

Obtaining ultimate parent and affiliate information will assist the Commission in monitoring enterprise-wide risks related to security-based swaps. If participants are not required to identify which of their affiliates also are participants of a particular registered SDR, the Commission or other relevant authorities might be unable to calculate the security-based swap exposures of that ownership group using data held in the registered SDR. As a result, systemic risk might build undetected within an ownership group, even if all security-based swaps for that enterprise were reported to the same registered SDR. The lack of transparency regarding OTC derivatives exposures within the same ownership group was one of the factors that hampered regulators' ability to respond to the financial crisis of 2007-08.[746]

The Commission believes that a reasonable means of monitoring security-based swap positions on a group-wide basis is by requiring each participant of a registered SDR to provide information sufficient to identify the participant's ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered SDR, using ultimate parent IDs and counterparty IDs.[747] Rule 906(b), as adopted, imposes an affirmative obligation on participants

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745 Specifically, the Commission is modifying Rule 906(b) to clarify that the term "participant," means a participant in a registered SDR. The Commission also is replacing the term "participant ID" with "counterparty ID."

746 See Financial Crisis Inquiry Commission, "The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States," January 2011, at xxi, available at: http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf, last visited September 22, 2014 (explaining that relevant authorities "lacked a full understanding of the risks and interconnections in the financial markets" prior to and during the financial crisis, including, among other things, the exposures created by Lehman Brothers' derivatives contracts).

747 Among other things, Rule 906(b) should enable the Commission and other relevant authorities to identify quickly security-based swaps of a corporate group that have been reported to the registered SDR, including security-based swaps held by securitization vehicles that are controlled by financial institutions.

of a registered SDR to provide this ownership and affiliation information to a registered SDR immediately upon becoming a participant of that SDR. The participant also must notify the registered SDR promptly of any changes to that information. To minimize burdens on participants and to align the burdens as closely as possible with the purpose behind the requirement, Rule 906(b) does not require a participant of a registered SDR to provide information to the registered SDR about all of its affiliates, but only those that are also participants of the same registered SDR.

The Commission received three comments addressing proposed Rule 906(b).[748] One commenter supported the proposed rule, stating that parent and affiliate information, along with other information required to be reported by Regulation SBSR, is critical to providing regulators with a comprehensive view of the swaps market and assuring that publicly reported data is accurate and meaningful.[749] This commenter further stated that registered SDRs should have the power to obtain parent and affiliate information from firms, because this information would help to illustrate the full group level exposures of firms and the impact of the failure of any participant.[750] The Commission generally agrees with the commenter's points and continues to believe that identifying security-based swap exposures within an ownership group is critical to monitoring market activity and detecting potential systemic risks. The existence of data vendors that provide parent and affiliate information may reduce any burdens on participants associated

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748 See DTCC II at 13-14; ICI I at 6; GS1 Proposal at 43-44.

749 See DTCC II at 13-14.

750 See id. at 17. This commenter believed that a registered SDR likely would obtain parent and affiliate information from a data vendor and allow participants to review and approve the data.

with reporting such information to a registered SDR,[751] but the Commission does not view this as an adequate substitute for having the information reported to and readily available from registered SDRs. Title VII's regulatory reporting requirement is designed to allow the Commission and other relevant authorities to have access to comprehensive information about security-based swap activity in registered SDRs. The Commission believes that it would be inimical to that end for relevant authorities to have all the transaction information in registered SDRs but be forced to rely on information from outside of registered SDRs to link positions held by affiliates within the same corporate group.

Two commenters suggested clarifications or modifications to the proposed rule.[752] One commenter expressed concerns about how Rule 906(b) would apply to agents, noting that investment advisers frequently execute a single security-based swap transaction on behalf of multiple accounts and allocate the notional amount of the transaction among these accounts at the end of the day.[753] The commenter stated that advisers often do not know all of the affiliates of their clients and, as a result, might be unable to comply with Rule 906(b).[754] The commenter recommended that "the Commission clarify that an adviser that has implemented reasonable policies and procedures to obtain the required information about affiliates and documented its efforts to obtain the information from its clients be deemed to have satisfied [Rule 906(b) of] Regulation SBSR."[755]

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751 See id.

752 See ICI I at 6; GS1 Proposal at 43-44.

753 See ICI I at 6, note 9.

754 See id.

755 Id.

The Commission believes that it is unnecessary to modify Rule 906(b) in response to this comment. The Commission notes that Rule 906(b) imposes no obligations on an execution agent, such as an investment adviser that executes a single security-based swap on behalf of multiple accounts and allocates the notional amount of the transaction among those accounts at the end of the day. Rather, it would be the counterparty itself that would have the responsibility under Rule 906(b).

Another commenter expressed the view that the information required to be reported by Rule 906(b) should be placed in prescribed XBRL templates or other such input mechanisms that would capture this information at its source for all downstream processes in the financial supply chain to use.[756] The Commission has determined not to specify the manner or format in which security-based swap counterparties must provide ultimate parent and affiliate information to a registered SDR. The Commission believes that it would be preferable to allow each registered SDR to determine a suitable way to receive and maintain ultimate parent and affiliate information about its participants. The Commission notes that Rule 907(a)(6), as adopted, requires a registered SDR to establish and maintain written policies and procedures for periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) with which the counterparty is affiliated, using ultimate parent IDs and counterparty IDs.[757]

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[756] See GS1 Proposal at 43.

[757] As originally proposed, Rule 907(a)(6) would have required a registered SDR to establish and maintain written policies and procedures "[f]or periodically obtaining from each participant information that identifies the participant's ultimate parent(s) and any other participant(s) with which the counterparty is affiliated, using ultimate parent IDs and participant IDs" (emphasis added). The Commission re-proposed Rule 907(a)(6) with the word "participant" in place of the word "counterparty."

The Commission received three comments on the definitions of "control" and "affiliate."[758] No commenters specifically addressed the definitions of "parent," "ultimate parent," or "ultimate parent ID." After carefully evaluating these comments, the Commission is adopting the definitions of "affiliate," "control," "parent," "ultimate parent," and "ultimate parent ID" as proposed and re-proposed.[759]

One commenter stated its view that the proposed definition of "control" was improper.[760] This commenter believed that the proposed 25% threshold for presuming control was too low, and that obtaining the information required by Rule 906(b) from entities with which a security-based swap market participant has less than a majority ownership relationship would be overly burdensome, and, in some cases, not practicable.[761] The commenter recommended that the Commission amend the definition to presume control based on no less than majority ownership.[762]

The Commission disagrees that, for purposes of Regulation SBSR, control should be presumed to exist only if there is majority ownership. Rule 906(b) is designed to assist the Commission and other relevant authorities in monitoring group-wide security-based swap exposures by enabling a registered SDR to provide them with the information necessary to calculate positions in security-based swaps held within the same ownership group that are reported to that registered SDR. If the Commission were to adopt definitions of "control" and

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758 See DTCC II at 17; Multiple Associations Letter at 7-8; SIFMA I at 6.

759 Final Rule 900(a) defines "affiliate," while the definitions of "control," "parent," "ultimate parent" and "ultimate parent ID" are in Rules 900(h), 900(t), 900(oo), and 900(pp), respectively.

760 See SIFMA I at 6.

761 See id.

762 See id.

"affiliate" that were based on majority ownership, participants would be required to identify fewer entities as affiliates, even if certain indicia of affiliation were present. The Commission believes that, to carry out its oversight function for the security-based swap market, it should err on the side of inclusion rather than exclusion when considering which positions are part of the same ownership group for general oversight purposes.

The Commission also notes that the definition of "control" as adopted in Rule 900(h) is consistent with the definition used in other Commission rules and forms,[763] so market participants should be accustomed to applying this definition in the conduct of their business activities. Furthermore, the CFTC's swap data reporting rules employ a materially similar definition of "control" for purposes of determining whether two market participants are affiliated with each other.[764] If the Commission were to adopt a different definition of "control," market participants would need to determine their affiliates under both sets of rules, thereby imposing what the Commission believes would be unnecessary costs on market participants.

One commenter suggested that the Commission and the CFTC use a consistent definition of "affiliate" throughout the Title VII rulemakings[765] and recommended that the Commission and CFTC use the definition of "affiliated group" in the Commissions' proposed joint rulemaking to

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763 See, e.g., Rule 300(f) of Regulation ATS under the Exchange Act, 17 CFR 242.300(f); Rule 19g2-1(b)(2) under the Exchange Act, 17 CFR 240.19g2-1(b)(2); Form 1 (Application for, and Amendments to Application for, Registration as a National Securities Exchange or Exemption from Registration Pursuant to Section 5 of the Exchange Act); Form BD (Uniform Application for Broker-Dealer Registration). See also Rule 3a55-4(b)(2) under the Exchange Act, 17 CFR 240.3a55-4(b)(2) (defining control to mean ownership of 20% or more of an issuer's equity, or the ability to direct the voting of 20% or more of the issuer's voting equity).

764 See 17 CFR 45.6(a) (defining "control" in the context of the CFTC's LEI system); 17 CFR 45.6(e)(2).

765 See Multiple Associations Letter at 7-8.

further define the terms swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, and eligible contract participant ("Entity Definitions Proposing Release").[766] The Commission does not believe it is appropriate to adopt, for purposes of Regulation SBSR, the definition of "affiliated group" that was proposed in the Entity Definitions Proposing Release. The final rules defining "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant" ("Final Entity Definition Rules") did not adopt a definition of "affiliated group."[767] When the Commission and CFTC adopted the Final Entity Definition Rules they specifically rejected the notion that an "affiliated group" should include only those entities that report information or prepare financial statements on a consolidated basis as a prerequisite for being affiliated because they did not believe that whether or not two entities are affiliated should change according to changes in accounting standards.[768] The Commission continues to believe that changes in accounting standards should not determine whether two entities are affiliated and therefore declines to adopt the definition of "affiliated group" that it proposed in the Entity Definitions Proposing Release.

766 Securities Exchange Act Release No. 63452 (December 7, 2010), 75 FR 80174 (December 21, 2010). In the Entity Definitions Proposing Release, "affiliated group" would have been used to describe the range of counterparties that a security-based swap market participant would need to count for purposes of determining whether it qualified for a de minimis exception from the definition of "security-based swap dealer." For purposes of the Entity Definitions Proposing Release, the Commissions stated that an affiliated group would be defined as "any group of entities that is under common control and that reports information or prepares its financial statements on a consolidated basis." See 75 FR at 80180, note 43.

767 Securities Exchange Act Release No. 66868 (April 27, 2012), 77 FR 30596 (May 23, 2012).

768 See id. at 30625.

C. Policies and Procedures of Registered Security-Based Swap Dealers and Registered Major Security-Based Swap Participants to Support Reporting—Rule 906(c)

For the security-based swap reporting requirements established by the Dodd-Frank Act to achieve the objectives of enhancing price transparency and providing regulators with access to data to help carry out their oversight responsibilities, the information that participants provide to registered SDRs must be reliable. Ultimately, the majority of security-based swaps likely will be reported by registered security-based swap dealers and registered major security-based swap participants. The Commission believes that requiring these participants to adopt policies and procedures to address their security-based swap reporting obligations will increase the accuracy and reliability of the transaction reports that they submit to registered SDRs.

Proposed Rule 906(c) would have required a participant that is a security-based swap dealer or major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that the participant complies with any obligations to report information to a registered SDR in a manner consistent with Regulation SBSR and the policies and procedures of any registered SDR of which it is a participant. The policies and procedures contemplated by proposed Rule 906(c) were intended to promote complete and accurate reporting of security-based swap information by participants that are security-based swap dealers and major security-based swap participants, consistent with their obligations under the Dodd-Frank Act and Regulation SBSR. Proposed Rule 906(c) also would have required a security-based swap dealer or major security-based swap participant to review and update its policies and procedures at least annually. The Commission re-proposed Rule

906(c) without change as part of the Cross-Border Proposing Release.[769] The one commenter who addressed this aspect of Regulation SBSR stated that proposed Rule 906(c) is "a necessary part of risk governance and compliance."[770]

The Commission agrees and is adopting Rule 906(c), largely as proposed and re-proposed, subject to two modifications.[771] As proposed and re-proposed, Rule 906(c) would have required security-based swap dealers and major security-based swap participants to establish, maintain, and enforce written policies and procedures to support security-based swap transaction reporting. As discussed above, Rule 906(c), as adopted, imposes this duty only on registered security-based swap dealers and registered major security-based swap participants.[772] Second, Rule 906(c), as adopted, does not include the phrase "and the policies and procedures of any registered security-based swap data repository of which it is a participant." The Commission believes that it is sufficient to require that the policies and procedures of registered security-based swap dealers and registered major security-based swap participants be reasonably designed to ensure compliance with the reporting obligations under Regulation SBSR.[773] Additionally, the Commission anticipates that SDRs will enter into contractual arrangements with reporting sides

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769 See 78 FR at 31214.

770 Barnard I at 3.

771 The Commission also revised Rule 906(c), to clarify that the term "participant" means a participant of a registered SDR.

772 See supra Section V(B)(1) (explaining that, during the period before the Commission has adopted rules for the registration of security-based swap dealers and major security-based swap participants, the Commission seeks to avoid imposing costs on market participants who otherwise would have to assess whether they are security-based swap dealers or major security-based swap participants).

773 The Commission notes that a reporting side is also required to electronically transmit information required under Regulation SBSR to a registered SDR in a format required by that SDR. See Rule 901(h); note 268, supra, and accompanying text.

for the reporting of transactions required to be reported under Regulation SBSR, and that such arrangements likely will stipulate the various rights and obligations of the parties when reporting security-based swap transactions.

Rule 906(c) is designed to promote greater accuracy and completeness of reported security-based swap transaction data by requiring the participants that will bear substantial reporting obligations under Regulation SBSR to adopt policies and procedures that are reasonably designed to ensure that their reports are accurate and reliable. If these participants do not have written policies and procedures for carrying out their reporting duties, compliance with Regulation SBSR might depend too heavily on key individuals or ad hoc and unreliable processes. The Commission, therefore, believes that registered security-based swap dealers and registered major security-based swap participants should be required to establish written policies and procedures which, because they are written and can be shared throughout the organization, should be independent of any specific individuals. Requiring such participants to adopt and maintain written policies and procedures relevant to their reporting responsibilities, as required under Rule 906(c), should help to improve the degree and quality of overall compliance with the reporting requirements of Regulation SBSR. Periodic review of the policies and procedures, as required by Rule 906(c), should help ensure that these policies and procedures remain well functioning over time.

The value of requiring policies and procedures in promoting regulatory compliance is well-established. Internal control systems have long been used to strengthen the integrity of financial reporting. For example, Congress recognized the importance of internal control systems in the Foreign Corrupt Practices Act, which requires public companies to maintain a system of internal accounting controls.[774] Broker-dealers also must maintain policies and procedures for various purposes.[775] The Commission believes that requiring each registered security-based swap dealer and registered major security-based swap participant to adopt and maintain written policies and procedures designed to promote compliance with Regulation SBSR is consistent with Congress's goals in adopting the Dodd-Frank Act.

The policies and procedures required by Rule 906(c) could address, among other things: (1) The reporting process and designation of responsibility for reporting security-based swap transactions; (2) the process for systematizing orally negotiated security-based swap transactions; (3) order management system outages or malfunctions, and when and how back-up systems are to be used in connection with required reporting; (4) verification and validation of all information relating to security-based swap transactions reported to a registered SDR; (5) a training program for employees responsible for security-based swap transaction reporting; (6) control procedures relating to security-based swap transaction reporting and designation of personnel responsible for testing and verifying such policies and procedures; and (7) reviewing and assessing the performance and operational capability of any third party that carries out any duty required by Regulation SBSR on behalf of the registered security-based swap dealer or registered major security-based swap participant.[776]

XIV. Other Aspects of Policies and Procedures of Registered SDRs

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774 See 15 U.S.C. 78m(b)(2)(B).

775 See, e.g., FINRA Conduct Rule 3010(b) (requiring FINRA member broker-dealers to establish and maintain written procedures "that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of [the NASD]"); FINRA Conduct Rule 3012 (requiring FINRA member broker-dealers to establish and maintain written supervisory procedures to ensure that internal policies and procedures are followed and achieve their intended objectives).

776 See 75 FR at 75234.

A. Public Availability of Policies and Procedures

Rule 907(c), as proposed and re-proposed, would have required a registered SDR to make its policies and procedures publicly available on its website. The Commission did not receive any comments on Rule 907(c) and is adopting it as proposed and re-proposed. This public availability requirement will allow all interested parties to understand how the registered SDR is utilizing the flexibility it has in operating the transaction reporting and dissemination system. Being able to review the current policies and procedures will provide an opportunity for participants to make suggestions to the registered SDR for altering and improving those policies and procedures, in light of new products or circumstances, consistent with the principles set out in Regulation SBSR.

B. Updating of Policies and Procedures

Proposed Rule 907(d) would have required a registered SDR to "review, and update as necessary, the policies and procedures required by [Regulation SBSR] at least annually." Proposed Rule 907(d) also would have required the registered SDR to indicate the date on which its policies and procedures were last reviewed. The Cross-Border Proposing Release re-proposed Rule 907(d) without revision.

The Commission did not receive any comments on Rule 907(d) and is adopting it as proposed and re-proposed. The Commission continues to believe that a registered SDR should periodically review its policies and procedures to ensure that they remain well-functioning over time. The Commission also continues to believe that requiring registered SDRs to indicate the date on which their policies and procedures were last reviewed will allow regulators and SDR participants to understand which version of the policies and procedures are current. A registered SDR could satisfy this obligation by, for example, noting when individual sections were last updated or by reissuing the entirety of the policies and procedures with an "as of" date. The Commission notes that, regardless of the method chosen and although only the most current version of a registered SDR's policies and procedures must be publicly available pursuant to Rule 907, the registered SDR must retain prior versions of those policies and procedures for regulatory purposes pursuant to Rule 13n-7(b) under the Exchange Act,[777] as adopted by the Commission.[778] These records would help the Commission, if conducting a review of a registered SDR's past actions, to understand what policies and procedures were in force at the time.

C. Provision of Certain Reports to the Commission

Under Title VII, the Commission is responsible for regulating and overseeing the security-based swap market, including the trade reporting obligations imposed by Regulation SBSR.[779] The Commission believes that, to carry out this responsibility, it will be necessary to obtain from each registered SDR information related to the timeliness, accuracy, and completeness of data reported to the registered SDR by the SDR's participants. Required data submissions that are untimely,[780] inaccurate,[781] or incomplete[782] could compromise the

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777 17 CFR 240.13n-7(b)(1) ("Every security-based swap data repository shall keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Act and the rules and regulations thereunder").

778 See SDR Adopting Release.

779 Under Title VII, registered SDRs are not self-regulatory organizations and thus lack the enforcement authority that self-regulatory organizations have over their members under the Exchange Act. Any information or reports requested by the Commission under Rule 907(e) would assist the Commission in examining for and enforcing compliance with Regulation SBSR by reporting parties.

780 For example, a registered SDR would be able to determine that a reporting side had reported late if the date and time of submission were more than 24 hours after the date and time of execution reported by the reporting side (or, if 24 hours after the time of

regulatory data that the Commission would utilize to carry out its oversight responsibilities. Furthermore, required data submissions that are untimely, inaccurate, or incomplete could diminish the value of publicly disseminated reports that are meant to promote transparency and price discovery.

Accordingly, the Commission proposed and re-proposed Rule 907(e), which would have required a registered SDR to "have the capacity to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it" pursuant to Regulation SBSR and the registered SDR's policies and procedures. The sole commenter on this provision agreed that an SDR should be able to "readily provide the Commission with any relevant information," but noted that an SDR might not be in the best position to confirm the accuracy of the trade information it receives.[783] The commenter believed that ultimate responsibility for the submission of accurate and complete information belongs with the reporting side, and that Rule 907(e) should be revised to reflect that an SDR's information will "only be as timely, accurate, and complete as provided to it by parties to the trade."[784]

The Commission is adopting Rule 907(e) with a minor revision. The final rule provides that a registered SDR "shall provide, upon request, information or reports . . ." rather than, as proposed and re-proposed, that a registered SDR "shall have the capacity to provide . . ." This

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execution would have fallen on a day that was not a business day, then after that same time on the next business day). See Rule 901(j).

781 Some examples of clearly inaccurate data would include using lettered text in a field that clearly requires a number (or vice versa), or using a UIC that corresponds to no valid LEI or to a UIC issued or endorsed by the registered SDR.

782 An example of an incomplete report would be leaving one or more required reporting fields blank.

783 DTCC V at 14.

784 Id.

language better conveys the Commission's expectation that, not only must a registered SDR have the capacity to provide the relevant information or reports, it must in fact provide such information or reports when the Commission requests. The Commission believes that this revision accords with the commenter who stated that an SDR should be able to "readily provide the Commission with any relevant information."[785]

However, the Commission is not revising Rule 907(e) to reflect that an SDR's information will "only be as timely, accurate, and complete as provided to it by parties to the trade," as requested by the commenter.[786] The Commission appreciates that there could be certain data elements submitted by reporting sides that a registered SDR could not reasonably be expected to know are inaccurate. For example, if the reporting side submits a valid trader ID for trader X when in fact the transaction was carried out by trader Y, the Commission would not expect a Rule 907(e) report provided by a registered SDR to reflect this fact. The Commission notes, however, that Rule 13n-5(b)(1)(iii) under the Exchange Act requires an SDR to "establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate." Thus, the Commission could require a registered SDR to include in a Rule 907(e) report any instances where a reporting side reported a trader ID that fails the SDR's validation rules, because the SDR is in a position to know which trader IDs (and other UICs) are consistent with UICs assigned to traders of its participants.[787]

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785 See note 783, supra.

786 Id.

787 See also Section 13(n)(5)(B) of the Exchange Act, 15 U.S.C. 78m(n)(5)(B) (requiring an SDR to "confirm with both counterparties to the security-based swap the accuracy of the data that was submitted"); Rule 13n-4(b)(3) under the Exchange Act (implementing that requirement).

XV. Rule 908—Cross-Border Reach of Regulation SBSR

Security-based swap business currently takes place across national borders, with agreements negotiated and executed between counterparties in different jurisdictions (which might then be booked and risk-managed in still other jurisdictions).[788] Given the global nature of the market and to help ensure an effective regime for regulatory reporting and public dissemination of security-based swap transactions under Title VII, it is important that Regulation SBSR identify which transactions in this global market will be subject to these Title VII requirements. Regulation SBSR, as initially proposed in November 2010, included Rule 908, which sought to address the cross-border application of the regulatory reporting and public dissemination requirements. In the Cross-Border Proposing Release, issued in May 2013, the Commission re-proposed Rule 908 with substantial revisions. Commenters' views on re-proposed Rule 908 and the final rule, as adopted by the Commission, are discussed in detail below, following a discussion of the Commission's approach to cross-border application of its authority under Title VII and the Exchange Act generally.

A. General Considerations

As stated in the Cross-Border Adopting Release, the Commission continues to believe that a territorial approach to the application of Title VII—including the requirements relating to regulatory reporting and public dissemination of security-based swap transactions—is

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788 Security-based swap market data indicates that many security-based swap transactions involve activity in more than one jurisdiction. See infra Section XXII(B)(1)(b) (noting that data in the Trade Information Warehouse reveals that approximately 13% of price-forming transactions in North American single-name CDS transaction from January 2008 to December 2013 were between two U.S.-domiciled counterparties; 48% of such transactions were cross-border transactions between a U.S.-domiciled counterparty and a foreign-domiciled counterparty; and an additional 39% were between two foreign-domiciled counterparties).

appropriate.[789] This approach, properly understood, is grounded in the text of the relevant statutory provisions and is designed to help ensure that the Commission's application of the relevant provisions is consistent with the goals that the statute was intended to achieve.[790] Once the Commission has identified the activity regulated by the statutory provision, it then determines whether a person is engaged in conduct that the statutory provision regulates and whether this conduct occurs within the United States.[791]

Under the foregoing analysis, when a U.S. person enters into a security-based swap, the security-based swap necessarily exists at least in part within the United States. The definition of "U.S. person"—adopted in the Cross-Border Adopting Release and incorporated by reference into Regulation SBSR—is intended, in part, to identify those persons for whom it is reasonable to infer that a significant portion of their financial and legal relationships is likely to exist within the United States, and that it is therefore reasonable to conclude that risk arising from their security-based swap activities could manifest itself within the United States, regardless of the location of their counterparties, given the ongoing nature of the obligations that result from security-based swap transactions.[792] Under its territorial approach, the Commission seeks to

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789 See 79 FR at 47287.

790 See Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869, 2884 (2010) (identifying focus of statutory language to determine what conduct was relevant in determining whether the statute was being applied to domestic conduct).

791 When the statutory text does not describe the relevant activity with specificity or provides for further Commission interpretation of statutory terms or requirements, this analysis may require the Commission to identify through interpretation of the statutory text the specific activity that is relevant under the statute or to incorporate prior interpretations of the relevant statutory text. See Cross-Border Adopting Release, 79 FR at 47287 (explaining the Commission's approach to interpreting Title VII requirements).

792 See 79 FR at 47288-89. As discussed below, the Commission is adopting a definition of "U.S. person" in Regulation SBSR that cross-references the definition adopted as part of the Cross-Border Adopting Release.

apply Title VII's regulatory reporting and public dissemination requirements in a consistent manner to differing organizational structures that serve similar economic purposes, and thereby avoid creating different regulatory outcomes for differing legal arrangements that raise similar policy considerations and pose similar economic risks to the United States.[793] Therefore, as discussed in the Cross-Border Adopting Release, this territorial application of Title VII requirements extends to the activities of U.S. person conducted through a foreign branch or office[794] and to the activities of a non-U.S. person for which the U.S. person provides a recourse guarantee.[795]

The Commission further notes that Section 15F(f)(1)(A) of the Exchange Act[796] provides that each registered security-based swap dealer and major security-based swap participant "shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and positions and financial condition of the registered security-based swap dealer or major security-based swap participant."[797]

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793 See id. at 47344.

794 See id. at 47289.

795 See id. at 47289-90.

796 15 U.S.C. 78o-10(f)(1)(A).

797 In addition, Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c), authorizes the Commission to apply Title VII to persons transacting a business "without the jurisdiction of the United States" if they contravene rules that the Commission has prescribed as "necessary or appropriate to prevent the evasion of any provision" of Title VII. As the Commission stated in the Cross-Border Adopting Release, Section 30(c) does not require a finding that actual evasion has occurred or is occurring to invoke the Commission's authority to reach activity "without the jurisdiction of the United States" or to limit application of Title VII to security-based swap activity "without the jurisdiction of the United States" only to business that is transacted in a way that is purposefully intended to evade Title VII. See 79 FR at 47291. The focus of this provision is not whether such rules impose Title VII requirements only on entities engaged in activity that is consciously evasive, but whether the rules are generally "necessary or appropriate" to prevent potential evasion of Title VII. The Commission therefore disagrees with the

Finally, the Commission seeks to minimize the potential for duplicative or conflicting regulations. The Commission recognizes the potential for market participants who engage in cross-border security-based swap activity to be subject to regulation under Regulation SBSR and parallel rules in foreign jurisdictions in which they operate. To address this possibility, the Commission—as described in detail below—is adopting a "substituted compliance" framework. The Commission may issue a substituted compliance determination if it finds that the corresponding requirements of the foreign regulatory system are comparable to the relevant provisions of Regulation SBSR, and are accompanied by an effective supervisory and enforcement program administered by the relevant foreign authorities.[798] The availability of substituted compliance is designed to reduce the likelihood of cross-border market participants being subject to potentially conflicting or duplicative reporting requirements.

B. Definition of "U.S. Person"

In the Regulation SBSR Proposing Release, the Commission proposed to define "U.S. person" as "a natural person that is a U.S. citizen or U.S. resident or a legal person that is organized under the corporate laws of any part of the United States or has its principal place of business in the United States."[799] In the Cross-Border Proposing Release, the Commission introduced a new definition of "U.S. person" that it proposed to use in all Title VII rulemakings to promote consistency and transparency, which differed from the initially proposed definition in

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commenter who stated that the Commission "should not adopt an extraterritorial regulatory framework premised on the assumption that activities conducted outside the U.S. will be undertaken abroad for the purpose of evasion." Cleary III at 5.

798 See Rule 908(c). See also infra Section XV(E).

799 Rule 900 as initially proposed. See also Regulation SBSR Proposing Release, 75 FR at 75284.

certain respects. Re-proposed Rule 900(pp) would have defined "U.S. person" by cross-referencing proposed Rule 3a71-3(a)(7), which would have defined "U.S. person" as:

(i) any natural person resident in the United States;

(ii) any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States; and

(iii) any account (whether discretionary or non-discretionary) of a U.S. person.[800]

The Commission received extensive comment on this proposed definition of "U.S. person" and responded to those comments in the Cross-Border Adopting Release.[801]

The Commission adopted a definition of "U.S. person" in the Cross-Border Adopting Release as Rule 3a71-3(a)(4) under the Exchange Act, which reflects a territorial approach to the application of Title VII.[802] The Commission believes that using the same definition of "U.S. person" in multiple Title VII rules could benefit market participants by eliminating complexity that might result from the use of different definitions for different Title VII rules. Accordingly, final Rule 900(ss) of Regulation SBSR defines "U.S. person" to have the same meaning as in Rule 3a71-3(a)(4). Rule 3a71-3(a)(4)(i) defines "U.S. person" as: (1) a natural person resident in the United States;[803] (2) a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its

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800 See Cross-Border Proposing Release, 78 FR at 31207.

801 See 79 FR at 47303-13. These comments focused on the proposed definition generally and did not address the application of the definition to Regulation SBSR.

802 See Cross-Border Adopting Release, 79 FR at 47308, note 255.

803 Rule 3a71-3(a)(5) under the Exchange Act, 17 CFR 240.3a71-3(a)(4), defines "United States" as the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

principal place of business[804] in the United States; (3) an account (whether discretionary or non-discretionary) of a U.S. person; or (4) any estate of a decedent who was a resident of the United States at the time of death. As discussed in the Cross-Border Adopting Release, the Commission believes that a definition of "U.S. person" that focused solely on whether a legal person is organized, incorporated, or established in the United States could encourage some entities to move their place of incorporation to a non-U.S. jurisdiction to avoid complying with Title VII, while maintaining their principal place of business in the United States.[805]

By incorporating Rule 3a71-3(a)(4) by reference, Regulation SBSR also incorporates subparagraph (iv) of Rule 3a71-3(a)(4), which allows a person to rely on a counterparty's representation that the counterparty is not a U.S. person, unless such person knows or has reason to know that the representation is inaccurate. As explained in the Cross-Border Adopting Release,[806] Rule 3a71-3(a)(4)(iv) reflects a constructive knowledge standard for reliance. Under this standard, a counterparty is permitted to rely on a representation, unless such person knows or has reason to know that it is inaccurate. A person would have reason to know the representation

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804 Rule 3a71-3(a)(4)(ii) under the Exchange Act, 17 CFR 240.3a71-3(a)(4)(ii), defines "principal place of business" as 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. See also Cross-Border Adopting Release, 79 FR at 47308 (discussing the Commission's rationale for adopting the "principal place of business" test).

805 See id., 79 FR at 47309, note 262 ("The final definition of 'principal place of business' will help ensure that entities do not restructure their business by incorporating under foreign law while continuing to direct, control, and coordinate the operations of the entity from within the United States, which would enable them to maintain a significant portion of their financial and legal relationships within the United States while avoiding application of Title VII requirements to such transactions").

806 See id. at 47313.

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.[807] Expressly permitting market participants to rely on such representations in the "U.S. person" definition should help facilitate the determination of which side to a security-based swap is the reporting side and mitigate challenges that could arise in determining a counterparty's U.S.-person status under the final rule.[808] It permits the party best positioned to make this determination to perform an analysis of its own U.S.-person status and convey, in the form of a representation, the results of that analysis to its counterparty. Such representations should help reduce the potential for inconsistent classification and treatment of a person by its counterparties and promote uniform application of Title VII.[809]

Rule 3a71-3(a)(4)(iii)—and thus Regulation SBSR—provides that 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; their agencies and pension plans; and any other similar international organizations and their agencies and pension plans. Therefore, a security-based swap involving any such institution, for that fact alone, will not be subject to regulatory reporting

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807 To the extent that a person has knowledge of facts that could lead a reasonable person to believe that a counterparty may not be a U.S. person under the definition, it might need to conduct additional diligence before relying on the representation. See id. at 47313, note 302.

808 As discussed below, under Rule 908(a), the U.S.-person status of the counterparties to a security-based swap is one factor in determining whether the security-based swap is subject to Regulation SBSR. If a security-based swap is subject to Regulation SBSR, the U.S.-person status of the counterparties may influence the determination of the reporting side under Rule 901(a)(2)(ii). See supra Section V(B).

809 The final rule permitting reliance on representations with respect to a counterparty's U.S.-person status applies only to the definition of "U.S. person" as used in Regulation SBSR and does not apply to any determination of a person's U.S.-person status under any other provision of the federal securities laws, including Commission rules, regulations, interpretations, or guidance.

or public dissemination under Regulation SBSR.[810] However, as discussed in Section XVI(A), infra, a security-based swap transaction involving such an institution could be subject to regulatory reporting and/or public dissemination, depending on the domicile and registration status of the other side of the transaction.

Finally, similar to the approach taken by the Commission in the Cross-Border Adopting Release for purposes of the de minimis calculation,[811] a change in a counterparty's U.S.-person status after a security-based swap is executed would not affect the original transaction's treatment under Regulation SBSR. However, if that person were to enter into another security-based swap following its change in status, any duties required by Regulation SBSR would be determined according to the new status of that person at the time of the second security-based swap.

C. Scope of Security-Based Swap Transactions Covered by Requirements of Regulation SBSR—Rule 908(a)

1. Transactions Involving a Direct Counterparty That Is a U.S. Person

Under both the proposal and re-proposal, any security-based swap that had a direct counterparty that is a U.S. person would have been subject to both regulatory reporting and public dissemination, regardless of the registration status or domicile of any counterparty on the other side of the transaction. Commenters generally did not object to this aspect of the proposal and the re-proposal.[812]

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810 See infra Section XV(C) (discussing when a security-based swap is subject to regulatory reporting and public dissemination).

811 See 79 FR at 47313, note 300.

812 Some commenters supported a cross-border jurisdictional regime that would apply security-based swap regulation on the basis of whether a direct counterparty to a security-based swap is a U.S. person. See, e.g., JFMC Letter at 5; JSDA Letter at 3-4; AFR Letter at 4, 13-14. These commenters did not, however, raise this suggestion specifically in the

Final Rule 908(a)(1)(i) provides, in relevant part, that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]here is a direct . . . counterparty that is a U.S. person on either or both sides of the transaction." Thus, any security-based swap that has a direct counterparty that is a U.S. person is subject to both regulatory reporting and public dissemination, regardless of the registration status or domicile of any counterparty on the other side of the transaction. This determination is consistent with the territorial application of Title VII described above, because any security-based swap that has a U.S.-person direct counterparty exists at least in part within the United States. One purpose of the rule is to allow the Commission and other relevant authorities to access, for regulatory and supervisory purposes, a record of each such transaction. A second purpose of the rule is to carry out the Title VII mandate for public dissemination of security-based swap transactions. The transparency benefits of requiring public dissemination of security-based swaps involving at least one U.S.-person direct counterparty would inure to other U.S. persons and the U.S. market generally, as other participants in the U.S. market are likely to transact in the same or related instruments.

2. Transactions Conducted Through a Foreign Branch or Office

Rule 908(a), as initially proposed, treated foreign branches and offices of U.S. persons as integral parts of the U.S. person itself.[813] Therefore, Rule 908(a), as initially proposed, would not have treated a security-based swap transaction executed by or through a foreign branch or office of a U.S. person any differently than any other transaction executed by the U.S. person.

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context of Regulation SBSR. See also IIB Letter at 11 (observing that a status-based test for jurisdictional application would be more appropriate than a territorial approach based on the location of conduct). The Cross-Border Adopting Release addressed these comments. See 79 FR at 47302-06.

813 See Regulation SBSR Proposing Release, 75 FR at 75240 ("Because a branch or office has no separate legal existence under corporate law, the branch or office would be an integral part of the U.S. person itself").

In the Cross-Border Proposing Release, the Commission revised its approach to transactions conducted through a foreign branch. Although all transactions conducted through a foreign branch or office would have been subject to regulatory reporting, re-proposed Rule 908(a)(2)(iii) would have provided an exception to public dissemination for transactions conducted through a foreign branch when the other side is a non-U.S. person who is not a security-based swap dealer.[814] In proposing this exception to public dissemination for such transactions conducted through a foreign branch, the Commission stated that it was "concerned that, if it did not take this approach, non-U.S. market participants might avoid entering into security-based swaps with the foreign branches of U.S. banks so as to avoid their security-based swaps being publicly disseminated."[815] However, Rule 908(a)(2) would have subjected a transaction conducted through a foreign branch to public dissemination if there was, on the other side, a U.S. person (including a foreign branch)[816] or a security-based swap dealer.[817]

One commenter expressed the view that foreign branches should be treated the same as non-U.S.-person security-based swap dealers for purposes of public dissemination, and that security-based swaps between two non-U.S. persons, between a non-U.S. person and a foreign

814 In the Cross-Border Proposing Release, the term "transaction conducted through a foreign branch" was defined in re-proposed Rule 900(hh) to cross-reference the definition of that term in proposed Rule 3a71-3(a)(4) under the Exchange Act, and the term "foreign branch" was defined in re-proposed Rule 900(n) to cross-reference the definition of foreign branch in proposed Rule 3a71-3(a)(1). In the Cross-Border Adopting Release, the Commission adopted the term "foreign branch" as proposed and adopted the term "transaction conducted through a foreign branch" with certain modifications. See 79 FR at 47322.

815 Cross-Border Proposing Release, 78 FR at 31063.

816 See re-proposed Rule 908(a)(2)(ii).

817 See re-proposed Rule 908(a)(2)(iv).

branch, and between two foreign branches should not be subject to public dissemination.[818] Another commenter, however, stated that "it should be expected that most jurisdictions would seek to apply their rules to transactions between two of their own domiciled persons, despite some of the activity being conducted abroad."[819] A third commenter recommended that the exception to public dissemination for foreign branches be eliminated, so that security-based swaps between a foreign branch and any non-U.S. person would be subject to public dissemination.[820]

As noted above, the Commission is adopting the requirement that any security-based swap transaction having a direct counterparty that is a U.S. person, including a security-based swap conducted through a foreign branch, shall be subject to regulatory reporting. The Commission has determined not to adopt the proposed exception from public dissemination for certain transactions conducted through a foreign branch. Thus, under Rule 908(a)(1)(i), as adopted, any security-based swap transaction conducted through a foreign branch is subject to both regulatory reporting and public dissemination. Under the territorial approach to the application of Title VII requirements discussed above, a foreign branch has no separate existence from the U.S. person itself. Therefore, any security-based swap transaction conducted through a foreign branch is a security-based swap executed by the U.S. person itself, and any security-

818 See SIFMA/FIA/Roundtable Letter at A-43.

819 IIB Letter at 9. The commenter also noted that "EMIR [the European Markets Infrastructure Regulation] would apply to transactions between the U.S. branches of two entities established in the EU," id., and thus appeared to suggest that U.S. regulation should apply to transactions between two foreign branches of U.S. persons.

820 See Better Markets IV at 23.

based swap executed by a U.S. person exists at least in part within the United States.[821] The Title VII requirements for regulatory reporting and public dissemination apply to all security-based swap transactions that exist in whole or in part within the United States, unless an exception applies.

Upon further consideration, the Commission believes that the exception from public dissemination for foreign branches in Rule 908(a), as re-proposed, is not warranted. Granting an exception to public dissemination for certain transactions conducted through a foreign branch could have created incentives for some U.S. persons to utilize foreign branches to evade Title VII's public dissemination requirements.[822] This could be the case particularly in a foreign jurisdiction that does not apply rules for public dissemination to all or some transactions conducted through foreign branches operating within that jurisdiction. Thus, the Commission disagrees with the commenter who expressed the view that foreign branches should be treated the same as non-U.S. person security-based swap dealers for purposes of public dissemination,[823]

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821 See Cross-Border Adopting Release, 79 FR at 47289 (describing the application of the security-based swap dealer de minimis threshold with respect to foreign branches or offices of U.S. persons). The Commission notes that a transaction conducted by a U.S. person through any other office that does not have a separate legal identity from the U.S. person, even if such office does not meet the definition of "foreign branch" in Rule 3a71-3(a)(2) of the Exchange Act, also is a transaction conducted by the U.S. person directly, and thus is subject to regulatory reporting and public dissemination under Rule 908(a)(1)(i), as adopted.

822 Under Rule 908(a)(2)(iii), as re-proposed, public dissemination would have applied to a security-based swap between a U.S. person direct counterparty and a non-U.S. person (other than a security-based swap dealer) unless the U.S. person conducted the transaction through a foreign branch. Thus, the U.S. person could have directed a non-U.S.-person counterparty to interact only with its foreign branch staff, which would have made the transaction eligible for the exception provided by re-proposed Rule 908(a)(2)(iii).

823 As discussed in Section XV(C)(6), infra, if a transaction involving a registered security-based swap dealer or registered major security-based swap participant does not fall within

and that security-based swaps between two non-U.S. persons, between a non-U.S. person and a foreign branch, and between two foreign branches should not be subject to public dissemination.[824]

3. Transactions Guaranteed by a U.S. Person

Regulation SBSR, as initially proposed, did not impose reporting requirements based on whether a U.S. person acts as a guarantor of a security-based swap. As re-proposed, however, Rule 908(a)(1)(ii) would have required regulatory reporting of any security-based swap that had a U.S.-person guarantor, even when no direct counterparty was a U.S. person.[825] In addition, Rule 908(a)(2), as re-proposed, would have required public dissemination of some, but not all, transactions having a U.S.-person indirect counterparty. Re-proposed Rule 908(a)(2)(ii) would have provided, in relevant part, that a security-based swap is subject to public dissemination if there is an indirect counterparty that is a U.S. person on each side of the transaction.[826] Re-proposed Rule 908(a)(2)(iv) would have provided, in relevant part, that a transaction where one side includes a U.S.-person (including an indirect counterparty that is a U.S. person) and the other side includes a non-U.S. person that is a security-based swap dealer would be subject to public dissemination. However, a transaction would have been excepted from public

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Rule 908(a)(1), Rule 908(a)(2), as adopted, subjects that transaction to regulatory reporting but not public dissemination.

824 See SIFMA/FIA/Roundtable Letter at A-43.

825 Also in the Cross-Border Proposing Release, the Commission proposed new terms "direct counterparty" and "indirect counterparty" to distinguish the primary obligor on the security-based swap from the person who guarantees the primary obligor's performance, respectively. The Commission also proposed the term "side" to refer to the direct counterparty and any guarantor of the direct counterparty. See 78 FR at 31211.

826 The Commission noted in the Cross-Border Proposing Release that, where U.S. persons have an interest on both sides of a transaction, even if indirectly, the transaction generally should be subject to Title VII's public dissemination requirement. See 78 FR at 31062.

dissemination if one side consisted of a non-U.S.-person direct counterparty and a U.S.-person guarantor, where neither is a security-based swap dealer or major security-based swap participant, and the other side includes no counterparty that is a U.S. person, security-based swap dealer, or major security-based swap participant (a "covered cross-border transaction").[827]

Commenters generally did not object to the Commission's proposal to subject transactions between direct counterparties who are U.S. persons to regulatory reporting or public dissemination. However, commenters expressed mixed views about extending regulatory reporting and public dissemination requirements to transactions involving U.S.-person guarantors.[828] One of these commenters stated that a guarantee of a security-based swap transaction by a U.S. person should not affect whether the transaction is subject to regulatory reporting or public dissemination, because there is too tenuous a nexus to justify applying Regulation SBSR on the basis of the guarantee alone.[829] Another commenter recommended that a security-based swap between two non-U.S. persons be subject to Commission regulation only where the transaction is "guaranteed by a U.S. person for a significant value."[830] A third commenter, however, recommended that the Commission apply Title VII rules to transactions in which the risk flows back to a U.S. entity, including transactions involving guaranteed foreign subsidiaries and branches of U.S. entities.[831]

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827 As used in this release, a "covered cross-border transaction" refers to a transaction that meets the description above and will not be submitted to clearing at a registered clearing agency having its principal place of business in the United States.

828 See SIFMA/FIA/Roundtable Letter at A-41; ESMA Letter at 3; AFR Letter at 4, 13-14.

829 See SIFMA/FIA/Roundtable Letter at A-41.

830 ESMA Letter at 3.

831 See AFR Letter at 4, 13-14 (noting that the geographic location of the entities ultimately responsible for security-based swap liabilities should determine the application of the Commission's rules implementing the Dodd-Frank Act). Another commenter stated that

The Commission is adopting, as re-proposed, in Rule 908(a)(1)(ii) the requirement that any transaction involving a U.S.-person guarantor is subject to regulatory reporting. The Commission has determined to continue to consider whether to carve out covered cross-border transactions from public dissemination. Thus, Rule 908(a)(1)(i), as adopted, requires public dissemination of all security-based swap transactions having a U.S.-person guarantor.[832] This approach is consistent with the territorial approach to applying Title VII requirements, described above. A security-based swap with a U.S.-person indirect counterparty is economically equivalent to a security-based swap with a U.S.-person direct counterparty, and both kinds of security-based swaps exist, at least in part, within the United States. As the Commission observed in the Cross-Border Adopting Release, the presence of a U.S. guarantor facilitates the activity of the non-U.S. person who is guaranteed and, as a result, the security-based swap activity of the non-U.S. person cannot reasonably be isolated from the U.S. person's activity in providing the guarantee.[833] The financial resources of the U.S.-person guarantor could be called upon to satisfy the contract if the non-U.S. person fails to meet its obligations. Thus, the

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the proposed definition of "indirect counterparty" in Regulation SBSR implies that an indirect counterparty can cause a trade to be subject to reporting even in cases where the direct counterparties to the trade would not lead to the conclusion that the trade is reportable. The commenter recommended that the Commission amend the definition of "indirect counterparty" to make it clear that its scope is limited to U.S.-person guarantors and not all guarantors, to be consistent with the intent demonstrated by the Commission in the preamble where reference is made to U.S.-person guarantors. See ISDA IV at 4. Although the Commission has not amended the definition of "indirect counterparty" in this manner, such an amendment is not necessary because Rule 908(a)(i), as adopted, effectively reaches the same result. Rule 908(a)(i) provides that a security-based swap will be subject to regulatory reporting and public dissemination if there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction.

832 As discussed below, compliance with Rule 908(a)(1)(i) is not required until the Commission establishes a compliance date for this provision.

833 See 79 FR at 47289 (discussing dealing transactions of non-U.S. persons that are subject to recourse guarantees by their U.S. affiliates).

extension of a guarantee is economically equivalent to a transaction entered into directly by the U.S.-person guarantor. Accordingly, Rule 908(a)(1)(i), as adopted, provides that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]here is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction" (emphasis added).The Commission disagrees with the commenter who stated that a guarantee of a security-based swap transaction by a U.S. person should not affect whether the transaction is subject to regulatory reporting or public dissemination, because there is too tenuous a nexus to justify applying Regulation SBSR on the basis of the guarantee alone.[834] Under the territorial approach described above, any security-based swap guaranteed by a U.S. person exists at least in part within the United States, which triggers the application of Title VII requirements. The Commission believes that this is true regardless of whether a particular guarantee is "for a significant value."[835] Furthermore, if the Commission does not require regulatory reporting of security-based swaps that are guaranteed by U.S. persons—in addition to security-based swaps having a U.S.-person direct counterparty—the Commission and other relevant authorities could be less likely to detect potential market abuse or the build-up of potentially significant risks within individual firms or groups or more widespread systemic risks to the U.S. financial system.

The Commission anticipates seeking additional comment on whether or not to except covered cross-border transactions from public dissemination in the future. Furthermore, as discussed in the proposed compliance schedule for Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR set forth in the Regulation SBSR Proposed Amendments Release, the Commission is proposing to defer the compliance date for Rule 908(a)(1)(i) with respect to the

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834 See SIFMA/FIA/Roundtable Letter at A-41.

835 See ESMA Letter at 3.

public dissemination of covered cross-border transactions until such time as the Commission has received and considered comment on such an exception. Thus, although covered cross-border transactions are subject to public dissemination under Rule 908(a)(1)(i), as adopted, there would be no public dissemination of any such transaction until the Commission considers whether these transactions should be excepted from public dissemination.

4. Transactions Accepted for Clearing by a U.S. Clearing Agency

Re-proposed Rules 908(a)(1)(iv) and 908(a)(2)(v) would have required regulatory reporting and public dissemination, respectively, of security-based swaps that are "cleared through a clearing agency having its principal place of business in the United States." One commenter agreed that "Dodd-Frank's reporting requirements should apply to any transaction that . . . was cleared through a registered clearing organization having its principal place of business in the U.S."[836] Two other commenters objected.[837] One of these commenters observed that Regulation SBSR could require regulatory reporting and public dissemination of transaction information before the transaction is submitted for clearing; as a result, circumstances could arise where the sides would not know whether a particular security-based swap is subject to regulatory reporting and public dissemination until after reporting deadlines have passed.[838] The other commenter argued that the proposed requirement might discourage market participants from clearing transactions in the United States, which would be contrary to the objective of reducing systemic risk.[839] Another commenter argued that a transaction between two non-U.S. persons that is cleared through a clearing agency having its principal place of business in the United

836 Id. at 4.

837 See CME II at 5; SIFMA/FIA/Roundtable Letter at A-42.

838 See CME II at 5.

839 See SIFMA/FIA/Roundtable Letter at A-42.

States should not be subject to public dissemination, "although the clearing agency can provide information for regulatory purposes."[840]

The Commission is adopting Rule 908(a)(1)(ii) with two modifications. The rule, as adopted, provides that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]he security-based swap is accepted for clearing by a clearing agency having its principal place of business in the United States." Rule 908(a)(1)(ii), as adopted, is consistent with the territorial approach discussed above. Just as a security-based swap to which a U.S. person is a direct or indirect counterparty exists, at least in part, within the United States, a security-based swap that is accepted for clearing by a clearing agency having its principal place of business in the United States also exists, at least in part, within the United States. Such acceptance creates ongoing obligations that are borne by a U.S. person and thus are properly viewed as existing within the United States.[841]

The Commission acknowledges the concerns of the commenter who observed that Regulation SBSR, as re-proposed, could have required regulatory reporting and public dissemination of transaction information before the transaction is submitted for clearing.[842] Currently, clearing in the security-based swap market is voluntary. Therefore, counterparties—if they decide to clear a transaction at all—might not submit the transaction to a clearing agency until some time after it is executed. The final rule reflects the Commission's view that, if a

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840 ISDA/SIFMA I at 19. The Regulation SBSR Proposed Amendments Release addresses the issue of whether registered clearing agencies should be required to report security-based swap transaction information to a registered SDR.

841 See Cross-Border Adopting Release, 79 FR at 47302-03, note 186 (explaining that security-based swap activity that "results in a transaction involving a U.S. counterparty creates ongoing obligations that are borne by a U.S. person, and thus is properly viewed as occurring within the United States").

842 See CME II at 5.

security-based swap is subject to regulatory reporting and public dissemination solely because of Rule 908(a)(1)(ii),[843] the duty to report the trade is not triggered by the execution of the security-based swap but rather by the registered clearing agency's acceptance of the transaction for clearing.[844] The Commission believes that it would not be appropriate to link the reporting requirement to the time of execution, because the registered clearing agency's acceptance of the transaction for clearing might not take place until several days after the time of execution.

The Commission disagrees with the commenter who argued that a transaction between two non-U.S. persons that is cleared through a clearing agency having its principal place of business in the United States should not be subject to public dissemination, "although the clearing agency can provide information for regulatory purposes."[845] The Commission believes that such transactions—subject to the modifications to the rule text noted above—should be subject to both regulatory reporting and public dissemination and therefore is not adopting the this commenter's recommendation. For the reasons described above, the Commission believes that such transactions exist at least in part within the United States; therefore, Title VII's requirements for both regulatory reporting and public dissemination properly apply to such transactions. This approach will permit the Commission and other relevant authorities the ability to observe in a registered SDR all of the alpha transactions that have been accepted by a

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843 A transaction also could be subject to regulatory reporting and public dissemination because it meets the first prong of Rule 908(a)(1): it could have a U.S. person on either or both sides of the transaction. Such a transaction must be reported within 24 hours after the time of execution, regardless of whether the transaction is accepted for clearing. See Rule 901(j).

844 See supra Sections II(A)(2)(a) and II(B)(2) (explaining that Rule 901(j) provides that the reporting timeframes applicable to Rules 901(c) and 901(d) are triggered by acceptance for clearing, not the time of execution, if a security-based swap is subject to regulatory reporting and public dissemination solely by operation of Rule 908(a)(1)(ii)).

845 ISDA/SIFMA I at 19.

registered clearing agency having its principal place of business in the United States and to carry out oversight of security-based swaps that exist at least in part within the United States. Furthermore, the Commission believes that public dissemination of such transactions will have value to participants in the U.S. security-based swap market, who are likely to trade the same or similar products, as these products have been made eligible for clearing by a registered clearing agency having its principal place of business in the United States.[846]

Furthermore, the Commission disagrees with the commenter who argued that requiring regulatory reporting and public dissemination of transactions cleared through a U.S. clearing agency is likely to discourage market participants from clearing transactions in the United States.[847] The Commission questions whether the commenters' assertion would in fact come to pass. Market participants are likely to consider multiple factors when deciding whether and where to clear a security-based swap. These factors could include the cost of clearing, the types of products that can be cleared, the safeguards that clearing agencies put in place for customer funds, and clearing agency policies on netting and margin. Commenters offered no support for the assertion that the application of regulatory reporting and public dissemination requirements

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846 Another commenter argued that, if the Commission applied Regulation SBSR to security-based swaps involving non-U.S. counterparties that nevertheless are cleared through a clearing agency having its principal place of business in the United States, the Commission could require reporting of such transactions to a registered SDR "without exercising further jurisdiction over" the transaction. Société Générale Letter at 12. The commenter believed that "[t]his solution would provide the Commission and U.S. market participants with information about swaps cleared in the United States without conflicting with foreign regulatory schemes." Id. The Commission's decision to require such transactions to be reported and publicly disseminated pursuant to Regulation SBSR does not necessarily indicate that they will be subjected to other requirements of Title VII. The Commission intends to address the scope of each of those requirements, including their applicability to the types of transactions identified by this commenter, in subsequent rulemakings.

847 See SIFMA/FIA/Roundtable Letter at A-42.

to transactions that are accepted for clearing by a U.S. clearing agency would be a deciding or even a significant factor in whether to clear or the choice of clearing agency. Even if this assertion were true, however, the Commission believes that it is appropriate, for the reasons discussed above, to subject these transactions to regulatory reporting and public dissemination.

Finally, the Commission recognizes that the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, does not assign reporting obligations for two kinds of cross-border transaction: (1) a transaction where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side; and (2) a transaction where there is no registered security-based swap dealer or registered major security-based swap participant on either side and there is a U.S. person on only one side. If such a transaction is accepted for clearing by a registered clearing agency having its principal place of business in the United States, neither side—under Regulation SBSR as adopted by the Commission—is required to report the transaction to a registered SDR. However, as described in Section V(B), supra, the Commission anticipates soliciting further comment on how Regulation SBSR should be applied to transactions involving unregistered non-U.S. persons, including how reporting duties should be assigned for the two kinds of transaction noted above.

5. Transactions Involving a Registered Security-Based Swap Dealer or Registered Major Security-Based Swap Participant That Is Not a U.S. Person

Under re-proposed Rule 908(a)(1)(iii), a security-based swap would have been subject to regulatory reporting if there is a direct or indirect counterparty that is a security-based swap dealer or major security-based swap participant on either side of the transaction, regardless of the counterparties' place of domicile and regardless of the place of execution of the transaction. Under Rule 908(a), as initially proposed, a counterparty's status as a security-based swap dealer or major security-based swap participant would not by itself have triggered reporting obligations for a particular security-based swap.[848]

One commenter recommended expanding the public dissemination requirement to include security-based swaps that occur outside the United States between a non-U.S. person security-based swap dealer and a non-U.S. person that is not guaranteed by a U.S. person,[849] and between two non-U.S. person security-based swap dealers.[850]

Rule 908(a)(2), as adopted, provides: "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."[851] Thus, a security-based swap between a non-U.S. person registered security-based swap dealer or registered major security-based swap participant and another non-U.S. person (which could include another non-U.S. person registered security-based swap dealer or registered major security-based swap participant), and where neither direct counterparty is guaranteed by a U.S. person, would be subject to regulatory reporting but not public dissemination. This treatment of security-based swaps involving non-U.S. person registered security-based swap dealers and non-U.S. person registered major security-based swap

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848 See proposed Rule 908(a); Regulation SBSR Proposing Release, 75 FR at 75239-40.

849 See Better Markets IV at 23.

850 See id. at 24.

851 A security-based swap involving a U.S.-person that is registered as a security-based swap dealer or major security-based swap participant is included in Rule 908(a)(1) and is thus subject to both regulatory reporting and public dissemination. A security-based swap between a non-U.S. person that is registered as a security-based swap dealer or major security-based swap participant and a U.S. person (including a foreign branch or office) also is included in Rule 908(a)(1).

participants is generally consistent with re-proposed Rule 908(a); the language of final Rule 908(a)(2) is designed to clarify that outcome.[852]

The Commission is not at this time taking the view that a security-based swap involving a registered security-based swap dealer or registered major security-based swap participant, for that reason alone, exists within the United States. Therefore, the Commission is not subjecting any transactions involving a non-U.S.-person registered security-based swap dealer or registered major security-based swap participant, for its registration status alone, to any requirement under Regulation SBSR based on a territorial application of Title VII. However, the Commission is requiring non-U.S.-person registered security-based swap dealers and registered major security-based swap participants to report their security-based swap transactions pursuant to Rule 908(a)(2).[853] Requiring reporting to a registered SDR of all transactions entered into by registered security-based swap dealers and registered major security-based swap participants will provide the Commission and other relevant authorities with important information to help with the assessment of their positions and financial condition.[854] Such information could in turn assist the Commission and other relevant authorities in assessing and addressing potential systemic

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852 Rule 908(a)(1)(iii), as re-proposed, would have required regulatory reporting of a security-based swap having a direct or indirect counterparty that is a registered security-based swap dealer or registered major security-based swap participant on either side of the transaction. However, Rule 908(a)(2), as re-proposed, did not list the existence of a registered security-based swap dealer or registered major security-based swap participant on either side of the transaction, for that reason alone, as triggering public dissemination.

853 See Section 15F(f)(1)(A) of the Exchange Act, 15 U.S.C. 78o-10(f)(1)(A) (providing that each registered security-based swap dealer and major security-based swap participant "shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and positions and financial condition of the registered security-based swap dealer or major security-based swap participant").

854 In the Cross-Border Proposing Release, the Commission noted its longstanding view that an entity that has registered with the Commission subjects itself to the entire regulatory system governing such regulated entities. See 78 FR at 30986.

risks caused by these security-based swap positions, or in detecting insider trading or other market abuse.

The Commission notes that a non-U.S. person that is registered as a security-based swap dealer or major security-based swap participant, when reporting a transaction that falls within Rule 908(a)(2), must comply with the policies and procedures of the registered SDR regarding how to flag the transaction as not subject to public dissemination. The Commission would not view a registered SDR as acting inconsistent with Rule 902 for publicly disseminating a security-based swap that falls within Rule 908(a)(2) if the reporting side had failed to appropriately flag the transaction.

6. No Final Rule Regarding Transactions Conducted Within the United States

Under re-proposed Rule 908(a)(1)(i), a security-based swap would have been subject to regulatory reporting if it was a transaction conducted within the United States.[855] Re-proposed Rule 908(a)(1)(i) preserved the principle—but not the specific language—from the initial proposal that a security-based swap would be subject to regulatory reporting if it is executed in the United States.[856] When the Commission re-proposed Rule 908(a)(1)(i) in the Cross-Border Proposing Release, the Commission expressed concern that the language in the Regulation SBSR

855 A security-based swap would be a "transaction conducted within the United States" if it is solicited, negotiated, executed, or booked within the United States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction. See proposed Rule 240.3a71-3(a)(5) under the Exchange Act; Cross-Border Proposing Release, 78 FR at 31297; re-proposed Rule 900(ii). The word "counterparty" as used within this term would have the same meaning as "direct counterparty" in re-proposed Rule 900(j) of Regulation SBSR. See Cross-Border Proposing Release, 78 FR at 31061.

856 Rule 908(a), as initially proposed, would have required regulatory reporting of any security-based swap that is "executed in the United States or through any means of interstate commerce." See Regulation SBSR Proposing Release, 75 FR at 75287.

Proposing Release could have required a security-based swap to be reported if it had only the slightest connection with the United States.[857]

Re-proposed Rules 908(a)(1)(i) and 908(a)(2)(i) would have subjected a security-based swap transaction to Regulation SBSR's regulatory reporting and public dissemination requirements, respectively, if the security-based swap was a "transaction conducted within the United States." Commenters expressed divergent views regarding this provision[858] and, after careful consideration, the Commission has decided not to adopt re-proposed Rule 908(a)(1)(i) or 908(a)(2)(i) at this time. As discussed above, the Commission anticipates seeking additional public comment on whether and, if so, how regulatory reporting and public dissemination requirements should be applied to transactions involving non-U.S. persons when they engage in conduct within the United States.[859]

D. Limitations on Counterparty Reporting Obligations—Rule 908(b)

As-proposed, Rule 908(b) would have provided that, notwithstanding any other provision of Regulation SBSR, a direct or indirect counterparty to a security-based swap would not incur any obligation under Regulation SBSR unless the counterparty is:

(1) a U.S. person;

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857 See 78 FR at 31061.

858 See ABA Letter at 3; Citadel Letter at 1-2; Cleary III at 28; IAA Letter at 6; IIB Letter at 9; SIFMA/FIA/Roundtable Letter at A-42; Pearson Letter at 2; FOA Letter at 7-8; JFMC Letter at 4-5; ISDA IV at 18.

859 In addition, the Commission has authority to promulgate rules, including additional regulatory requirements, applicable to persons transacting a business in security-based swaps "without the jurisdiction of the United States" when "necessary or appropriate" to prevent evasion of the provisions of Title VII of the Dodd-Frank Act. The Commission is not necessarily exercising the full extent of its authorities today but will be monitoring for gaps in reporting of swaps outside the United States that could be an evasion of the Commission's rules and regulations. See Section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c).

(2) a security-based swap dealer or major security-based swap participant; or

(3) a counterparty to a transaction conducted within the United States.

The Commission received no comments that specifically addressed re-proposed Rule 908(b).[860]

At this time, the Commission is adopting only the first two prongs of Rule 908(b). Thus, Rule 908(b), as adopted, provides that, notwithstanding any other provision of Regulation SBSR, a person shall not incur any obligation under Regulation SBSR unless it is a U.S. person, a registered security-based swap dealer, or a registered major security-based swap participant. As discussed above, U.S. persons can be subjected to requirements under Title VII because their transactions, whether undertaken directly or indirectly, exist at least in part within the United States. Furthermore, registered security-based swap dealers and registered major security-based swap participants are required to report their security-based swap transactions.[861]

Rule 908(b) is designed to specify the types of persons that will incur duties under Regulation SBSR. If a person does not come within any of the categories enumerated by Rule 908(b), it would not incur any duties under Regulation SBSR. Under Rule 908(b), as adopted, a non-U.S. person incurs no duties under Regulation SBSR unless it is a registered security-based swap dealer or registered major security-based swap participant. The Commission believes that this modification will reduce assessment costs and provide greater legal certainty to counterparties engaging in cross-border security-based swaps. The Commission anticipates soliciting additional public comment on whether regulatory reporting and/or public dissemination requirements should be extended to transactions occurring within the United

[860] However, several commenters argued that specific requirements under Regulation SBSR should not apply to certain kinds of counterparties in certain circumstances. All of these comments are discussed in relation to Rule 908(a) in the section immediately above.

[861] See supra Section XV(C)(5), note 853 and accompanying text.

States between non-U.S. persons and, if so, which non-U.S. persons should incur reporting duties under Regulation SBSR.

E. Substituted Compliance—Rule 908(c)

1. General Considerations

The security-based swap market is global in scope, and relevant authorities around the globe are in the process of adopting security-based swap reporting and public dissemination requirements within their jurisdictions. Once these new requirements are finalized and take effect, market participants that engage in security-based swap transactions involving more than one jurisdiction could be subject to conflicting or duplicative reporting or public dissemination obligations. As initially proposed, Regulation SBSR did not contemplate that the reporting and public dissemination requirements associated with cross-border security-based swaps could be satisfied by complying with the rules of a foreign jurisdiction instead of U.S. rules. Thus, in many cases, counterparties to a security-based swap would have been required to comply with proposed Regulation SBSR even if reporting of a security-based swap also was required under the rules of a foreign jurisdiction.

As discussed in the Cross-Border Proposing Release,[862] a number of commenters urged the Commission to allow compliance with comparable home country requirements to substitute for compliance with the parallel U.S. requirements.[863] In response to those comments and recognizing that other jurisdictions may implement regulatory reporting and public dissemination regimes for security-based swaps that are comparable to the requirements set forth in Title VII

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862 See 78 FR at 31092.

863 See, e.g., Cleary III at 15-16; Davis Polk I at 7, 11; Davis Polk II at 21-22; Société Générale Letter at 11; CCMR II at 2. See also Cross-Border Adopting Release, 79 FR at 47357-58 (discussing several comments relating to substituted compliance issues generally).

and Regulation SBSR, the Commission re-proposed Rule 908 in the Cross-Border Proposing Release to include a new paragraph (c). Rule 908(c), as re-proposed, would have permitted, under certain conditions, substituted compliance for regulatory reporting and public dissemination requirements relating to security-based swaps. The Commission preliminarily believed that the availability of substituted compliance would reduce the likelihood that market participants would be subject to potentially conflicting or duplicative sets of rules while still meeting the statutory and policy objectives of Title VII. Re-proposed Rule 908(c) would have specified the security-based swaps that would be eligible for substituted compliance and would have established procedures for market participants to request, and for the Commission to issue, substituted compliance orders.

As discussed in detail below, the Commission is adopting Rule 908(c) substantially as re-proposed, with minor modifications also described below. The Commission believes in general that, if a foreign jurisdiction applies a comparable system for the regulatory reporting and public dissemination of security-based swaps, it would be appropriate to consider permitting affected market participants to comply with the foreign requirements to satisfy the comparable requirements of Regulation SBSR. Where the Commission finds that a foreign jurisdiction's reporting and public dissemination requirements are comparable to those implemented by the Commission, Rule 908(c) provides that the Commission may make a substituted compliance determination with respect to such jurisdiction for these requirements. The Commission believes that permitting substituted compliance could reduce the likelihood that market participants would be subject to conflicting or duplicative regulation with respect to a security-based swap transaction.

In adopting Rule 908(c), the Commission is not making any assessment at this time regarding whether any foreign jurisdiction's requirements for regulatory reporting and public dissemination of security-based swaps are comparable to Regulation SBSR. Furthermore, because the analysis of any particular foreign jurisdiction would be very fact specific, it is impractical for the Commission to opine at this time on whether specific aspects of a foreign system would or would not allow the Commission to make a comparability determination. In view of the many technical differences that could exist between the Commission's Title VII rules and parallel requirements in other jurisdictions, the Commission stated in the Cross-Border Proposing Release that "the Commission would endeavor to take a holistic approach in making substituted compliance determinations—that is, we would ultimately focus on regulatory outcomes as a whole with respect to the requirements within the same category rather than a rule-by-rule comparison."[864] The Commission continues to believe that this approach to comparability is appropriate, and intends to focus on regulatory outcomes as a whole when considering whether to make a comparability determination.

2. Substituted Compliance Procedure—Rule 908(c)(2)(i)

Rule 908(c)(2)(i), as re-proposed, would have allowed the Commission, conditionally or unconditionally, by order, to make a substituted compliance determination regarding regulatory reporting and public dissemination with respect to a foreign jurisdiction "if that foreign jurisdiction's requirements for regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements" under Regulation SBSR.

A number of commenters endorsed the Commission's proposal to permit substituted

[864] 78 FR at 31085-86.

compliance with Regulation SBSR.[865] One of these commenters noted, for example, that substituted compliance would reduce burdens on businesses in the United States and elsewhere without weakening oversight, thus allowing firms to use funds more efficiently.[866] However, two commenters recommended that the Commission narrow the proposed availability of substituted compliance. One of these commenters stated that the Commission's proposed controls on substituted compliance would be inadequate.[867] The commenter further stated that, although substituted compliance potentially has a legitimate role to play in a cross-border regulatory regime, the greater the scope for substituted compliance, the stricter the controls should be on the ability to substitute foreign rules for U.S. rules.[868] The other commenter stated that the Cross-Border Proposing Release failed to provide an adequate legal or policy justification for allowing substituted compliance.[869] This commenter believed that, rather than using substituted compliance, the Commission should exercise its exemptive authority sparingly and only upon finding an actual conflict exists with a particular foreign regulation.[870]

The Commission has carefully considered these comments and determined to adopt Rule 908(c)(2)(i) as re-proposed, with one modification, as described in Section XV(E)(3), infra. Permitting substituted compliance should reduce the likelihood that market participants face duplicative or contradictory reporting or public dissemination requirements, and thereby

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865 See ESMA Letter at 2-3; FOA Letter at 2-3; IIF Letter at 1-2; JSDA Letter at 2; MFA/AIMA Letter at 5-7.

866 See IIF Letter at 3.

867 See AFR Letter at 8.

868 See id.

869 See Better Markets IV at 3, 24-25 (noting that the Commission's duty is to protect investors and the public consistent with congressional policy, not to minimize the costs, burdens, or inconvenience that regulation imposes on industry).

870 See id. at 26.

decrease costs and administrative burdens on market participants without compromising the regulatory goals of Title VII. The requirements for substituted compliance are designed to ensure that the Title VII requirements for regulatory reporting and public dissemination of security-based swaps are being satisfied, albeit through compliance with the rules of a foreign jurisdiction rather than the specific provisions of Regulation SBSR.

3. Security-Based Swaps Eligible for Substituted Compliance—Rule 908(c)(1)

Rule 908(c)(1), as re-proposed, would have provided that compliance with the regulatory reporting and public dissemination requirements in Sections 13(m) and 13A of the Exchange Act, and the rules and regulations thereunder, may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a substituted compliance order issued by the Commission, 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, and the transaction is not solicited, negotiated, or executed within the United States. Thus, under re-proposed Rule 908(c)(1), certain kinds of security-based swaps would not have been eligible for substituted compliance even if they were subject to reporting and public dissemination requirements in a foreign jurisdiction.[871] Specifically, a security-based swap between two U.S. persons would not have been eligible for substituted compliance with respect to regulatory reporting and public dissemination, even if the security-based swap was solicited, negotiated, and executed outside the United States.[872]

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871 If the rules of a foreign jurisdiction did not apply to the security-based swap, there would be no need to consider the possibility of substituted compliance, because there would be no foreign rules that could substitute for the applicable U.S. rules.

872 As noted in the Cross-Border Proposing Release, this assumed that neither U.S. person is acting through a foreign branch. If either or both U.S. persons is acting through a foreign branch, the security-based swap between those U.S. persons would have been eligible for

Furthermore, re-proposed Rule 908(c)(1) would not have allowed for the possibility of substituted compliance with respect to regulatory reporting and public dissemination if the relevant direct counterparty that was either a non-U.S. person or foreign branch (or its agent)—regardless of place of domicile—solicited, negotiated, or executed a security-based swap from within the United States.

The Commission received two comment letters in response to re-proposed Rule 908(c)(1), both of which addressed the proposal to limit substituted compliance availability to security-based swaps that are not solicited, negotiated, or executed in the United States.[873] One of these commenters recommended that the Commission remove this requirement altogether.[874] The other commenter noted that, as a general matter, it is virtually impossible to determine on a trade-by-trade basis whether each specific contact with a counterparty or potential counterparty has some nexus to the United States, and urged the Commission to subject security-based swaps to Title VII regulation solely according to whether counterparties are U.S. persons.[875]

In response to these comments, the Commission has decided to adopt a modified version of Rule 908(c)(1) that does not condition substituted compliance eligibility on the location of execution, negotiation, or solicitation of a particular transaction.[876] Under Rule 908(c)(1), as

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substituted compliance under Rule 908(c)(1), as re-proposed. See 78 FR at 31093-94, note 1149.

873 See ISDA II at 5; SIFMA/FIA/Roundtable Letter at 3-4. A third commenter expressed the view that any swap involving a U.S. person and a non-U.S. person should be eligible for substituted compliance. See CCMR II at 2-3.

874 See ISDA II at 5.

875 See SIFMA/FIA/Roundtable Letter at 3-4. This commenter did not raise this comment expressly in the context of Rule 908(c)(1), however.

876 Rule 908(c)(1), as adopted, provides: "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

adopted, a security-based swap is eligible for substituted compliance with respect to regulatory reporting and public dissemination if at least one of the direct counterparties to the security-based swap is either a non-U.S. person or a foreign branch. Thus, Rule 908(c)(1) permits a security-based swap between a U.S. person and the New York branch of a foreign bank (i.e., a non-U.S. person with operations inside the United States) to be eligible for substituted compliance, provided that a substituted compliance order is in effect with respect to the home country of the foreign bank that operates the U.S. branch. The standard in Rule 908(c)(1), as adopted, is consistent with the Commission's decision not to impose, at this time, reporting or public dissemination requirements based solely on whether a transaction is conducted within the United States.

Regarding which security-based swaps are eligible for the possibility of substituted compliance, the Commission believes that, if at least one direct counterparty to a security-based swap is a foreign branch or a non-U.S. person (even if the non-U.S. person is a registered security-based swap dealer or registered major security-based swap participant, or is guaranteed by a U.S. person), the security-based swap should be eligible for consideration for a substituted compliance determination under Regulation SBSR. This approach recognizes that a transaction involving a foreign branch or a non-U.S. person faces the possibility of being subject to reporting requirements in multiple jurisdictions (the United States and another jurisdiction whose rules may govern the transaction). The approach adopted by the Commission of allowing any transaction involving a foreign branch or non-U.S. person to be eligible to be considered for substituted compliance is designed to limit disincentives for non-U.S. persons to transact

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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."

security-based swaps with U.S. persons by allowing for the possibility that compliance with the rules of a foreign jurisdiction could be substituted for compliance with the specific provisions of Regulation SBSR when the non-U.S. person transacts with a U.S. person. This approach also would allow for a reasonable minimization of reporting burdens on foreign branches and non-U.S. persons in situations where the local jurisdiction in which they operate does not offer the possibility of substituted compliance.

4. Requests for Substituted Compliance—Rule 908(c)(2)(ii)

Rule 908(c)(2)(ii), as re-proposed, would have established the process for market participants to follow when applying for a substituted compliance determination: "Any person that executes security-based swaps that would, in the absence of a substituted compliance order, be required to be reported pursuant to [Regulation SBSR] 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. Such application shall include the reasons therefor and such other information as the Commission may request."

A number of commenters recommended that the Commission permit foreign regulators, as well as market participants, to file an application for a substituted compliance determination.[877] Some of these commenters noted that foreign regulatory authorities would be well-positioned to describe their regulatory frameworks and manner of supervision, and, in any

[877] See ABA Letter at 5; ICI II at 11; IIB Letter at 27; IIF Letter at 4; ISDA II at 4; JFMC Letter at 7-8; FOA Letter at 4 (noting that the Commission should begin discussions with the European Commission to establish an agreed approach for the coordinated oversight of the transatlantic security-based swap markets); SIFMA/FIA/Roundtable Letter at A-36.

event, their involvement would be needed to negotiate the memorandum of understanding that the Commission proposed to require as a precondition of granting a substituted compliance order.[878] One commenter also stated that the CFTC's Cross-Border Guidance[879] contemplates accepting applications for substituted compliance from non-U.S. regulators.[880] Two commenters suggested that substituted compliance applications should be submitted by foreign regulatory authorities, rather than individual firms.[881]

The Commission is adopting Rule 908(c)(2)(ii) largely as re-proposed, with a few minor revisions. First, consistent with the adoption of Rule 0-13 in the Cross-Border Adopting Release, the Commission has revised Rule 908(c)(2)(ii) to permit foreign financial regulatory authorities to submit applications for substituted compliance determinations on behalf of market participants subject to their jurisdictions.[882]

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878 See ICI II at 11; ISDA II at 4. Re-proposed Rule 908(c)(2)(iv), described below, would have required the Commission to enter into a supervisory and enforcement memorandum of understanding or other agreement with the relevant foreign regulator(s) prior to issuing a substituted compliance order covering a foreign jurisdiction.

879 Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR at 45292 (July 26, 2013).

880 See ISDA II at 4.

881 See ESMA Letter at 3 (recommending that comparability determinations should be requested at the European Union-level, rather than by individual firms); JSDA Letter at 2. See also Pearson Letter at 3 (recommending that the review of a foreign regime be conducted in cooperation solely with the relevant foreign regulators or legislators, not firms).

882 See 79 FR at 47358 ("We are persuaded that allowing foreign regulators to submit such requests would promote the completeness of requests and promote efficiency in the process for considering such requests, in light of foreign regulators' expertise regarding their domestic regulatory system, including the effectiveness of their compliance and enforcement mechanisms, and to allow for a single point of contact to facilitate the consideration of substituted compliance requests associated with the jurisdiction").

Second, Rule 908(c)(2)(ii), as re-proposed, would have permitted filing by any "person that executes security-based swaps." Read literally, this language in the re-proposed rule could have permitted persons who are not subject to Regulation SBSR to seek a substituted compliance determination. The Commission seeks to limit the scope of persons who can apply for substituted compliance determinations to foreign financial regulators and parties that would be subject to Regulation SBSR, because these persons have the greatest knowledge about the foreign jurisdiction in question. Moreover, in the case of market participants active in that jurisdiction, they will be directly impacted by potentially overlapping rules and thus have the greatest interest in making the strongest case for substituted compliance. Accordingly, Rule 908(c)(2)(ii), as adopted, permits a "party that potentially would comply with requirements under [Regulation SBSR] pursuant to a substituted compliance order,"[883] or the relevant foreign financial regulatory authority or authorities in that jurisdiction,[884] to file an application requesting a substituted compliance determination.[885]

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883 This could be either a U.S. person or a non-U.S. person that engages in activity in that jurisdiction.

884 This formulation of final Rule 908(c)(2)(ii) closely follows the language of Rule 0-13(a) under the Exchange Act, 17 CFR 240.0-13(a), which provides in relevant part that an application for substituted compliance must be submitted to the Commission "by a party that potentially would comply with requirements under the Exchange Act pursuant to a substituted compliance order, or by the relevant foreign financial regulatory authority or authorities."

885 Thus, the Commission disagrees with the commenters who argued that substituted compliance applications should be submitted only by foreign regulatory authorities, rather than individual firms. See ESMA Letter at 3; JSDA Letter at 2. Although obtaining information from foreign regulatory authorities could be an important aspect of the substituted compliance review, the Commission sees no basis for denying individual firms that might comply with requirements of Regulation SBSR pursuant to a substituted compliance order the ability to request substituted compliance and thereby initiate that review. See Cross-Border Adopting Release, 79 FR at 47358 ("We are not . . . foreclosing the ability of a market participant itself to submit a request that it be able to comply with Exchange Act requirements pursuant to a substituted compliance order").

Third, the Commission has determined not to include the final sentence of re-proposed Rule 908(c)(2)(ii)—"[s]uch application shall include the reasons therefor and such other information as the Commission may request"—in final Rule 908(c)(2)(ii). Rule 0-13(e) under the Exchange Act, as adopted in the Cross-Border Adopting Release, provides detailed requirements regarding the information required to be submitted (e.g., supporting documentation, including information regarding applicable regulatory requirements, compliance monitoring by foreign regulators, and applicable precedent).[886] In light of the cross-reference to Rule 0-13 in final Rule 908(c)(2)(ii), the last sentence of re-proposed Rule 908(c)(2)(ii) is unnecessary and therefore is not included in final Rule 908(c)(2)(ii).

5. Findings Necessary for Substituted Compliance—Rule 908(c)(2)(iii)

Rule 908(c)(2)(iii), as re-proposed, would have provided that, in making a substituted compliance determination with respect to a foreign jurisdiction, the Commission shall take into account such factors as it 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. Furthermore, Rule 908(c)(2)(iii), as re-proposed, would have provided that the Commission would not make a substituted compliance determination with respect to regulatory reporting and public dissemination unless the Commission found that the relevant foreign regulatory regime provided for the reporting and public dissemination of comparable data elements in a manner and timeframe comparable to

[886] See id. In addition, Rule 0-13(h) requires the Commission to publish in the Federal Register a notice that a complete application has been submitted.

those required by Regulation SBSR.[887] As a prerequisite to any substituted compliance determination, re-proposed Rule 908(c)(2)(iii) also would have required that the Commission have direct electronic access to the security-based swap data held by the trade repository or foreign regulatory authority.[888] Lastly, re-proposed Rule 908(c)(2)(iii) would have required the Commission to find that any trade repository or foreign regulatory authority in the foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on registered SDRs.[889]

The Commission has determined to adopt Rule 908(c)(2)(iii) as re-proposed, subject to two minor changes, one in each of Rules 908(c)(2)(iii)(B) and 908(c)(2)(iii)(D), which are discussed below. Final Rule 908(c)(2)(iii) provides that, in making a substituted compliance determination, the Commission shall take into account such factors that it determines are appropriate, which include but are not limited to 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 rule further provides that 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 Rule 901;

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[887] See Cross-Border Proposing Release, 78 FR at 31215.

[888] See id.

[889] See id.

(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 Regulation SBSR (or, in the case of transactions that are subject to regulatory reporting but not public dissemination, the rules of the foreign jurisdiction require the security-based swaps to be reported in a manner and timeframe comparable to those required by Regulation SBSR);

(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.[890]

Although no commenters discussed the appropriateness of considering the examination and enforcement practices of foreign regulators in making a substituted compliance determination for Regulation SBSR specifically, a number of commenters addressed the general concept of considering actual practices in the foreign jurisdiction as part of the substituted compliance determination. Certain commenters generally supported the retention by the Commission of the authority to decline to make a comparability finding based on the substantive enforcement of foreign regulatory regimes.[891] Two of these commenters noted, however, that

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[890] See Rule 908(c)(2)(iii)(A)-(D), as adopted, and infra note 910.

[891] See ABA Letter at 5; AFR Letter at 12; Better Markets IV at 3, 29-32; ISDA II at 6.

supervisory practices differ significantly among jurisdictions.[892] One of these commenters stated: "This lack of commonality should not be assumed to be a defect in supervisory standards; common objectives may be reached through differing means."[893] This commenter expressed the general view, however, that "a general, high-level inquiry into the existence of an examination and enforcement process and institutions to support it arguably should inform views about the comparability of outcomes."[894]

The Commission agrees that the examination and enforcement practices of each foreign jurisdiction will need to be evaluated on a case-by-case basis, and anticipates that it will consider whether the regulatory protections provided in that jurisdiction's security-based swap markets are substantially realized through sufficiently vigorous supervision and enforcement. While the Commission believes that common objectives may be reached through differing means, the Commission also believes that compliance with a foreign jurisdiction's rules for reporting and public dissemination of security-based swaps should be a substitute for compliance with the U.S. rules only when the foreign jurisdiction has a reporting and public dissemination regime comparable to that of the United States. This determination must consider actual practices and implementation as well as written laws and regulations of the foreign jurisdiction.

a. Data Element Comparability—Rule 908(c)(2)(iii)(A)

The Commission received several comments regarding the data element comparability determination required by what is now final Rule 908(c)(2)(iii)(A). Two commenters recommended that the Commission determine whether a foreign jurisdiction has comparable

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892 See FOA Letter at 6; ISDA II at 6.

893 ISDA II at 6.

894 Id.

security-based swap reporting requirements based on a holistic review of that jurisdiction's regulations and the local market environment.[895] Some commenters suggested that the Commission should determine whether the security-based swap reporting framework of a foreign jurisdiction is designed to achieve the G-20 goals of transparency in the derivatives markets.[896]

The Commission is adopting re-proposed Rule 908(c)(2)(iii)(A) without revision. Under the final rule, the foreign jurisdiction must require reporting of data elements comparable to those required under Rule 901 of Regulation SBSR for the Commission to make a comparability determination. If the data elements required by the foreign jurisdiction are not comparable, important information about a security-based swap might not be captured by the foreign trade repository or foreign regulatory authority. This could create gaps or inconsistencies in the information available to the Commission and impair the Commission's ability to monitor the security-based swap market. As noted in Section XV(E)(1), supra, the Commission generally agrees with the commenters who expressed the view that the Commission should take a "holistic" or "outcomes-based" view of another jurisdiction's rules when making a substituted compliance determination, rather than conduct a "line-by-line" or "rule-by-rule" analysis. At

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895 See JFMC Letter at 7; ISDA II at 8. Other commenters expressed a general preference for a holistic review of a relevant jurisdiction's security-based swap regulatory regime but did not expressly reference Regulation SBSR in this context. See, e.g., SIFMA/FIA/Roundtable Letter at A-37-A-38; Pearson Letter at 3; IIF Letter at 5; ICI II at 11; JFMC Letter at 1; MFA/AIMA Letter at 5 (observing that a line-by-line or rule-by-rule analysis would place a significant burden on the Commission, and potentially result in disjointed regulation); ABA Letter at 5.

896 See ICI II at 12; ISDA II at 8 (noting also that jurisdictions may choose to establish goals and requirements that are ancillary to the G-20 regulatory goals, but these ancillary requirements should not become a barrier to an effective cross-border compliance regime that furthers the G-20 goals). With respect to security-based swap reporting, the "G-20 goals" referenced by these commenters were articulated in the Leaders' Statement at the Pittsburgh Summit (September 24-25, 2009), available at: https://www.g20.org/sites/default/files/g20_resources/library/Pittsburgh_Declaration.pdf, last visited September 22, 2014.

this time, the Commission does not believe that it is sufficient to consider only whether the data elements required by the foreign regulatory regime are designed to achieve the objectives of the G-20 with respect to reporting. The G-20 objectives are a high-level set of principles designed to guide jurisdictions in adopting reforms for the OTC derivatives markets. Therefore, the Commission believes that it is necessary and appropriate to consider whether the data elements reported under that jurisdiction's rules are comparable to those required under Rule 901 of Regulation SBSR—not whether they are comparable to the G-20 standards—in deciding whether to grant a substituted compliance determination. If the Commission took the opposite view, it would be difficult to conclude that the oversight and transparency goals of Title VII were being satisfied through compliance with the rules of the foreign jurisdiction in lieu of Regulation SBSR.[897]

b. Timeframe of Reporting and Public Dissemination—Rule 908(c)(2)(iii)(B)

The Commission also is adopting Rule 908(c)(2)(iii)(B) as re-proposed, subject to certain conforming changes.[898] Rule 908(c)(2)(iii)(B), as adopted, provides that the Commission shall

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897 One commenter urged the Commission to "replace the apparently subjective 'outcomes-based' standard for comparison with a more rigorous and objective standard based on the underlying rules." AFR Letter at 9. For the reasons noted above, the Commission is adopting a "comparable" standard, rather than the type of review suggested by the commenter. This commenter further stated: "Another reason that 'outcomes-based' assessment may not be adequate is that the inter-operability of different rule sets may be critical to the effectiveness of the overall international regime. . . . this is the case for standardization of data formats in reporting, and may also be true for various risk management elements that must be standardized across a global financial institution." Id. at 10. The Commission intends to work with foreign regulatory authorities to develop more uniform data standards to allow maximum aggregability while minimizing market participant costs and burdens that would result from having to report in different jurisdictions using different data standards and formats.

898 As re-proposed, this rule would have provided that the Commission shall not make a substituted compliance determination unless it finds that the "rules of the foreign

not issue a substituted compliance determination unless the relevant foreign jurisdiction requires security-based swaps to be reported and publicly disseminated "in a manner and a timeframe comparable to those required by [Regulation SBSR]." Given the Title VII requirements that all security-based swaps be reported to a registered SDR and that security-based swaps be publicly disseminated in real time, the Commission believes that allowing substituted compliance with the rules of a foreign jurisdiction that has reporting timeframes and dissemination outcomes not comparable to those in the United States would run counter to the objectives and requirements of Title VII. If the Commission allowed substituted compliance for such a jurisdiction, the Commission might have access to less regulatory data about the security-based swap market, or price discovery could be less efficient, than would have been the case if Regulation SBSR applied in its entirety. Thus, for example, the Commission generally does not anticipate permitting substituted compliance with respect to regulatory reporting and public dissemination under Rule 908(c) if a foreign jurisdiction does not (among other things) impose public dissemination requirements for all security-based swaps on a trade-by-trade basis.[899] Thus, the Commission disagrees with the commenter who suggested that a non-U.S. public dissemination

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 242.911." As discussed previously, Regulation SBSR, as adopted, consists of Rules 900 through 909 under the Exchange Act. Therefore, the reference in re-proposed Rule 908(c)(2)(iii)(B) to "§§ 242.900 through 242.911" is being revised to read: "§§ 242.900 through 242.909."

899 Although the Commission is requiring reporting and public dissemination of security-based swaps within 24 hours of the time of execution during the first initial phase of Regulation SBSR, see Rule 901(j), the Commission anticipates considering provisions to implement the Title VII requirement for real-time public dissemination. Therefore, the Commission would view a foreign jurisdiction's regime for public dissemination of security-based swaps as comparable only if it (1) had rules providing for real-time public dissemination of all security-based swaps currently, or (2) was following a comparable process of moving to real-time public dissemination for all security-based swaps in phases.

regime that disseminates data on an aggregate basis should be deemed comparable to Regulation SBSR.[900]

One commenter stated that "[c]omparability should be addressed flexibly with respect to public dissemination, recognizing that in certain jurisdictions' [sic] transparency obligations are linked to use of a trading venue and fall on the venue."[901] Another commenter recommended that the Commission should not determine that a foreign jurisdiction lacks comparable security-based swap reporting rules based on technical differences in the timeframes for, or manner of, reporting.[902] Whether the Commission grants a substituted compliance determination will depend on the facts and circumstances pertaining to a particular request. Thus, it is difficult to address concerns such as those raised by these two commenters in the abstract. As the Commission noted in Section XV(E)(1), supra, it will assess comparability in a holistic manner rather than on a rule-by-rule basis.

c. Direct Electronic Access—Rule 908(c)(2)(iii)(C)

The Commission also is adopting Rule 908(c)(2)(iii)(C) as re-proposed. Rule 908(c)(2)(iii)(C) provides that the Commission may not issue a substituted compliance order with respect to regulatory reporting and public dissemination in a foreign jurisdiction unless "[t]he Commission has direct electronic access to the security-based swap data held by a trade

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900 See JSDA Letter at 2. Another commenter requested that the Commission determine that Japan has comparable security-based swap reporting standards. See JFMC Letter at 8. This comment is beyond the scope of this rulemaking. However, after Regulation SBSR becomes effective, market participants in this jurisdiction that would rely on a substituted compliance determination, or their regulators, may submit a request for substituted compliance with respect to regulatory reporting and public dissemination if they believe that the rules in that jurisdiction satisfy the criteria for substituted compliance described in Rule 908(c).

901 ISDA II at 9.

902 See ICI II at 12.

repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction."[903] Commenters expressed differing views regarding the direct electronic access requirement in re-proposed Rule 908(c)(2)(iii)(C). One commenter expressed support for the proposed requirement, believing that direct electronic access is a critical element for adequate monitoring of risks to U.S. financial stability.[904] However, two commenters objected to the proposed direct electronic access requirement.[905] One of these commenters suggested that the Commission should not require direct electronic access at this time, but should instead wait for the "FSB" to develop plans "to produce and share globally aggregated trade repository data that authorities need for monitoring systemic risks."[906] Another commenter "urge[d] the Commission to take into account the issue of foreign jurisdictions' privacy laws before imposing a blanket requirement that [the Commission] have direct electronic access."[907]

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903 Under Rule 900(l), as adopted, "direct electronic access" has the same meaning as in Rule 13n-4(a)(5) under the Exchange Act, discussed in the SDR Adopting Release. Rule 13n-4(a)(5) defines "direct electronic access" to mean access, which shall be in a form and manner acceptable to the Commission, to data stored by an SDR in an electronic format and updated at the same time as the SDR's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the SDR can query or analyze the data.

904 See AFR Letter at 9 (noting that the Commission should seek to analyze data from foreign repositories in conjunction with U.S.-sourced data to determine the swap exposure of an entity on a global basis).

905 See IIF Letter at 7; ISDA II at 8.

906 Id. at 8. The second commenter did not offer a rationale for its opposition to the proposed direct electronic access requirement. See IIF Letter at 7.

907 SIFMA/FIA/Roundtable Letter at A-46 (stating that over a dozen jurisdictions have been identified where local law prohibits the disclosure of client names to non-local regulators that do not have an information-sharing treaty or agreement in place with the local regulator, some of which cannot be satisfied by counterparty consent).

After carefully considering the comments received, the Commission continues to believe that requiring direct electronic access to security-based swap data held by a trade repository or foreign regulatory authority is a necessary part of any substituted compliance determination. Thus, the Commission does not believe that it should rely instead on the FSB or other international bodies developing arrangements for trade repositories and relevant authorities to share information across jurisdictions. While these cross-border information-sharing arrangements are important, and the Commission will continue to participate in such efforts, granting substituted compliance without direct electronic access would not be consistent with the underlying premise of substituted compliance: that a comparable regulatory result is reached through compliance with foreign rules rather than with the corresponding U.S. rules. If the Commission were to grant substituted compliance for a foreign jurisdiction where the Commission did not have direct electronic access to the facility to which security-based swap transactions of that jurisdiction are reported, the Commission might not have access to transaction information for portions of the security-based swap market that it otherwise would have the ability to surveil.[908] If the Commission were to rely solely on international information-sharing agreements, it could face substantial delays before a foreign trade repository or foreign regulatory authority, even acting expeditiously, could compile and make available to the Commission data relating to a substantial volume of transactions. Delays in obtaining such data could compromise the ability of the Commission to supervise security-based swap market participants, or to share information with other relevant U.S. authorities in a timely fashion. Thus, the Commission believes that direct electronic access to security-based swap data held by

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908 See supra note 788 (providing statistics regarding the amount of cross-border trading in the security-based swap market).

the foreign trade repository or foreign regulatory authority to which security-based swap transactions are reported in the foreign jurisdiction must be a prerequisite to issuing a substituted compliance order with respect to Regulation SBSR applying to that jurisdiction.

The Commission has taken into consideration the comment that certain jurisdictions have privacy laws or blocking statutes that could, in certain cases, render a foreign trade repository or foreign regulatory authority unable to provide the Commission with direct electronic access to transaction information that would include the identity of the counterparties. The Commission is not persuaded that this consideration should remove direct electronic access as a requirement for substituted compliance under Regulation SBSR. Indeed, if foreign privacy laws result in the Commission having less than comparable access to the security-based swap transaction data held at a foreign trade repository or foreign regulatory authority than the Commission otherwise would have if no substituted compliance order were in effect, then the premise of substituted compliance would not be met. Although foreign regulatory authorities would likely have access to information about security-based swap transactions that exist at least in part in their jurisdictions, these authorities might lack the ability to share this information with the Commission. As a result, it could be difficult if not impossible for the Commission or any other relevant authority, foreign or domestic, to observe the build-up of systemic risks created by the global security-based swap activity of U.S. persons. In sum, the Commission believes that, if it does not have direct electronic access to the transaction information reported to the foreign trade repository or foreign regulatory authority, substituted compliance would not yield a comparable outcome and the requirements of Rule 908(c)(2) would not be met.[909] The Commission believes

909 See also infra Section XVI(A) (addressing the impact of foreign privacy laws on Regulation SBSR).

that, in this situation, the specific requirements of Regulation SBSR should continue to apply; if necessary supervisory information cannot be obtained via direct electronic access to the security-based swap data held by a foreign trade repository or foreign regulatory authority, then such transactions must continue to be reported to a registered SDR, from which the Commission can obtain such information.

d. Trade Repository Capabilities—Rule 908(c)(2)(iii)(D)

The Commission received no comments on Rule 908(c)(2)(iii)(D) and is adopting that rule as re-proposed, with certain minor changes. Final Rule 908(c)(2)(iii)(D) provides that the Commission shall not make a substituted compliance determination with respect to regulatory reporting and public dissemination unless it finds that "[a]ny 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" (emphasis added). In the re-proposed rule, the highlighted language would have read ". . . by §§ 240.13n-5 through 240.13n-7 of this chapter." Because requirements imposed on registered SDRs relating to data collection and maintenance; systems capacity, integrity, resiliency, availability, and security; and recordkeeping could be imposed by Commission rules and regulations other than or in addition to Rules 13n-5 through 13n-7 under the Exchange Act, the Commission believes that it would be more appropriate to use the broader language in the text of final Rule 908(c)(2)(iii)(D). The Commission continues to believe that, to allow substituted compliance for regulatory reporting and public dissemination with respect to a foreign jurisdiction, any entity in that foreign jurisdiction that is required to receive and maintain security-based swap transaction data must have protections and operability standards comparable to those imposed on SEC-registered SDRs.

In addition, the re-proposed rule would have required, in relevant part, that—in connection with a substituted compliance determination—the foreign trade repository or foreign regulatory authority must be subject to requirements for "systems capacity, resiliency, and security" that are comparable to parallel U.S. requirements. That provision in final Rule 908(c)(2)(iii)(D) now states, "systems capacity, integrity, resiliency, availability, and security." The addition of "integrity" and "availability" to characterize the expected operational capability of the foreign trade repository or foreign regulatory authority is derived from a parallel change that the Commission made in adopting final Rule 13n-6 under the Exchange Act that applies to SEC-registered SDRs.[910] Because these standards apply to SEC-registered SDRs, the Commission believes that it is appropriate for Rule 908(c)(2)(iii)(D) to include them as elements necessary for a finding that a foreign trade repository or foreign regulatory authority is subject to comparable regulatory duties.

e. Memoranda of Understanding—Rule 908(c)(2)(iv)

Rule 908(c)(2)(iv), as re-proposed, would have required that, before issuing a substituted compliance order relating to regulatory reporting and public dissemination with respect to a foreign jurisdiction, the Commission shall have entered into a supervisory and enforcement memorandum of understanding ("MOU") or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system

910 See SDR Adopting Release, note 831.

addressing oversight and supervision of the applicable security-based swap market. No commenters addressed this proposed requirement.

The Commission is adopting Rule 908(c)(2)(iv) with certain minor revisions. First, the Commission is modifying the rule to indicate that a substituted compliance determination may require the Commission to enter into more than one MOU or other arrangement with a foreign authority. Second, the Commission has modified the rule to provide that such MOUs or other arrangements would "address[] supervisory and enforcement cooperation and other matters arising under the substituted compliance determination."[911] These clarifications are designed to facilitate discussions between the Commission and relevant foreign regulators.

The Commission expects that any grant of substituted compliance would be predicated on the presence of enforcement MOUs or other arrangements that provide formal mechanisms by which the Commission can request assistance and obtain documents and information from foreign authorities regarding enforcement matters involving securities. Substituted compliance also may be expected to be predicated on the presence of supervisory MOUs or other arrangements that provide formal mechanisms by which the Commission can request assistance and obtain non-public information from foreign authorities related to the oversight of dually regulated entities. As a result, such MOUs or other arrangements should help the Commission ensure compliance with Title VII requirements for regulatory reporting and public dissemination.

In addition, any grant of substituted compliance may be conditioned upon the Commission entering into other MOUs or arrangements that address additional matters specific to the substituted compliance determination. Such MOUs or other arrangements, among other respects, may be expected to help promote the effectiveness of substituted compliance by

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911 Rule 908(c)(2)(iv).

providing mechanisms by which the Commission may request information and/or monitor for circumstances where the foreign regime may no longer be comparable to the counterpart Title VII requirements (due, for example, to changes in the substantive legal framework of the foreign regime that are inconsistent with the understandings that underpinned the Commission's initial grant of substituted compliance). In addition, such MOUs or other arrangements may provide mechanisms by which the Commission could request information and monitor the effectiveness of the enforcement and supervision capabilities of the appropriate foreign regulator(s). More generally, such MOUs or other arrangements can provide mechanisms by which the Commission could obtain information relevant to the assessment of comparability.

f. Modification or Withdrawal of Substituted Compliance Order

Rule 908(c)(2)(v), as re-proposed, would have provided that the Commission may, on its own initiative, modify or withdraw a substituted compliance order with respect to regulatory reporting and public dissemination in a foreign jurisdiction, at any time, after appropriate notice and opportunity for comment. The Commission is adopting Rule 908(c)(2)(v) as re-proposed, without revision.

Situations can arise where it would be necessary or appropriate to modify or withdraw a substituted compliance order. A modification or withdrawal could be necessary if, after the Commission issues a substituted compliance order, the facts or understandings on which the Commission relied when issuing that order are no longer true. The Commission believes, therefore, that it is appropriate to establish a mechanism whereby it could, at any time and on its own initiative, modify or withdraw a previously issued substituted compliance order with respect to regulatory reporting and public dissemination, after appropriate notice and opportunity for comment. Having made a comparability determination, the Commission should have the ability to periodically review the determination and decide whether the substituted compliance determination should continue to apply.[912] The Commission could determine to condition a substituted compliance order on an ongoing duty to disclose relevant information. Thus, the Commission generally agrees with the commenter who argued that persons making use of substituted compliance should be responsible for informing the Commission if factors on which the Commission relied in making the determination change in any material way.[913]

Two commenters generally supported the re-proposed Rule 908(c)(2)(v) requirement for the Commission to publish for comment proposed withdrawals or modifications.[914] Several commenters also recommended that any final decision by the Commission to modify or withdraw a comparability determination should include a phase-in period to provide market participants adequate opportunity to make necessary adjustments to their compliance systems and processes.[915] The Commission generally agrees with these comments, and believes that all affected persons should have appropriate notice of the introduction, withdrawal, or modification of a substituted compliance order so as to minimize undue disruptions in the market. The Commission will address phase-in issues and timeframes on a case-by-case basis—in the relevant order that introduces, modifies, or withdraws substituted compliance—depending on the facts and circumstances of the particular situation.

6. Consideration of Regulatory Reporting and Public Dissemination in the Commission's Analysis of Substituted Compliance

912 The Commission made a similar statement in the Cross-Border Proposing Release. See 78 FR at 31089. Three commenters agreed with the statement. See AFR Letter at 12; Better Markets IV at 30; IIF Letter at 4, 7.

913 See Better Markets IV at 29, 32.

914 See ABA Letter at 6; ISDA II at 9.

915 See FOA Letter at 5; IIF Letter at 7; SIFMA/FIA/Roundtable Letter at A-37.

When the Commission re-proposed Rule 908(c) in the Cross-Border Proposing Release, it expressed a preliminary view that regulatory reporting and public dissemination should be considered together in the Commission's analysis of whether to permit substituted compliance.[916] If the Commission were to adopt that approach, security-based swap transactions would not be eligible for substituted compliance if there were comparable foreign rules in one area but not the other. In other words, a foreign jurisdiction that has comparable rules for regulatory reporting of security-based swap transactions but not comparable rules for public dissemination of such transactions would not have been eligible for substituted compliance under Regulation SBSR.

Three commenters suggested that the Commission consider making separate substituted compliance determinations for regulatory reporting and public dissemination.[917] One of these commenters expressed the view that making separate determinations is appropriate because regulatory reporting and public dissemination serve distinct goals.[918] This commenter also argued that, due to the significant costs associated with documentation, procedures, and technological systems necessary to comply with reporting regimes, the possibility of separate substituted compliance determinations for regulatory reporting and public dissemination could substantially reduce costs for non-U.S. market participants while still achieving the Commission's important market surveillance and transparency goals.[919] One of the other commenters argued that "[d]ifferences among jurisdictions in the timing of reporting . . . should be evaluated in light of systemic risk and market supervisory objectives, rather than policies of

916 See 78 FR at 31096.

917 See IIB Letter at 25; ISDA II at 9; SIFMA/FIA/Roundtable Letter at A-45.

918 See IIB Letter at 25 ("regulatory reporting provides the Commission with the tools for market surveillance and oversight of its regulated markets, while public dissemination is designed to provide the market, rather than regulators, real-time price transparency").

919 See id.

facilitating price discovery."[920] The commenter concluded, therefore, that "[s]uch flexibility should include the potential for separate determinations regarding regulatory reporting and public dissemination requirements."[921]

Notwithstanding these comments, the Commission continues to believe that—subject to one exception described below—regulatory reporting and public dissemination should be considered together for purposes of substituted compliance under Rule 908(c). Even if regulatory reporting and public dissemination serve different policy goals, the Commission believes that treating regulatory reporting and public dissemination separately would not further those goals as effectively as considering these requirements together. The Commission agrees with the commenters who argued that regulatory reporting serves important market oversight goals.[922] However, the Commission disagrees that these objectives should be pursued "rather than policies of facilitating price discovery."[923] Title VII requires the Commission to pursue both sets of policy goals. If the Commission were to permit substituted compliance for regulatory reporting but not for public dissemination, certain transactions could be reported to a foreign trade repository or a foreign regulatory authority in lieu of a registered SDR but would (in theory) still be subject to the Regulation SBSR's public dissemination requirements in Rule 902. Under Regulation SBSR, registered SDRs are charged with publicly disseminating information about security-based swap transactions. To carry out its public dissemination function, a registered SDR must obtain data about security-based swap transactions that Regulation SBSR requires it to publicly disseminate. If this data were reported to a foreign trade

920 ISDA II at 9.

921 Id.

922 Id.; IIB Letter at 25.

923 ISDA II at 9.

repository or foreign regulatory authority under the terms of a substituted compliance order, it would be impractical, if not impossible, for a registered SDR to disseminate that transaction data, as required under Rule 902. In other words, because the registered SDR needs a report of the transaction from the reporting side in order to carry out public dissemination, no purpose would be served—and indeed public dissemination could be compromised—by removing the duty to report the transaction to a registered SDR in lieu of the duty to report it to the foreign trade repository or foreign regulatory authority.[924] The Commission continues to believe that it is impractical and unnecessary to devise an alternate method of public dissemination for security-based swaps that are reported in a foreign jurisdiction pursuant to a substituted compliance order. The Commission concludes, therefore, that a foreign jurisdiction's regulatory reporting and public dissemination requirements—subject to one exception described immediately below—shall be considered together for purposes of evaluating comparability for purposes of a substituted compliance determination under Rule 908(c).

One commenter argued that the Commission should be able to issue a substituted compliance order solely in respect of regulatory reporting that would apply to cross-border security-based swaps that are subject to regulatory reporting but not public dissemination under Regulation SBSR.[925] Under Rule 908(a), as adopted, there is one kind of security-based swap that is subject to regulatory reporting but not public dissemination: a transaction with a non-U.S. person that is registered as a security-based swap dealer or major security-based swap participant

924 The Commission specifically raised this issue in the Cross-Border Proposing Release and asked how public dissemination could be carried out if substituted compliance were in effect for regulatory reporting but not for public dissemination. See 78 FR at 31096.

925 See IIB Letter at 25 ("the separate possibility of substituted compliance for either regulatory reporting or public dissemination could substantially reduce costs for non-U.S. market participants while still achieving the Commission's important market surveillance and transparency goals").

on one side and no U.S. person on the other side. Upon further consideration, the Commission agrees with the commenter and is adopting Rule 908(c) with certain revisions that will allow the Commission to issue a substituted compliance order with respect to regulatory reporting but not public dissemination with respect to this subset of cross-border transactions. The Commission has added a second sentence to the language in re-proposed Rule 908(c)(2)(i) to carry out this aim.[926] The Commission also revised one prong of re-proposed Rule 908(c)(iii) to exclude consideration of the reporting timeframes for public dissemination in cases where the Commission is considering a substituted compliance request with respect to cross-border transactions that are, under Regulation SBSR, subject to regulatory reporting but not public dissemination. The Commission believes that offering the possibility of substituted compliance for these kinds of cross-border transactions could reduce compliance burdens for affected persons without reducing the capability of the Commission and other relevant authorities to oversee the security-based swap market.

XVI. Other Cross-Border Issues

A. Foreign Public Sector Financial Institutions

In response to the Regulation SBSR Proposing Release, six commenters expressed concern about applying the requirements of Title VII to the activities of foreign public sector financial institutions ("FPSFIs"), such as foreign central banks and multilateral development banks.[927] One commenter, the European Central Bank ("ECB"), noted that security-based swaps entered into by the Federal Reserve Banks are excluded from the definition of "swap" in the

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926 Rule 908(c)(2)(i).

927 See BIS Letter passim; CEB at 2, 4; ECB Letter passim; ECB Letter II passim; EIB Letter passim; Nordic Investment Bank Letter at 1; World Bank Letter I passim.

Commodity Exchange Act ("CEA")[928] and that the functions of foreign central banks and the Federal Reserve are broadly comparable. The ECB argued, therefore, that security-based swaps entered into by foreign central banks should likewise be excluded from the definition of "swap."[929] A second commenter, the World Bank (representing the International Bank for Reconstruction and Development, the International Finance Corporation, and other multilateral development institutions of which the United States is a member) also argued generally that the term "swap" should be defined to exclude any transaction involving a multilateral development bank.[930] The World Bank further noted that EMIR—the E.U. counterpart to Title VII of the Dodd-Frank Act—would expressly exclude multilateral development banks from its coverage.[931]

The ECB and BIS stated that foreign central banks enter into security-based swaps solely in connection with their public mandates, which require them to act confidentially in certain circumstances.[932] The ECB argued in particular that public disclosure of its market activities could compromise its ability to take necessary actions and "could cause signaling effects to other

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928 Section 1a(47)(B)(ix) of the CEA, 7 U.S.C. 1a(47)(B)(ix), excludes from the definition of "swap" any agreement, contract, or transaction a counterparty of which is a Federal Reserve Bank, the federal government, or a federal agency that is expressly backed by the full faith and credit of the United States. A security-based swap includes any swap, as defined in the CEA, that is based on, among other things, a narrow-based index or a single security or loan. See Section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c3(a)(68).

929 See ECB Letter I at 2; ECB Letter II at 2. See also EIB Letter at 1; Nordic Development Bank at 1.

930 See World Bank Letter I at 6-7.

931 See id. at 4. See also EIB Letter at 7 ("As a matter of comity, actions by U.S. financial regulators should be consistent with the laws of other jurisdictions that provide exemption from national regulation for government-owned multinational developments such as the [EIB]").

932 See BIS Letter at 4-5; ECB Letter I at 3.

market players and finally hinder the policy objectives of such actions."[933] Another commenter, the Council of Europe Development Banks ("CEB"), while opposing application of Title VII requirements to multilateral development banks generally, did not object to the CFTC and SEC preserving their authority over certain aspects of their transactions, such as by imposing reporting requirements.[934] Similarly, the World Bank believed that the definition of "swap" could be qualified by a requirement that counterparties would treat such transactions as swaps solely for reporting purposes.[935]

In the Cross-Border Proposing Release, the Commission sought additional information to assist with analysis of this issue and asked a number of questions, including questions relating to how active FPSFIs are in the security-based swap market generally; the extent to which FPSFIs engage in security-based swap activity with U.S. persons; whether there are any characteristics of FPSFI activity in the security-based swap market that could make it easier for market observers to detect an FPSFI as a counterparty or that could make it easier to detect an FPSFI's business transactions or market positions; and whether there are steps that the Commission could take to minimize such information leakage short of suppressing all FPSFI trades from public dissemination.[936] The Commission specifically requested that commenters on this issue focus on the security-based swap market, not the market for other swaps. In addition, commenters were requested to answer only with respect to security-based swap activity that would be subject to Regulation SBSR, and not with respect to activity that, because of other factors, would not be

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933 ECB Letter I at 3. See also ECB Letter II at 2.

934 See CEB Letter at 4. However, the CEB did not state a view as to whether FPSFI trades should be subject to post-trade transparency.

935 See World Bank Letter I at 7.

936 See 78 FR at 31074.

subject to Regulation SBSR in any case.[937]

Only a few commenters on the Cross-Border Proposing Release responded to any of these questions or offered additional comments on FPSFI issues related to Regulation SBSR. One commenter, FMS-Wertmanagement ("FMS"), an instrumentality of the government of the Federal Republic of Germany that manages certain legacy financial portfolios, stated that security-based swaps form only a small portion of its overall derivatives portfolio, and that it does not enter into any new security-based swaps "except with the purpose of restructuring existing security-based swaps within the limits of its winding-up strategy."[938] This commenter, however, did not provide an opinion regarding how any provisions of Regulation SBSR would affect its operations; instead, the primary opinion expressed in the comment was that FPSFIs such as FMS should not be required to register as security-based swap dealers or major security-based swap participants and be subject to the attendant requirements.[939] Another commenter, KfW Bankengruppe ("KfW"), is also an instrumentality of the Federal Republic of Germany and engages in "promotional lending opportunities."[940] KfW indicated that it has in the past engaged in a small number of security-based swap transactions but none recently.[941] Like FMS, KfW argued that FPSFIs should not be subject to regulation as security-based swap dealers or major

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937 See id.

938 FMS Letter at 8. See also IDB Letter at 1 (noting that IDB does not currently enter into security-based swaps but that it may do so in the future, and expressing concern about applying the requirements of Title VII to the activities of FPSFIs).

939 See id. at 8-11.

940 KfW Letter at 1.

941 KfW indicated, for example, that between 2009 and 2012 it engaged in only four new trades to acquire credit protection, all in 2011; that the last time it had sold credit protection was in 2009; and that as of 2012 the outstanding notional amount of the credit protection it had purchased was zero. See id. at Annex A.

security-based swap participants and did not otherwise comment on any issues specific to Regulation SBSR.[942] A third commenter, the World Bank, stated that, "We do not object to reporting of our transactions by U.S. counterparties or non-U.S. counterparties that are independently required to be registered with the Commission. Our concern is limited to ensuring that non-U.S. counterparties that are otherwise not subject to regulation could become subject to certain requirements solely because a transaction with us could be deemed to be a 'Transaction conducted within the United States.' We are amenable to any solution that fixes this problem."[943] A fourth commenter agreed with the World Bank, arguing that the term "transaction conducted within the United States," which as proposed in the Cross-Border Proposing Release would trigger the regulatory reporting requirement, should be modified to exclude transactions with FPSPIs.[944]

The Commission believes that a security-based swap to which an FPSFI is a counterparty ("FPSFI trade") should not, on that basis alone, be exempt from regulatory reporting. By the same token, however, the Commission also believes that a security-based swap to which an FPSFI is a counterparty—even if headquartered in the United States—should not, on that basis alone, be subject to regulatory reporting. All FPSFIs, even FPSFIs that are based in the United States, are deemed non-U.S. persons under the Commission's Title VII rules.[945] As with any

942 See id. at 1-6.

943 World Bank Letter at 6, note 11.

944 See Sullivan Letter at 18-19.

945 See Rule 3a71-3(a)(4)(iii) under the Exchange Act (specifically excluding from the term "U.S. person" 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, affiliates, and pension plans, and any other similar international organizations, their agencies, affiliates, and pension plans).

other security-based swap transaction having a direct counterparty that is a non-U.S. person, a transaction involving an FPSFI as a direct counterparty would be subject to Regulation SBSR's regulatory reporting requirements only if it met one of the conditions in Rule 908(a)(1). Thus, a transaction between an FPSFI and a U.S. person would be subject to regulatory reporting,[946] and the U.S. person would be the reporting side.[947] However, a transaction between an FPSFI and a non-U.S. person would be subject to regulatory reporting only if the non-U.S. person is a registered security-based swap dealer or a registered major security-based swap participant or is guaranteed by a U.S. person, a registered security-based swap dealer or a registered major security-based swap participant.[948] As noted above,[949] the Commission has declined to adopt the term "transaction conducted within the United States," which was proposed in the Cross-Border Proposing Release. In the Conduct Re-Proposal, the Commission anticipates soliciting additional comment on such transactions as they relate to regulatory reporting and public dissemination under Regulation SBSR.

Regulatory reporting of FPSFI trades involving, on the other side, a U.S. person, a registered security-based swap dealer, or a registered major security-based swap participant will facilitate the Commission's ability to carry out our regulatory oversight responsibilities with respect to registered entities, U.S. persons, and the U.S. security-based swap market more generally. The Commission notes that this approach was endorsed by the World Bank and

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946 See Rule 908(a)(a)(1) (requiring regulatory reporting of a security-based swap where there is a direct or indirect counterparty that is a U.S. person on either side of the transaction).

947 See Rule 901(a)(2)(ii)(E)(2).

948 See Rule 901(a)(1)(i) and (ii).

949 See supra Section XV(C)(3)(iv).

another commenter in response to the original Regulation SBSR Proposing Release.[950]

Finally, the Commission does not believe that a sufficient basis exists to support an exemption from public dissemination for FPSFI trades. The Commission is aware of no characteristics of security-based swap transactions executed by FPSFIs that indicate that an exemption from the public dissemination requirements of Regulation SBSR would be appropriate. No commenters suggested that FPSFIs use security-based swaps differently from other market participants or that publicly disseminating FPSFI trades would provide an inaccurate view of the market. Moreover, based on the comments received, it appears that that FPSFI participation in the security-based swap market—rather than the swap market generally—is extremely limited.[951] Thus, if security-based swap activity consists of such a small portion of FPSFI activities, it is less apparent that an exemption is warranted; the harm that would result from disseminating security-based swap transactions—assuming such harm exists—would, all other things being equal, be less the fewer such transactions there are. The Commission notes, in any event, that Regulation SBSR contains provisions relating to public dissemination that are designed to protect the identity of security-based swap counterparties[952] and prohibit a registered SDR (with respect to uncleared security-based swaps) from disclosing the business transactions and market positions of any person.[953] The Commission also notes that, during the interim phase

950 See CEB Letter at 4; World Bank Letter I at 7 (stating that, although swaps involving FPSFIs as counterparties generally should be exempt from the definition of "swap," they should be treated as swaps solely for reporting purposes).

951 See BIS Letter at 3 (stating that the BIS generally does not transact security-based swaps such as credit default swaps or equity derivatives); KfW Letter at Annex A; FMS Letter at 8.

952 See Rule 902(c)(1) (requiring a registered SDR not to disseminate the identity of any counterparty to a security-based swap).

953 See Rule 902(c)(2).

of Regulation SBSR, no transaction must be reported before 24 hours after execution. This approach is designed to minimize any adverse market impact of publicly disseminating any security-based swap transactions, when the Commission has not yet proposed and adopted block trades thresholds and the associated dissemination delays for the benefit of all counterparties, including FPSFIs. Given these potential protections for all security-based swap counterparties, not just FPSFIs, the Commission does not at this time see a basis to exempt FPSFI trades from public dissemination.

B. Foreign Privacy Laws Versus Duty to Report Counterparty IDs

Rule 901(d), as adopted, sets forth the data elements that must be reported to a registered SDR for regulatory purposes. One such element is the "counterparty ID" of each counterparty, which will enable the Commission to determine every person who is a counterparty, direct or indirect, to a security-based swap. The Commission believes that it could be necessary to assess the positions and trading activity of any counterparty in order to carry out its regulatory duties for market oversight.[954] Since only one side of the transaction is required to report, the reporting

954 The Commission and other relevant authorities have a strong interest in being able to monitor the risk exposures of U.S. persons, particularly those involved in the security-based swap market, as the failure or financial distress of a U.S. person could impact other U.S. persons and the U.S. economy as a whole. The Commission and other relevant authorities also have an interest in obtaining information about non-U.S. counterparties that enter into security-based swaps with U.S. persons, because the ability of such non-U.S. counterparties to perform their obligations under those security-based swaps could impact the financial soundness of U.S. persons. See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 ("As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole") (emphasis added).

side is required to provide the counterparty ID of any counterparty on the other side.[955] Without this requirement, the registered SDR would not have a record of the identity of the other side.

Some commenters cautioned that U.S. persons might be restricted from complying with such a requirement in cases where a security-based swap is executed outside the United States.[956] One of these commenters stated, for example, that the London branch of a U.S. person would need its counterparty's consent to identify that party under U.K. law.[957] The commenter noted that, in this case, the reporting party is located in a jurisdiction where applicable local law restricts the reporting party from reporting the identity of a counterparty. The same commenter added that, in a similar transaction executed by a Paris branch of a U.S. firm, French law requires the branch to obtain the consent of the counterparty every time that it wants to report that counterparty's identity.[958] Another of these commenters urged the Commission to "consider

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955 However, as described above in Section II(C)(3)(b), the reporting side might not know the counterparty ID of a counterparty by the time it must report the transaction (e.g., if the trade is to be allocated to a series of funds, and the fund manager has not yet determined the allocation). In such case, the reporting side would know the identity of the execution agent acting for the funds and thus would be required to report the execution agent ID instead of the counterparty ID with the initial transaction report.

956 See DTCC Letter II at 21; ISDA/SIFMA Letter I at 20. In addition, two comments on the Commission's interim final temporary rule on the reporting of security-based swaps entered into before July 21, 2010, Securities Exchange Act Release No. 63094 (October 13, 2010), 75 FR 64643 (October 20, 2010), made similar points. See Deutsche Bank Letter at 5 ("In some cases, dissemination or disclosure of [counterparty] information could lead to severe civil or criminal penalties for those required to submit information to an SDR pursuant to the Interim Final Rules. These concerns are particularly pronounced because of the expectation that Reportable Swap data will be reported, on a counterparty identifying basis, to SDRs, which will be non-governmental entities, and not directly to the Commissions"); ISDA I at 6 ("In many cases, counterparties to cross-border security-based swap transactions will face significant legal and reputational obstacles to the reporting of such information. Indeed, disclosure of such information may lead to civil penalties in some jurisdictions and even criminal sanctions in other jurisdictions").

957 See DTCC Letter II at 21.

958 See id.

carefully and provide for consistency with, foreign privacy laws, some of which carry criminal penalties for wrongful disclosure of information,"[959] but did not provide further detail. A third commenter argued, without further explanation, that allowing substituted compliance when both parties are not domiciled in the United States could avoid problems with foreign privacy laws conflicting with U.S. reporting requirements.[960]

In the Cross-Border Proposing Release, the Commission stated that it sought to understand more precisely if—and, if so, how—requiring a party to report the transaction pursuant to Regulation SBSR (including disclosure of the other side's identity to a registered SDR) might cause it to violate local law in a foreign jurisdiction where it operates. Before determining whether any exception to reporting the counterparty's counterparty ID might be necessary or appropriate, the Commission sought additional information about any such foreign privacy laws and asked a number of questions about this issue.[961]

In response to the questions, one commenter listed specific provisions in foreign laws that would prevent the reporting side from identifying its foreign counterparty.[962] Another commenter noted that reporting parties could face issues with identifying the counterparty if "either (i) consent is required for disclosing trade data to the Commission and such consent has not or cannot be obtained or (ii) a counterparty consent is not sufficient to overcome the data privacy restrictions."[963] This commenter requested that the Commission "recognize in [Regulation SBSR] the necessity for reporting parties to redact/mask counterparty-identifying

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959 ISDA/SIFMA Letter I at 20.

960 See Cleary II at 17-18.

961 See 78 FR at 31073.

962 See IIB Letter at 19, note 45.

963 ISDA IV at 19.

information" if they reasonably believe that disclosure of such information may violate the laws of another jurisdiction.[964] Commenters did not suggest any rule text for a possible exemption from proposed Rule 901(d)(1)(i) or discuss the effects of granting substituted compliance on avoiding foreign legal barriers to reporting.

Based on the comment received as well as other sources consulted,[965] the Commission understands that some laws and regulations exist in foreign jurisdictions that may limit or prevent reporting of counterparty ID to an SEC-registered SDR pursuant to Regulation SBSR. These types of restrictions may include privacy laws, which generally restrict disclosure of certain identifying information about a natural person or entity,[966] and so-called "blocking statutes" (including secrecy laws) which typically prevent the disclosure of information relating to third parties and/or foreign governments.[967] Several jurisdictions with possible legal and

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964 Id.

965 See letter from Robert Pickel, Chief Executive Officer, ISDA, to David A. Stawick, Secretary, CFTC, dated August 27, 2012 ("ISDA CFTC Letter"), passim, available at www2.isda.org/attachment/NjY2NQ==/Comment%20Letter%20-%20CFTC%20Reporting%20Obligations%20Cross%20Border%20FINAL%20082712.pdf (last visited January 13, 2015) (discussing a survey of privacy laws in a number of foreign jurisdictions); FSB OTC Derivatives Working Group (ODWG), OTC Derivatives Market Reforms: Fifth Progress Report on Implementation (April 15, 2013); Seventh Progress Report on Implementation (April 8, 2014); OTC Derivatives Regulators Group (ODRG), Report on Agreed Understandings to Resolving Cross-Border Conflicts, Inconsistencies, Gaps And Duplicative Requirements (August 2013); ODRG, Report on Cross-Border Implementation Issues (September 2013).

966 The Commission understands that the privacy law limitations on disclosure of certain identifying information related to natural persons or entities can usually (but not always) be overcome by counterparty consent to such disclosure. Even where express consent resolves any outstanding privacy law issues, obtaining consent from the necessary counterparties may require market education and additional time to implement. See ISDA CFTC Letter at 8.

967 The Commission understands that blocking statue barriers to reporting normally cannot be waived by the person or entity that is the subject of the information, though the person

regulatory barriers also have reported that they are in the process of modifying their legislation and regulations to remove such barriers.[968] Therefore, it is difficult for the Commission to assess the extent to which legal and regulatory barriers will continue to exist that would hinder the ability of parties to meet the reporting requirement of Regulation SBSR.

The Commission recognizes that security-based swap counterparties that will incur the duty to report pre-enactment and transactional security-based swaps pursuant to Rule 901(i) may have entered into some of those transactions with counterparties in jurisdictions that have privacy laws or blocking statutes that may prohibit these reporting sides from disclosing the identities of these foreign counterparties. At the time that these transactions were executed, there was no regulatory requirement to report the identity of the counterparty under the United States securities laws. Therefore, the Commission believes that it would be inappropriate to compel a reporting side to disclose the identity of a counterparty to a historical security-based swap now, if such disclosure would violate applicable foreign law and the reporting side could not reasonably have foreseen a future conflict with applicable U.S. law. The Commission will consider requests from reporting sides for exemptions, pursuant to Section 36 of the Exchange Act,[969] from the requirement to report counterparty IDs of historical security-based swaps executed up to the last day before the effective date of these final rules. Any such request should be filed pursuant to Rule 0-12 under the Exchange Act[970] and include: (1) the name of the jurisdiction or jurisdictions which the requester believes prohibit it from being able to carry out the duty under

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or entity may, in some circumstances, apply for an exemption to report certain information. See id.

968 See ODWG Seventh Progress Report, supra note 965, at 10.

969 15 U.S.C. 78mm.

970 17 CFR 240.0-12.

Rule 901(i) of reporting the identity of a counterparty; and (2) a discussion of the laws of the jurisdiction or jurisdictions that prohibit such reporting, and why compliance with the duty to report the counterparty ID under Rule 901(i) is limited or prohibited.[971] Upon the effective date of these final rules, every security-based swap counterparty that is the reporting side for one or more security-based swaps will eventually have to report, among other things, the identity of each of its counterparties.[972]

C. Antifraud Authority

The provisions of Regulation SBSR and the interpretive guidance discussed above relate solely to the applicability of the security-based swap regulatory reporting and public dissemination requirements under Title VII. Regulation SBSR does not limit the cross-border reach of the antifraud provisions or other provisions of the federal securities laws that are not addressed by this release.[973]

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[971] For example, to support an exemption request, the requester should consider discussing whether obtaining waivers from its counterparties is an acceptable practice under the law of the foreign jurisdiction.

[972] The rules adopted in this release will be effective 60 days after publication in the Federal Register. For Rules 900, 907, and 909, the compliance date is the same as the effective date. The Commission is proposing a new compliance schedule for Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR. See Regulation SBSR Proposed Amendments Release, Section VII. Market participants will not have to comply with the requirements in those rules—such as the requirement in Rule 901(i) to report historical security-based swaps—until certain dates that will be specified when the Commission takes final action on the proposed compliance schedule.

[973] For example, security-based swaps, as securities, are subject to the provisions of the Securities Act and the rules and regulations thereunder applicable to securities. The Securities Act requires that any offer and sale of a security must either be registered under the Securities Act, see Section 5 of the Securities Act, 15 U.S.C. 77e, or made pursuant to an exemption from registration, see, e.g., Sections 3 and 4 of the Securities Act, 15 U.S.C. 77c and 77d. In addition, the Securities Act requires that any offer to sell, offer to buy or purchase, or sale of a security-based swap to any person who is not an eligible contract participant must be registered under the Securities Act. See Section 5(e) of the Securities Act, 15 U.S.C. 77e(e). Because of the statutory language of Section

In Section 929P(b) of the Dodd-Frank Act,[974] Congress added provisions to the federal securities laws confirming the Commission's broad cross-border antifraud authority.

In the Cross-Border Adopting Release, the Commission adopted Rule 250.1 under the Exchange Act,[975] which sets forth the Commission's interpretation of its cross-border authority.[976] Rule 250.1(a) provides that the antifraud provisions of the securities laws apply to: "(1) Conduct within the United States that constitutes significant steps in furtherance of the violation; or (2) Conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Nothing in this Regulation SBSR limits the broad cross-border application of the anti-fraud provisions as set forth in Rule 250.1.

D. International Coordination Generally

Several commenters urged the Commission to coordinate their efforts to implement Title VII requirements with those of foreign regulators who also are imposing new requirements on the OTC derivatives markets.[977] For example, one commenter urged the SEC and CFTC "to

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5(e), exemptions from this requirement in Sections 3 and 4 of the Securities Act are not available.

974 The antifraud provisions of the securities laws include Section 17(a) of the Securities Act, 15 U.S.C. 77q(a); Sections 9, 10(b), 14(e), and 15(c)(1)-(2) and (7) of the Exchange Act, 15 U.S.C. 78i, 78j, 78n, 78o(c)(1)-(2); Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6; and any rule or regulation of the Commission promulgated under these statutory provisions.

975 17 CFR 250.1.

976 See Cross-Border Adopting Release, 79 FR at 47360.

977 See, e.g., Cleary III at 36; Markit III at 2; SIFMA I at 5-6; WMBAA III at 3 ("U.S. regulations also need to be in harmony with regulations of foreign jurisdictions"); NGFP Letter at 1-2; AFGI Letter at 1 (urging the Commission to ensure the consistent regulation of financial guaranty insurers); CDEU Letter at 2; PensionsEurope Letter at 1-2 (urging the Commission to avoid conflicts with European regulatory requirements); Barnard II at 1-2; Six Associations Letter at 1-2 (expressing general support for coordination among regulators with respect to the regulation of swaps and security-based swaps); CCMR II, passim.

harmonize their real-time reporting regimes with each other and with those of comparable international regulators."[978] Similarly, a second commenter stated that the SEC and CFTC "should work with foreign regulators that plan to create their own real-time reporting regimes to harmonize their requirements regarding the timing of dissemination and the data to be disseminated."[979] The same commenter urged the SEC and CFTC "to continue their efforts in establishing a globally harmonized approach to creating [LEIs]."[980] Other commenters believed generally that global coordination is necessary to develop LEIs and other identification codes.[981]

The Commission agrees broadly with these commenters that international coordination will be helpful in developing robust and efficient regimes for regulating cross-border security-based swap activity and overseeing the security-based swap market. The Commission is cognizant of its duty under Section 752(a) of the Dodd-Frank Act[982] and remains committed to engaging in bilateral and multilateral discussions with foreign regulatory authorities to carry out this goal. The Commission staff has consulted and coordinated with the CFTC, prudential regulators,[983] and foreign regulatory authorities consistent with the consultation provisions of the

978 SIFMA I at 5-6.

979 Markit III at 2.

980 Id. at 4-5.

981 See Benchmark at 1; Bloomberg Letter at 1; DTCC V at 14.

982 15 U.S.C. 8325 ("In order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps").

983 The term "prudential regulator" is defined in Section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in Section 3(a)(74) of the Exchange Act, 15 U.S.C. 78c(a)(74).

Dodd-Frank Act,[984] and more generally as part of its domestic and international coordination efforts. The Commission staff has participated in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives.[985] Through these discussions and the Commission's participation in various international task forces and working groups, it has gathered information about foreign regulatory reform efforts and discussed the possibility of conflicts and gaps, as well as inconsistencies and duplications, between U.S. and foreign regulatory regimes. The Commission has taken and will continue to take these discussions into consideration in developing rules, forms, and interpretations for implementing Title VII of the Dodd-Frank Act.

XVII. Rule 909—SIP Registration

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984 Section 712(a)(2) of the Dodd-Frank Act provides in part that the Commission shall "consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible."

985 Senior representatives of OTC derivatives market regulators from G20 jurisdictions have met on a number of occasions to discuss international coordination of OTC derivatives regulations, including as part of the OTC Derivatives Regulators Group. See, e.g., Report of the OTC Derivatives Regulators Group on Cross-Border Implementation Issues (March 2014), available at https://www.g20.org/sites/default/files/g20_resources/library/Report%20of%20the%20OTC%20Derivatives%20Regulators%20Group%20on%20Cross-Border%20Implementation%20Issues.pdf; Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-Border OTC Derivatives Market (December 4, 2012), available at http://www.sec.gov/news/press/2012/2012-251.htm; Joint Statement on Regulation of OTC Derivatives Markets (May 7, 2012), available at: http://www.sec.gov/news/press/2012/2012-85.htm; Joint Statement on Regulation of OTC Derivatives Markets (December 9, 2011), available at: http://www.sec.gov/news/press/2011/2011-260.htm, each last visited September 22, 2014. The Commission participates in the FSB's Working Group on OTC Derivatives Regulation ("ODWG"), both on its own behalf and as the representative of the International Organization of Securities Commissions ("IOSCO"), which is co-chair of the ODWG. The Commission also serves as one of the co-chairs of the IOSCO Task Force on OTC Derivatives Regulation.

Section 3(a)(22)(A) of the Exchange Act[986] defines a SIP as "any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations." Security-based swaps are securities under the Exchange Act.[987] Because Regulation SBSR requires registered SDRs to collect security-based swap transaction reports from participants and to distribute data from such reports, registered SDRs will be SIPs for purposes of the Exchange Act.

Section 11A(c)(1) of the Exchange Act[988] provides that the Commission may prescribe rules requiring SIPs to, among other things, assure "the fairness and usefulness of the form and content"[989] of the information that they disseminate, and to assure that "all other persons may obtain on terms which are not unreasonably discriminatory" the transaction information published or distributed by SIPs.[990] Section 11A(c)(1) applies regardless of whether a SIP is registered with the Commission as such.

The provisions of Section 11A(b)(5) and11A(b)(6) of the Exchange Act, however, apply only to registered SIPs. Requiring a registered SDR to register with the Commission as a SIP

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986 15 U.S.C. 78c(a)(22)(A).

987 See 15 U.S.C. 78c(a)(10).

988 15 U.S.C. 78k-1(c)(1).

989 15 U.S.C. 78k-1(c)(1)(B).

990 15 U.S.C. 78k-1(c)(1)(D).

would subject that entity to Section 11A(b)(5) of the Exchange Act,[991] which requires a registered SIP to notify the Commission whenever it prohibits or limits any person's access to its services. Upon its own motion or upon application by any aggrieved person, the Commission could review the registered SIP's action.[992] If the Commission finds that the person has been discriminated against unfairly, it could require the SIP to provide access to that person.[993] Section 11A(b)(6) of the Exchange Act also authorizes the Commission to take certain regulatory action as may be necessary or appropriate against a registered SIP.[994]

Section 11A(b)(1) of the Exchange Act[995] provides that a SIP not acting as the "exclusive processor"[996] of any information with respect to quotations for or transactions in securities is exempt from the requirement to register with the Commission as a SIP unless the Commission, by rule or order, determines that the registration of such SIP "is necessary or appropriate in the

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991 15 U.S.C. 78k-1(b)(5).

992 See 15 U.S.C. 78k-1(b)(5)(A)

993 See 15 U.S.C. 78k-1(b)(5)(B).

994 See 15 U.S.C. 78k-1(b)(6) (providing that the Commission, by order, may censure or place limitations upon the activities, functions, or operations of any registered SIP or suspend for a period not exceeding 12 months or revoke the registration of the SIP, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest, necessary or appropriate for the protection of investors or to assure the prompt, accurate, or reliable performance of the functions of such SIP, and that such SIP has violated or is unable to comply with any provision of this title or the rules or regulations thereunder).

995 15 U.S.C. 78k-1(b)(1).

996 15 U.S.C. 78c(a)(22)(B) (defining "exclusive processor" as any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (1) transactions or quotations on or effected or made by means of any facility of such exchange or (2) quotations distributed or published by means of any electronic system operated or controlled by such association).

public interest, for the protection of investors, or for the achievement of the purposes of [Section 11A]." An SDR does not engage on an exclusive basis on behalf of any national securities exchange or registered securities association in collecting, processing, or preparing for distribution or publication any information with respect to transactions or quotations in securities; therefore, an SDR does not fall under the statutory definition of "exclusive processor."

To subject an SDR to the requirements of Sections 11A(b)(5) and 11A(b)(6), the Commission would need, by rule or order, to make the determination under Section 11A(b)(1) noted above. Accordingly, the Commission proposed Rule 909 to require a registered SDR also to register with the Commission as a SIP on existing Form SIP. The Commission requested comment on this proposed requirement, and whether it should combine Form SIP and Form SDR to create a joint registration form. In the Cross-Border Proposing Release, the Commission re-proposed Rule 909 without revision.

The Commission believes that requiring registered SDRs to register as SIPs will help to ensure fair access to important security-based swap transaction data reported to and publicly disseminated by them. The Commission believes that the additional authority over a registered SDR/SIP provided by Sections 11A(b)(5) and 11A(b)(6) of the Exchange Act will ensure that these entities offer security-based swap market data on terms that are fair and reasonable and not unreasonably discriminatory. Therefore, the Commission believes that registering SDRs as SIPs is necessary or appropriate in the public interest, for the protection of investors, or for the achievement of the purposes of Section 11A of the Exchange Act. Section 11A of the Exchange Act establishes broad goals for the development of the securities markets and charges the Commission with establishing rules and policies that are designed to further these objectives. Section 11A(a) states, among other things, that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure economically efficient execution of securities transactions; the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities; and an opportunity for investors' orders to be executed without the participation of a dealer. Requiring registered SDRs also to register with the Commission as SIPs is designed to help achieve these objectives in the still-developing security-based swap market.

One commenter stated that, because of the duplicative nature of the information required by Form SDR and Form SIP, the Commission should combine the two forms so that an SDR could register as both an SDR and a SIP using only one form.[997] As an alternative, the commenter suggested that an SDR be permitted to use either Form SDR or Form SIP to register as both an SDR and a SIP.[998]

Rule 909, as re-proposed, stated that "[a] registered security-based swap data repository shall also register with the Commission as a securities information processor on Form SIP." For reasons discussed in the SDR Adopting Release, the Commission agrees that Form SDR should be revised to accommodate SIP registration.[999] Accordingly, Rule 909, as adopted, eliminates the reference to Form SIP and states instead that "[a] registered security-based swap data repository shall also register with the Commission as a securities information processor on Form

997 See DTCC III at 9.

998 See id.

999 See SDR Adopting Release, Section VI(A)(1)(c). Form SDR is being adopted by the Commission as part of the SDR Adopting Release. Form SDR will be used by SIPs that also register as SDRs. Form SIP will continue to be used by applicants for registration as SIPs not seeking to become dually registered as an SDR and a SIP, and for amendments by registered SIPs that are not dually registered as an SDR and a SIP.

SDR." There are no filing requirements in addition to the Form SDR for a person to register as both a SIP and an SDR.

XVIII. Constitutional Questions About Reporting and Public Dissemination

One commenter argued that the reporting and dissemination requirements of Regulation SBSR could violate the First and Fifth Amendments to the Constitution by compelling "non-commercial speech" without satisfying a strict scrutiny standard and by "taking" transaction and/or holding data without just compensation.[1000]

As a preliminary matter, the Commission presumes "that Congress acted constitutionally when it passed the statute."[1001] Furthermore, the Commission has carefully considered the commenter's arguments and pertinent judicial precedent, and believes that the commenter does not raise any issue that would preclude the Commission's adoption of Regulation SBSR's regulatory reporting and public dissemination requirements substantially as proposed and re-proposed. The Commission does not believe that the public dissemination requirements of Regulation SBSR violate the First Amendment. Under the federal securities laws, the Commission imposes a number of requirements that compel the provision of information to the Commission itself or to the public. The Supreme Court has suggested that only limited scrutiny under the First Amendment applies to securities regulation, and that the government permissibly

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1000 See Viola Letter at 3-4.

1001 See Nebraska v. EPA, 331 F.3d 995, 997 (DC Cir. 2003) ("Agencies do not ordinarily have jurisdiction to pass on the constitutionality of federal statutes.") (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994)); Todd v. SEC, 137 F.2d 475, 478 (6th Cir. 1943) (same); William J. Haberman, 53 SE.C. 1024, 1029 note14 (1998) ("[W]e have no power to invalidate the very statutes that Congress has directed us to enforce.") (citing Milton J. Wallace, 45 SE.C. 694, 697 (1975); Walston & Co., 5 SE.C. 112, 113 (1939)).

regulates "public expression by issuers of and dealers in securities."[1002] And in other contexts, the required disclosure of purely factual and uncontroversial information has also been subjected to only limited First Amendment scrutiny.[1003]

Nor does the Commission believe that public dissemination requirements of Regulation SBSR violate the Fifth Amendment. To constitute a regulatory taking, the government action must (1) affect a property interest, and (2) go "too far" in so doing.[1004] The Supreme Court has identified several factors to be considered in determining whether the government action goes too far, such as "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[1005] The requirements at issue here directly advance the government's legitimate interest in enhancing price discovery by, among other things, reducing information asymmetries, enhancing transparency, and improving confidence in the market. The character of the government action, therefore, weighs against Rule 902(a) being a taking. The Commission further believes that the regulatory reporting and public dissemination requirements of Regulation SBSR do not impose an unconstitutional

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1002 See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) (stating also that the First Amendment does not "preclude[] States from having 'blue sky' laws to regulate what sellers of securities may write or publish..."). See also S.E.C. v. Wall St. Pub. Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988) ("Speech relating to the purchase and sale of securities…forms a distinct category of communications" in which "the government's power to regulate [speech about securities] is at least as broad as with respect to the general rubric of commercial speech").

1003 See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61-62 (2006); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 21-22 (D.C. Cir. 2014); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009) (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113-115 (2d Cir. 2001)).

1004 See Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1000-01, 1005 (1984).

1005 Id. at 1005 (quoting PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980)).

economic impact[1006] or interfere with reasonable investment-backed expectations. Regulation SBSR does not interfere with market participants' reasonable investment-backed expectations because the financial markets are an industry with a long tradition of regulation focused on promoting disclosure of information to investors. Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends.[1007] Although security-based swaps did not become securities and thus did not become fully subject to the regulatory regime for securities regulation until after passage of the Dodd-Frank Act, the Commission believes that the economic similarity of markets in securities and security-based swaps strongly suggests that market participants could have anticipated regulation at a future date. Furthermore, the Commission believes that the commenter has provided no argument to support the proposition that the mere fact that security-based swaps were not fully subject to the Exchange Act until passage of the Dodd-Frank Act necessarily implies that it was unconstitutional for Congress to amend the Exchange Act to cover these securities.

XIX. What Happens If There Are Multiple SDRs?

1006 See District Intown Properties Ltd. P'ship v. District of Columbia, 198 F.3d 874, 883 (D.C. Cir. 1999) (requiring a Fifth Amendment claim to "put forth striking evidence of economic effects").

1007 District Intown Properties Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1008-09 (1984) (finding no reasonable investment-backed expectations because "the possibility was substantial" in an industry long "the focus of great public concern and significant government regulation" that Congress "would find disclosure to be in the public interest"); Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 154-156 (1st Cir. 2012) (finding no reasonable investment-backed expectations because the Maine legislature's "continued expansion of this right of access" to information about insurance plans to a type of plan not covered by previous statutes providing a right of access was "reasonably foreseeable" in light of "the historically heavy and continuous regulation of insurance in Maine").

The provisions of Title VII that amended the Exchange Act to require the registration of security-based swap data repositories do not require that there be only a single SDR; in fact, these provisions contemplate that there could be multiple SDRs registered with the Commission.[1008] Therefore, no provision of Regulation SBSR, as adopted, is designed to require or promote the use of only a single SDR. The Commission believes, however, that it must consider how the Title VII goals of monitoring and reducing systemic risk and promoting transparency in the security-based swap market will be achieved if there are multiple registered SDRs.

One commenter believed that a diverse range of options for reporting security-based swap data would benefit the market and market participants.[1009] However, other commenters raised various concerns with having multiple registered SDRs. Two commenters recommended that the Commission designate a single registered SDR per asset class.[1010] Similarly, a third commenter stated that "the Commission should consider designating one [registered SDR] per SBS asset class to act as the industry consolidator of SBS data for the Commission and for the purpose of public reporting."[1011] This commenter also recommended that all life cycle events be

1008 See Section 13(n) of the Exchange Act, 15 U.S.C. 78m.

1009 See MFA Letter at 6.

1010 See ISDA I at 4; ISDA/SIFMA I at 9, note 12 (noting that, with a single SDR, there would be no redundancy of platforms, no need for additional levels of data aggregation for each asset class, reduced risk of errors, and greater transparency).

1011 MarkitSERV I at 8. The commenter also urged the Commission to "ensure that there is consistency between the fields that different SBS SDRs in the same asset class would collect and report in order to lay the foundation for the data to be consolidatable." Id. See also DTCC IX at 3. See supra Section II(B)(2) for discussion of the Commission's approach to ensure consistency. Another commenter also noted that "if there is more than one registered SDR for an asset class, it may prove difficult for the Commission to ensure that all registered SDRs calculate the same block thresholds for the same SBS reported to the same registered SDR that received the original transaction report and that registered SDRs be required to accept all security-based swaps in an asset class to further reduce fragmentation of data across multiple SDRs.

Another commenter warned of the risks of security-based swaps being reported to multiple SDRs, stating that, "[u]nless data fragmentation can be avoided, the primary lessons of the 2008 financial crisis, as related to OTC derivatives trading, will not have been realistically or adequately taken into account."[1012] This commenter noted the "large one-way trades put on by AIG in mortgage related credit derivatives" and stated that "if AIG had chosen to try to hide [its] trades by reporting to multiple repositories, these systemically risky positions would not have been discovered absent a 'super repository' that aggregated the trade level data of the various reporting repositories in a manner as to detect the large one-way aggregate positions."[1013] The same commenter stated in a subsequent comment letter that, if there are multiple registered SDRs, the "Commission should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs."[1014] One option suggested by this commenter was utilizing Section 13(n)(5)(D)(i) of the Exchange Act,[1015] which requires an SDR to "provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity)." The commenter explained that, using this authority, "the Commission could designate

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instruments." WMBAA II at 4. As discussed in more detail above in Section VII, the Commission is not yet adopting or proposing block trade rules.

1012 See DTCC II at 15.

1013 Id.

1014 DTCC IV at 5.

1015 15 U.S.C. 78m(n)(5)(D)(i).

one [SDR] as the recipient of information from other [SDRs] in order to have consolidation and direct electronic access for the Commission."[1016]

Four commenters urged the Commission to mandate the consolidation of publicly disseminated security-based swap data.[1017] One of these commenters stated that "in order to most effectively increase transparency in the swaps markets, it will be important for the real-time swaps data to be available on a consolidated basis."[1018] The second commenter believed that a central consolidator or the Commission must have the authority to compel all participants, including registered SDRs, to submit data to assure that there is a single, comprehensive, and accurate source for security-based swap data.[1019] A third commenter, citing the regime for producing consolidated public information in the U.S. equity markets, stated that "there is no obvious reason why a similar regime could not succeed for security-based swaps."[1020] In addition, this commenter believed that "the ideal approach would be collaboration by the SEC and the CFTC to create (or facilitate the direct creation of) a single, central system that performs these data dissemination functions."[1021] The fourth commenter cautioned that the failure to make real-time data available on a consolidated basis would especially disadvantage less frequent and

1016 DTCC I at 7.

1017 See Barnard I at 3; Better Markets II at 6; FINRA Letter at 5; MarkitSERV I at 7.

1018 MarkitSERV I at 7.

1019 See FINRA Letter at 5 (also noting that mandating the consolidation of security-based swap transaction data would help to assure uniformity, thereby promoting market integrity and investor protection).

1020 Better Markets II at 6. However, the commenter cautioned that the security-based swap data dissemination regime must avoid the direct data feeds that have developed in the equity markets because these data feeds allow "high-frequency traders to bypass the aggregation and dissemination procedure, at the expense of retail and other investors." Id.

1021 Id. at 4.

smaller users of the transaction data, who would not be able to obtain an accurate view of market activity because of the cost and complexity of accessing multiple data sources.[1022]

The Commission shares the concerns of these commenters. The regulatory goals underpinning the Title VII requirements for regulatory reporting and public dissemination of security-based swap transaction information could be frustrated if the information cannot be easily aggregated and normalized. The Commission notes, however, that the statutory provisions allow for the possibility of multiple SDRs.[1023] The Commission therefore seeks to develop a regulatory framework that would accommodate multiple SDRs, but mitigates the undesirable fragmentation of regulatory data that would come from incompatible data standards.

At the same time, the Commission generally agrees with the commenter who stated that the "Commission should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs."[1024] The requirement that all life cycle events must be reported to the same registered SDR that received the report of the initial transaction is designed to minimize some potential problems of having multiple registered SDRs, such as overstating open interest. Although the reporting side can choose the registered SDR to which to report the initial transaction, all subsequent life cycle events must then be reported to that registered SDR. The

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[1022] See MarkitSERV I at 7-8.

[1023] In the Regulation SBSR Proposing Release, the Commission stated that requiring registered SDRs to be the registered entities with the duty to disseminate security-based swap transaction information—rather than, for example, SB SEFs, clearing agencies, or the counterparties themselves—would produce some degree of mandated consolidation of that information and help to provide consistency in the form of the reported information. See 75 FR at 75227. However, the Commission acknowledges that this approach cannot guarantee consolidation of the published data because of the possibility of multiple registered SDRs.

[1024] DTCC IV at 5.

Commission believes that this requirement will facilitate its ability to track security-based swaps over their duration and minimize instances of double counting the same economic activity, which could occur if the records of life cycle event reports did not indicate their relationship to earlier occurring transactions.[1025]

Similarly, the Commission is adopting Rules 902(c)(4) and 907(a)(4) to address potential issues arising from non-mandatory reports (which could include duplicate reports of transactions reported to a second SDR when a mandatory report has already been provided to a first SDR). Rule 902(c)(4) prohibits a registered SDR from publicly disseminating a report of a non-mandatory transaction; this requirement is designed to prevent market observers from over-estimating the true amount of market activity, which could occur if the same transaction was disseminated by two SDRs. Rule 907(a)(4) requires registered SDRs to establish and maintain policies and procedures, among other things, for how participants must identify non-mandatory reports to the SDR, so that the SDR will be able to avoid publicly disseminating them.

The Commission believes that problems associated with the existence of multiple registered SDRs can be minimized to the extent that such SDRs refer to the same persons or things in the same manner. Thus, final Rule 903 provides that, if an IRSS that meets certain criteria is recognized by the Commission and has assigned a UIC to a person, unit of a person, or product, all registered SDRs must use that UIC in carrying out their responsibilities under Regulation SBSR. As discussed in Section X(B)(2), supra, the Commission has recognized the GLEIS—through which LEIs can be obtained—as an IRSS that meets the criteria of Rule 903. Therefore, if an entity has an LEI issued by or through the GLEIS, that LEI must be used for all

[1025] Thus, the Commission concurs with the commenter who recommended that all life cycle events be reported to the same registered SDR that received the original transaction report. See MarkitSERV I at 8.

purposes under Regulation SBSR. Furthermore, Rule 903(a)—in connection with the Commission's recognition of the GLEIS—requires all persons who are participants of at least one registered SDR to obtain an LEI from or through the GLEIS for use under Regulation SBSR, 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 Rule 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.

The Commission is particularly hopeful that a robust system for product IDs could greatly improve the usability of security-based swap data, both for regulators and for market observers that obtain publicly disseminated transaction information. The product ID could minimize administrative burdens by rendering unnecessary the separate reporting of several data elements. Product IDs also should more easily distinguish standardized from non-standardized products and, thus, should facilitate aggregation of the public feeds issued from different registered SDRs.

The Commission did not propose to take any specific actions towards consolidation of the security-based swap data disseminated by different registered SDRs. As the Commission stated in the Regulation SBSR Proposing Release, it considered mandating one consolidated reporting entity to disseminate all security-based swap transaction data for each asset class by requiring each registered SDR in an asset class to provide all of its security-based swap data to a "central processor" that would also be a registered SDR.[1026] The Commission noted that there is substantial precedent for this approach in the equity markets, where market participants may

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[1026] See 75 FR at 75227.

access a consolidated quote for national markets system securities and a consolidated tape reporting executed transactions. The Commission stated, however, that such approach "may not be warranted given the present [security-based swap] market structure."[1027]

The Commission continues to believe there is no need at this time to require consolidation of the publicly disseminated security-based swap data.[1028] Although it is likely that there will be multiple registered SDRs, it is unclear at present the extent to which each will be publicly disseminating a significant number of transactions.[1029] Furthermore, the Commission currently believes that, to the extent that there are different SDR data feeds that warrant consolidation and that such feeds cannot readily be aggregated by market observers themselves, certain market data vendors may be able to do so for commercially reasonable fees. As different SDRs register with the Commission and these SDRs implement Regulation SBSR, the Commission will monitor the situation and consider taking such action as it deems necessary in order to better carry about the Title VII policy of promoting greater transparency in the security-based swap market.

The Commission also acknowledges the recommendation made by one commenter to use Section 13(n)(5)(D)(i) of the Exchange Act to direct all regulatory reports received by multiple

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1027 Id.

1028 In response to the commenter who recommended requiring registered SDRs to accept all security-based swaps in an asset class to reduce fragmentation of data, the Commission notes that Rule 13n-5(b)(1)(ii) under the Exchange Act, adopted as part of the SDR Adopting Release, requires an SDR that accepts reports for any security-based swap in a particular asset class to accept reports for all security-based swaps in that asset class that are reported to the SDR in accordance with that SDR's policies and procedures.

1029 The Commission notes that, under Rule 902(c)(6), most clearing transactions will not be publicly disseminated. Therefore, to the extent that a registered SDR receives only clearing transactions, it would likely be required to publicly disseminate few if any security-based swap transactions.

registered SDRs into a single "aggregator" SDR.[1030] The Commission believes that Rule 13n-4(b)(5), as adopted,[1031] helps to address these concerns. Rule 13n-4(b)(5) requires an SDR to provide the Commission with direct electronic access to the data stored by the SDR. As stated in the SDR Adopting Release:

> data [provided by an SDR to the Commission] must be in a form and manner acceptable to the Commission ...[T]he form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs.[1032]

Thus, the Commission does not believe that it is necessary or appropriate at this time to direct registered SDRs to provide their transaction data to a single "aggregator" SDR, because the SDR rules are designed to facilitate the Commission's ability to aggregate information directly. As registered SDRs and their participants develop experience with the Regulation SBSR reporting regime and the Commission develops experience with overseeing that regime, the Commission may consider re-evaluating the need for or the desirability of an aggregator SDR in the future.

1030 See DTCC I at 7 ("Under Section 13 of the Exchange Act . . . security-based swap data repositories shall 'provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity.' Under this authority, the Commission could designate one security-based swap data repository as the recipient of information from other security based-swap data repositories in order to have consolidation and direct access for the Commission") (citation omitted).

1031 See SDR Adopting Release, Section VI(D)(2)(c)(ii).

1032 See id. The SDR Adopting Release states, further, that "[t]he Commission recognizes that as the [security-based swap] market develops, new or different data fields may be needed to accurately represent new types of [security-based swap data], in which case the Commission may provide updated specifications of formats and taxonomies to reflect these new developments. Therefore, the Commission intends to publish guidance, as appropriate, on the form and manner that will be acceptable to it for the purposes of direct electronic access" (internal citations omitted).

XX. Section 31 Fees

In the Regulation SBSR Proposing Release,[1033] the Commission also proposed certain amendments to Rule 31 under the Exchange Act,[1034] which governs the calculation and collection of fees and assessments owed by self-regulatory organizations to the Commission pursuant to Section 31 of the Exchange Act.[1035]

Section 991 of the Dodd-Frank Act amended Section 31(e)(2) of the Exchange Act to provide that certain fees and assessments required under Section 31 will be required to be paid by September 25, rather than September 30.[1036] Therefore, the Commission proposed to make a corresponding change to the definition of "due date" in Rule 31(a)(10)(ii) under the Exchange Act[1037] by replacing a reference to "September 30" with a reference to "September 25."

The Commission also proposed to exempt security-based swap transactions from the application of Section 31 transaction fees. Section 31(c) of the Exchange Act[1038] requires a national securities association to pay fees based on the "aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange of securities . . . registered on a national securities exchange or subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities

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1033 See 75 FR at 75245-46.

1034 17 CFR 240.31.

1035 15 U.S.C. 78ee.

1036 Section 991 of the Dodd Frank Act provides, in relevant part: "(1) AMENDMENTS.—Section 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78ee) is amended . . . in subsection (e)(2), by striking 'September 30' and inserting 'September 25'."

1037 17 CFR 240.31(a)(10)(ii).

1038 15 U.S.C. 78ee(c).

association." Pursuant to Section 761(a) of the Dodd-Frank Act,[1039] security-based swaps are securities.[1040] Accordingly, when security-based swap transactions become subject to prompt last-sale reporting pursuant to the rules of the Commission, the members of a national securities association that effect sales of security-based swaps other than on an exchange would become liable for Section 31 fees for any such sales.[1041] Because of certain potential difficulties in fairly and evenly applying Section 31 fees for sales of security-based swaps,[1042] the Commission proposed to exercise its authority under Section 31(f) of the Exchange Act[1043] to exempt all such sales from the application of Section 31 fees. To carry out that objective, the Commission proposed to add a new subparagraph (ix) to Rule 31(a)(11), which defines the term "exempt sale," to include as an exempt sale "[a]ny sale of a security-based swap." The Commission also proposed to add a new paragraph (19) to Rule 31(a) to provide a definition for the term "security-based swap."

One commenter submitted two comment letters on this aspect of the proposal relating to Rule 31.[1044]

1039 15 U.S.C. 78c(a)

1040 See 15 U.S.C. 78c(a)(10).

1041 A national securities exchange also would be liable for fees in connection with any transactions in security-based swaps executed on its market. See 15 U.S.C. 78ee(b).

1042 See Regulation SBSR Proposing Release, 75 FR at 75245-46.

1043 15 U.S.C. 78ee(f) ("The Commission, by rule, may exempt any sale of securities or any class of sales of securities from any fee or assessment imposed by this section, if the Commission finds that such exemption is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system.").

1044 See OneChicago I at 2-3 (arguing that, because "exchange for physical" ("EFP") transactions conducted on OneChicago are economically similar to security-based swap transactions, EFP transactions also should be exempt from Section 31 fees or, The Commission is not adopting these proposed revisions to Rule 31(a). As discussed above, the Commission is not yet requiring that security-based swap transactions be publicly disseminated in real time. Because security-based swaps are not yet subject to prompt last-sale reporting pursuant to the rules of the Commission or a national securities association,[1045] sales of security-based swaps are not yet subject to Section 31 fees. In the future, the Commission anticipates soliciting public comment on block thresholds and the timeframe in which non-block security-based swap transactions must be publicly disseminated. At such time, when implementation of prompt last-sale public dissemination of security-based swap transactions would subject them to Section 31 fees, the Commission can revisit whether to adopt the proposed exemption for security-based swaps from Section 31 fees.

XXI. Paperwork Reduction Act

Certain provisions of Regulation SBSR contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1046] The Commission published notices requesting comment on the collection of information requirements relating to Regulation SBSR, as originally proposed, in the Regulation SBSR Proposing Release[1047] and, as re-proposed, in the Cross-Border Proposing Release[1048] and submitted relevant information to the

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alternatively, that security-based swaps should be subject to Section 31 fees); OneChicago II (same).

1045 See supra Section VII (discussing phased approach to public dissemination and block trades, which will permit security-based swap transactions to be reported any time up to 24 hours after the time of execution (or, if 24 hours after the time of execution would fall on a day that is not a business day, by the same time on the next day that is a business day) during the first phase).

1046 44 U.S.C. 3501 et seq.

1047 See Regulation SBSR Proposing Release, 75 FR at 75251-61.

1048 See Cross-Border Proposing Release, 78 FR at 31115-18.

Office of Management and Budget ("OMB") for review in accordance with the PRA.[1049] The titles for the collections are: (1) Rule 901—Reporting Obligations—For Reporting Sides; (2) Rule 901—Reporting Obligations—For Registered SDRs; (3) Rule 902—Public Dissemination of Transaction Reports; (4) Rule 904—Operating Hours of Registered Security-Based Swap Data Repositories; (5) Rule 905—Correction of Errors in Security-Based Swap Information—For Reporting Sides; (6) Rule 905—Correction of Errors in Security-Based Swap Information—Non-Reporting Sides; (7) Rule 906(a)—Other Duties of All Participants—For Registered SDRs; (8) Rule 906(a)—Other Duties of All Participants—For Non-Reporting Sides; (9) Rule 906(b)—Other Duties of All Participants—For All Participants; (10) Rule 906(c)—Other Duties of All Participants—For Covered Participants; (11) Rule 907—Policies and Procedures of Registered Security-Based Swap Data Repositories; and (12) Rule 908(c)—Substituted Compliance (OMB Control No. 3235-0718). Compliance with these collections of information requirements is mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number.

The Commission is adopting Regulation SBSR, which contains these 12 collections of information, largely as re-proposed, with certain revisions suggested by commenters or designed to clarify the rules.[1050] The rules, as adopted, establish a "reporting hierarchy" that specifies the side that has the duty to report a security-based swap that is a covered transaction[1051] and provides for public dissemination of security-based swap transaction information (except as provided in Rule 902(c)). Registered SDRs are required to establish and maintain certain

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[1049] 44 U.S.C. 3507; 5 CFR 1320.11.

[1050] In addition, the Commission, in separate releases, is adopting rules relating to SDR registration, duties, and core principles and proposing amendments to Regulation SBSR.

[1051] See supra notes 11-12 and accompanying text.

policies and procedures regarding how transaction data are reported and disseminated, and participants of registered SDRs that are registered security-based swap dealers or registered major security-based swap participants are required to establish and maintain policies and procedures that are reasonably designed to ensure that they comply with applicable reporting obligations. Regulation SBSR also requires a person that registers with the Commission as an SDR also to register with the Commission as a SIP.

The hours and costs associated with complying with Regulation SBSR constitute reporting and cost burdens imposed by each collection of information. Certain estimates (e.g., the number of reporting sides, the number of non-reporting sides, the number of participants, and the number of reportable events[1052] pertaining to a security-based swap transaction) contained in the Commission's earlier PRA assessments have been updated to reflect the rule text of Regulation SBSR, as adopted, as well as additional information and data now available to the Commission, as discussed in further detail below. The Commission believes that the methodology used for calculating the re-proposed paperwork burdens set forth in the Cross-Border Proposing Release is appropriate and has received no comments to the contrary. The revised paperwork burdens estimated by the Commission herein are consistent with those made in connection with the re-proposal of Regulation SBSR, which was included in the Cross-Border Proposing Release. However, as described in more detail below, certain estimates have been modified, as necessary, to conform to the adopted rules and to reflect the most recent data available to the Commission.

[1052] A reportable event includes both an initial security-based swap transaction, required to be reported pursuant to Rule 901(a), as well as a life cycle event, the reporting of which is governed by Rule 901(e).

The Commission requested comment on the collection of information requirements included in both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release. As noted above, the Commission received 86 comment letters on the Regulation SBSR Proposing Release and six comment letters on the Cross-Border Proposing Release that specifically referenced Regulation SBSR. Although the comment letters did not specifically address the Commission's estimates for the proposed collection of information requirements, views of commenters relevant to the Commission's analysis of burdens, costs, and benefits of Regulation SBSR are discussed below.

The rules containing these specific collections of information are discussed further below.

A. Definitions—Rule 900

Rule 900 sets forth definitions of various terms used in Regulation SBSR. In the Regulation SBSR Proposing Release, the Commission stated its belief that Rule 900, since it contains only definitions of relevant terms, would not be a "collection of information" within the meaning of the PRA.[1053] Although Rule 900, as adopted, contains revisions to re-proposed Rule 900, including additions and deletions of certain defined terms and modification of others, the Commission continues to believe that Rule 900 does not constitute a "collection of information" within the meaning of the PRA.

B. Reporting Obligations—Rule 901

Rule 901, as adopted, sets forth various requirements relating to the reporting of covered transactions. Rule 901 of Regulation SBSR, as adopted, contains "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 901—Reporting Obligations."

[1053] See Regulation SBSR Proposing Release, 75 FR at 75246.

1. Summary of Collection of Information

Title VII of the Dodd-Frank Act amended the Exchange Act to require the reporting of security-based swap transactions. Accordingly, the Commission is adopting Rule 901 under the Exchange Act to implement this requirement. Rule 901 specifies, with respect to each reportable event pertaining to covered transactions, who is required to report, what data must be reported, when it must be reported, where it must be reported, and how it must be reported. Rule 901(a), as adopted, establishes a "reporting hierarchy" that specifies the side that has the duty to report a security-based swap that is a covered transaction.[1054] The reporting side, as determined by the reporting hierarchy, is required to submit the information required by Regulation SBSR to a registered SDR. The reporting side may select the registered SDR to which it makes the required report.

Pursuant to Rule 901(b), as adopted, if there is no registered SDR that will accept the report required by Rule 901(a), the person required to make the report must report the transaction to the Commission. Rule 901(c) sets forth the primary trade information and Rule 901(d) sets forth the secondary trade information that must be reported. Under the final rules, covered transactions—regardless of their notional amount—must be reported to a registered SDR at any point up to 24 hours after the time of execution, or, in the case of a security-based swap that is subject to regulatory reporting and public dissemination solely by operation of Rule 908(a)(1)(ii), within 24 hours after the time of acceptance for clearing.[1055] Except as required by

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[1054] See supra notes 11-12 and accompanying text.

[1055] See supra Section VII(B)(1) (discussing Rule 901(j) and the rationale for 24-hour reporting timeframe). In addition, as discussed in more detail in Section VII(B), supra, if 24 hours after the time of execution would fall on a non-business day (i.e., a Saturday, Sunday, or U.S. federal holiday), reporting would be required by the same time on the next business day. As discussed in Section XV(C)(4), supra, Rule 908(a)(1)(ii), as

Rule 902(c), the information reported pursuant to Rule 901(c) must be publicly disseminated. Information reported pursuant to Rule 901(d) is for regulatory purposes only and will not be publicly disseminated.

Rule 901(e) requires the reporting of life cycle events, and adjustments due to life cycle events, within 24 hours of the time of occurrence, to the entity to which the original transaction was reported. The report must contain the transaction ID of the original transaction.

In addition to the reporting duties that reporting sides incur under Rule 901, Rule 901 also imposes certain duties on a registered SDR that receives security-based swap transaction data. Rule 901(f) requires a registered SDR to timestamp, to the second, any information submitted to it pursuant to Rule 901, and Rule 901(g) requires a registered SDR to assign a transaction ID to each security-based swap, or establish or endorse a methodology for transaction IDs to be assigned by third parties. Rule 901(h) requires reporting sides to electronically transmit the information required by Rule 901 in a format required by the registered SDR.

Rule 901(i) requires reporting of pre-enactment security-based swaps and transitional security-based swaps to the extent that information about such transactions is available.

As detailed in Sections II to V, supra, in adopting Rule 901, the Commission has made certain changes to Rule 901, both as originally proposed and as re-proposed in the Cross-Border Proposing Release, in response to comments or in order to clarify various provisions. The Commission believes that these changes do not substantially alter the underlying method of computing the paperwork burdens, but do result in changes to the number of impacted entities

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adopted, provides that a security-based swap that is subject to regulatory reporting and public dissemination solely by operation of Rule 908(a)(1)(ii)—i.e., because the security-based swap has been accepted for clearing by a clearing agency having its principal place of business in the United States—must be reported within 24 hours of acceptance for clearing.

and the number to transactions covered by the rules, thus impacting the paperwork burden totals that were previously estimated for Rule 901.

2. Use of Information

The security-based swap transaction information required to be reported pursuant to Rule 901 will be used by registered SDRs, market participants, the Commission, and other relevant authorities. The information reported by reporting sides pursuant to Rule 901 will be used by registered SDRs to publicly disseminate reports of security-based swap transactions, as well as to offer a resource for the Commission and other relevant authorities to obtain detailed information about the security-based swap market. Market participants will use the public market data feed, among other things, to assess the current market for security-based swaps and to assist in the valuation of their own positions. The Commission and other relevant authorities will use information about security-based swap transactions reported to and held by registered SDRs to monitor and assess systemic risks, as well as for market surveillance purposes.

3. Respondents

Rule 901(a) assigns reporting duties for covered transactions. In the Cross-Border Proposing Release, the Commission revised its preliminary estimate to 300 respondents.[1056] The Commission continues to believe that it is reasonable to use 300 as an estimate of "reporting sides" (as that term was used in the Cross-Border Proposing Release).

The Commission notes that, since issuing the Regulation SBSR Proposing Release, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC-TIW. These historical data suggest that, among the 300

[1056] See Cross-Border Proposing Release, 78 FR at 31113 (lowering the estimate of reporting sides from 1,000 to 300).

reporting sides, approximately 50 are likely to be required to register with the Commission as security-based swap dealers and approximately five are likely to register as major security-based swap participants.[1057] These data further suggest that these 55 reporting sides likely will account for the vast majority of recent security-based swap transactions and reports and that there are only a limited number of security-based swap transactions that do not include at least one of these larger counterparties on either side.[1058]

Rule 901 imposes certain duties on registered SDRs. In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the number of registered SDRs would not exceed ten, an estimate that was affirmed in the Cross-Border Proposing Release.[1059] The Commission continues to believe that it is reasonable to estimate ten registered SDR respondents for the purpose of estimating collection of information burdens for Regulation SBSR.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

Pursuant to Rule 901, covered transactions must be reported to a registered SDR or to the Commission. Together, sections (a), (b), (c), (d), (e), (h), and (j) of Rule 901 set forth the parameters that govern how reporting sides report covered transactions. Rule 901(i) addresses the reporting of pre-enactment and transitional security-based swaps. These reporting requirements impose initial and ongoing burdens on reporting sides. The Commission believes

[1057] See id. at 31103.

[1058] As a result, the Commission generally will continue to use 300 as an estimate of the number of reporting sides. In cases where a rule is more limited in its application, for example Rule 906(c), the Commission may use a different number that reflects some subset of the estimated 300 reporting sides. See also Cross-Border Adopting Release, 79 FR at 47300 (stating that 55 firms might register as security-based swap dealers or major security-based swap participants).

[1059] See Regulation SBSR Proposing Release, 75 FR at 75247; See also Cross-Border Proposing Release, 78 FR at 31113.

that these burdens will be a function of, among other things, the number of reportable events and the data elements required to be reported for each such event. Rule 901(f) requires a registered SDR to the time stamp, to the second, all reported information, and Rule 901(g) requires a registered SDR to assign a transaction ID to each security-based swap, or establish or endorse a methodology for transaction IDs to be assigned by third parties. These requirements impose initial and ongoing burdens on registered SDRs.

a. Baseline Burdens

In the Regulation SBSR Proposing Release, the Commission estimated that respondents would face three categories of burdens to comply with Rule 901.[1060] First, each entity that would incur a duty to report security-based swap transactions pursuant to Regulation SBSR (a "reporting party"[1061]) would likely have to develop an internal order and trade management system ("OMS") capable of capturing the relevant transaction information.[1062] Second, each such entity would have to implement a reporting mechanism.[1063] Third, each such entity would have to establish an appropriate compliance program and support for the operation of any OMS and reporting mechanism.[1064] In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that the initial, aggregate annualized burden associated with Rule 901 would be 1,438 hours per reporting party—for a total of 1,438,300 hours for all reporting

1060 See Regulation SBSR Proposing Release, 75 FR at 75248.

1061 In the Regulation SBSR Proposing Release, the Commission proposed the term "reporting party" to describe the entity with the duty to report a particular security-based swap transaction. See 75 FR at 75211. In the Cross-Border Proposing Release, the Commission revised the term "reporting party" to "reporting side" as part of the re-proposal of Regulation SBSR. See 78 FR at 31059.

1062 See Regulation SBSR Proposing Release, 75 FR at 75248.

1063 See id.

1064 See id.

parties—in order to develop an OMS, implement a reporting mechanism, and establish an appropriate compliance program and support system.[1065] The Commission preliminarily estimated that the ongoing aggregate annualized burden associated with Rule 901 would be 731 hours per reporting party, for a total of 731,300 hours for all reporting parties.[1066] The Commission further estimated that the initial aggregate annualized dollar cost burden on reporting parties associated with Rule 901 would be $201,000 per reporting party, for a total of $201,000,000 for all reporting parties.[1067]

b. Burdens of Final Rule 901

For Reporting Sides. The reporting hierarchy is designed to place the duty to report covered transactions on counterparties who are most likely to have the resources and who are best able to support the reporting function.

Reporting sides that fall under the reporting hierarchy in Rule 901(a)(2)(ii) incur certain burdens as a result thereof with respect to their reporting of covered transactions. As stated above, the Commission believes that an estimate of 300 reporting sides that would incur the duty to report under Regulation SBSR is reasonable for estimating collection of information burdens under the PRA. This estimate includes all of those persons that incur a reporting duty under Regulation SBSR, as adopted, including registered security-based swap dealers and registered major security-based swap participants. This estimate also includes some smaller counterparties

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[1065] See id. at 75250.

[1066] See id.

[1067] See id. In the Cross-Border Proposing Release, the Commission noted that the Regulation SBSR Proposing Release incorrectly stated this total as $301,000 per reporting party. The correct number is $201,000 per reporting party ($200,000 + $1,000). See 78 FR at 31113, note 1259.

to security-based swaps that could incur a reporting duty, but many fewer than estimated in the PRA of the Regulation SBSR Proposing Release.

As discussed in more detail in Section V, supra, Rule 901(a)(2)(ii) adopts the reporting hierarchy set forth in the Cross-Border Proposing Release, but limits its application to uncleared transactions. The Commission believes, however, that this limitation will not materially change the number of reporting sides for PRA purposes, as there likely would be a significant overlap between the approximately 300 reporting sides reporting uncleared transactions and those reporting other security-based swaps.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that there would be 15.5 million reportable events associated with security-based swap transactions per year.[1068] In the Cross-Border Proposing Release, in addition to lowering its estimate of the number of reporting sides from 1,000 to 300, the Commission also revised its estimate of the number of reportable events to approximately 5 million.[1069] Since issuing the Cross-Border Proposing Release, however, the Commission has obtained additional and more granular data regarding participation in the security-based swap market from DTCC-TIW. As a result, the Commission is now further revising its estimate of the number of reportable events. Accordingly, the Commission now estimates that there will be approximately 3 million reportable events per year under Rule 901, as adopted.[1070] The Commission further estimates

1068 See Regulation SBSR Proposing Release, 75 FR at 75248.

1069 See Cross-Border Proposing Release, 78 FR at 31114.

1070 According to data published by the Bank for International Settlements, the global notional amount outstanding in equity forwards and swaps as of December 2013 was \$2.28 trillion. The notional amount outstanding in single-name CDS was approximately \$11.32 trillion, in multi-name index CDS was approximately \$8.75 trillion, and in multi-name, non-index CDS was approximately \$950 billion. See Semi-annual OTC derivatives statistics at end-December 2013 (June 2014), Table 19, available at that approximately 2 million of these reportable events will consist of uncleared transactions (i.e., those transactions that will be reported to a registered SDR by the reporting sides). The Commission noted in the Cross-Border Proposing Release, and continues to believe, that the reduction in the estimate of the number of reportable events per year is likely a result of several factors.[1071]

The Commission believes that, once a respondent's reporting infrastructure and compliance systems are in place, the burden of reporting each individual reportable event will be small when compared to the burdens of establishing the reporting infrastructure and compliance systems.[1072] As stated above, the Commission estimates that 2 million of the 3 million total

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http://www.bis.org/statistics/dt1920a.pdf (last visited September 22, 2014). For the purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based index CDS and, therefore, are not security-based swaps. The Commission also assumes that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Based on those assumptions, single-name CDS appear to constitute roughly 82% of the security-based swap market. Although the BIS data reflect the global OTC derivatives market, and not just the U.S. market, the Commission believes that it is reasonable to assume these ratios would be similar in the U.S. market. The Commission now estimates that there were approximately 2.26 million single-name CDS transactions in 2013. Because single-name CDS appear to constitute roughly 78% of the security-based swap market, the Commission now estimates that there are approximately 3 million security-based swap transactions (i.e., 2,260,000/0.78 = 2,898,329 reportable events).

1071 See 78 FR at 31115.

1072 In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that reporting specific security-based swap transactions to a registered SDR—separate from the establishing of infrastructure and compliance systems that support reporting—would impose an annual aggregate cost of approximately $5,400,000. See 75 FR 75265. The Commission further estimated that Rule 901 would impose an aggregate total first-year cost of approximately $1,039,000,000 and an ongoing annualized aggregate cost of approximately $703,000,000. See id. at 75280. See also Cross-Border Proposing Release, 78 FR at 31115 (stating the Commission's preliminary belief that the reporting of a single reportable event would be de minimis when compared to the burdens of establishing the reporting infrastructure and compliance systems).

reportable events would consist of the initial reporting of security-based swaps as well as the reporting of any life cycle events. The Commission estimates that of the 2 million reportable events, approximately 900,000 would involve the reporting of new security-based swap transactions, and approximately 1,100,000 would involve the reporting of life cycle events under Rule 901(e). The Commission estimates that Rule 901(a) would result in reporting sides having a total burden of 4,500 hours attributable to the initial reporting of security-based swaps by reporting sides to registered SDRs under Rules 901(c) and 901(d) over the course of a year.[1073] The Commission further estimates that reporting sides would have a total burden of 5,500 hours attributable to the reporting of life cycle events under Rule 901(e) over the course of a year.[1074] Therefore, the Commission believes that Rule 901, as adopted, would result in a total reporting burden for reporting sides under Rules 901(c) and (d) along with the reporting of life cycle events under Rule 901(e) of 10,000 burden hours per year. The Commission continues to believe that many reportable events will be reported through electronic means and that the ratio of electronic reporting to manual reporting is likely to increase over time. The Commission continues to believe that the bulk of the burden hours estimated above will be attributable to manually reported transactions. Thus, reporting sides that capture and report transactions

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1073 In the Regulation SBSR Proposing Release, the Commission estimated that it would take approximately 0.005 hours for each security-based swap transaction to be reported. See 75 FR at 75249, note 195. The Commission calculates the following: ((900,000 x 0.005) / (300 reporting sides)) = 15 burden hours per reporting side or 4,500 total burden hours attributable to the initial reporting of security-based swaps.

1074 In the Regulation SBSR Proposing Release, the Commission estimated that it would take approximately 0.005 hours for each security-based swap transaction to be reported. See 75 FR at 75249, note 195. The Commission calculates the following: ((1,100,000 x 0.005) / (300 reporting sides)) = 18.33 burden hours per reporting side or 5,500 total burden hours attributable to the reporting of life cycle events under Rule 901(e).

electronically will likely incur bear fewer burden hours than those reporting sides that capture and report transactions manually.

Based on the foregoing, the Commission estimates that Rule 901, as adopted, will impose an estimated total first-year burden of approximately 1,394 hours[1075] per reporting side for a total first-year burden of 418,200 hours for all reporting sides.[1076] The Commission estimates that Rule 901, as adopted, will impose ongoing annualized aggregate burdens of approximately 687 hours[1077] per reporting side for a total aggregate annualized cost of 206,100 hours for all reporting sides.[1078] The Commission further estimates that Rule 901, as adopted, will impose initial and ongoing annualized dollar cost burdens of $201,000 per reporting side, for total aggregate initial and ongoing annualized dollar cost burdens of $60,300,000.[1079]

1075 The Commission derived its estimate from the following: (355 hours (one-time hourly burden for establishing and OMS) + 172 hours (one-time hourly burden for establishing security-based swap reporting mechanisms) + 180 hours (one-time hourly burden for compliance and ongoing support) = 707 hours (one-time total hourly burden). See Regulation SBSR Proposing Release, 75 FR at 75248-50, notes 186, 194, and 201. (436 hours (annual-ongoing hourly burden for internal order management) + 33.3 hours (revised annual-ongoing hourly burden for security-based swap reporting mechanisms) + 218 hours (annual-ongoing hourly burden for compliance and ongoing support) = 687.3 hours (one-time total hourly burden. See id. at 75248-50, notes 187 and 201 (707 one-time hourly burden + 687 revised annual-ongoing hourly burden = 1,394 total first-year hourly burden).

1076 The Commission derived its estimate from the following: (1,394 hours per reporting side x 300 reporting sides) = 418,200 hours.

1077 See Cross-Border Proposing Release, 78 FR at 31112-15.

1078 The Commission derived its estimate from the following: (687 hours per reporting side x 300 reporting sides) = 206,100 hours.

1079 The Commission derived its estimate from the following: ($201,000 per reporting side x 300 reporting sides) = $60,300,000. See Cross-Border Proposing Release, 78 FR at 31113-15. The Commission originally estimated this burden based on discussions with various market participants. See Regulation SBSR Proposing Release, 75 FR at 75247-50.

For Registered SDRs. In the Regulation SBSR Proposing Release, the Commission set forth estimated burdens on registered SDRs related to Rule 901.[1080] The Commission continues to believe that these estimated burdens are reasonable.

Rule 901(f) requires a registered SDR to time-stamp, to the second, information that it receives. Rule 901(g) requires a registered SDR to assign a unique transaction ID to each security-based swap it receives or establish or endorse a methodology for transaction IDs to be assigned by third parties. The Commission continues to believe that such design elements will pose some additional burdens to incorporate in the context of designing and building the technological framework that will be required of an SDR to become registered.[1081] Therefore, the Commission estimates that Rules 901(f) and 901(g) will impose an initial one-time aggregate burden of 1,200 burden hours, which corresponds to 120 burden hours per registered SDR.[1082] This figure is based on an estimate of ten registered SDRs, which the Commission continues to believe is reasonable.

Once operational, these elements of each registered SDR's system will have to be supported and maintained. Accordingly, the Commission estimates that Rule 901(f) and 901(g) will impose an annual aggregate burden of 1,520 burden hours, which corresponds to 152 burden

[1080] See 75 FR at 75250-51.

[1081] The Commission has adopted additional rules under the Exchange Act relating to the duties, data collection and maintenance requirements, and automated systems requirements of SDRs. See SDR Adopting Release.

[1082] See Regulation SBSR Proposing Release, 75 FR at 75250. This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer at 80 hours) + (Sr. Systems Analyst at 20 hours) + (Compliance Manager at 8 hours) + (Director of Compliance at 4 hours) + (Compliance Attorney at 8 hours)) x (10 registered SDRs)] = 1,200 burden hours, which is 120 hours per registered SDR.

hours per registered SDR.[1083] This figure represents an estimate of the burden for a registered SDR for support and maintenance costs for the registered SDR's systems to time stamp incoming submissions and assign transaction IDs.

Thus, the Commission estimates that the first-year aggregate annualized burden on registered SDRs associated with Rules 901(f) and 901(g) will be 2,720 burden hours, which corresponds to 272 burden hours per registered SDR.[1084] Correspondingly, the Commission estimates that the ongoing aggregate annualized burden associated with Rules 901(f) and 901(g) will be 1,520 burden hours, which corresponds to 152 burden hours per registered SDR.[1085] The above burden estimates pertaining to Rules 901(f) and 901(g) are identical to those set forth in the Regulation SBSR Proposing Release.[1086]

Since Regulation SBSR, as adopted, requires reporting for only covered transactions, registered SDRs will be required to receive, process, and potentially disseminate a smaller number of security-based swaps than originally envisioned. Because the bulk of an SDR's burdens and costs under Regulation SBSR are not transaction-based, however, the Commission has determined that the burden and cost estimates set forth in the Cross-Border Proposing Release remain valid for the purposes of the PRA.

1083 See Regulation SBSR Proposing Release, 75 FR at 75250. This figure is based on discussions with various market participants as follows: [((Sr. Programmer at 60 hours) + (Sr. Systems Analyst at 48 hours) + (Compliance Manager at 24 hours) + (Director of Compliance at 12 hours) + (Compliance Attorney at 8 hours)) x (10 SDRs)] = 1,520 burden hours, which is 152 hours per registered SDR.

1084 See Regulation SBSR Proposing Release, 75 FR at 75250. This figure is based on the following: [(1,200) + (1,520)] = 2,720 burden hours, which corresponds to 272 burden hours per registered SDR.

1085 See supra note 1083.

1086 See Regulation SBSR Proposing Release, 75 FR at 75250.

In addition, the Commission recognizes that, since the publication of the Regulation SBSR Proposing Release, many entities already have spent considerable time and resources building the infrastructure that will support reporting of security-based swaps. Indeed, some reporting is already occurring voluntarily.[1087] As a result, the Commission notes that the burdens and costs calculated herein could be greater than those actually incurred by affected parties as a result of the adoption of Regulation SBSR. Nonetheless, the Commission believes that its estimates represent a reasonable upper bound of the actual burdens and costs required to comply with Regulation SBSR.

5. Recordkeeping Requirements

Rule 13n-5(b)(4) under the Exchange Act requires an SDR to maintain the transaction data and related identifying information that it collects for not less than five years after the applicable security-based swap expires, and historical positions for not less than five years.[1088] Accordingly, security-based swap transaction reports received by a registered SDR pursuant to Rule 901 will be required to be retained by the registered SDR for not less than five years.

6. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

For the majority of security-based swap transactions, all of the information collected pursuant to Rule 901(c) will be widely available to the public because these transactions will be publicly disseminated by a registered SDR pursuant to Rule 902. However, certain security-

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1087 DTCC currently compiles information on the credit default swap market. See http://www.dtcc.com/about/businesses-and-subsidiaries/ddr-us.aspx (last visited September 22, 2014).

1088 See SDR Adopting Release, Section VI(E)(4).

based swaps are not subject to Rule 902's public dissemination requirement;[1089] therefore, information about these transactions will not be publicly available. In addition, reporting sides must provide certain information about security-based swap transactions pursuant to Rule 901(d). Rule 901(d) information is for regulatory purposes and will not be publicly disseminated.

An SDR, pursuant to Section 13(n)(5) of the Exchange Act and Rules 13n-4(b)(8) and 13n-9 thereunder, must maintain the privacy of security-based swap information,[1090] including information reported pursuant to Rule 901(d) of Regulation SBSR, as well as information about a security-based swap transaction reported pursuant to Rule 901(c) where the transaction falls into a category enumerated in Rule 902(c). To the extent that the Commission receives these kinds of information under Regulation SBSR, such information will be kept confidential, subject to the provisions of applicable law.

C. Public Dissemination of Transaction Reports—Rule 902

Rule 902(a), as adopted, requires a registered SDR to publicly disseminate a transaction report immediately upon receipt of information about a security-based swap, or a life cycle event or adjustment due to a life cycle event (or upon re-opening following a period when the registered SDR was closed), except in certain limited circumstances described in Rule 902(c). A published transaction report must consist of all the information reported pursuant to Rule 901(c), plus any condition flags required by the policies and procedures of the registered SDR to which the transaction is reported. Certain provisions of Rule 902 of Regulation SBSR contain

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1089 See supra Section VI(D).

1090 See SDR Adopting Release, Sections VI(D)(2) and VI(I)(1).

"collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 902—Public Dissemination of Transaction Reports."

1. Summary of Collection of Information

As adopted, Rule 902(a) generally requires that a registered SDR publicly disseminate a transaction report for each security-based swap transaction, or a life cycle event or adjustment due to a life cycle, immediately upon receipt of information about the security-based swap submitted by a reporting side pursuant to Rule 901(c). The transaction report must contain all of the information reported pursuant to Rule 901(c) along with any condition flags required by the policies and procedures of the registered SDR to which the transaction is reported.[1091] If its systems are unavailable to publicly disseminate these transaction data immediately upon receipt, the registered SDR is required to disseminate the transaction data immediately upon re-opening. Rule 902(a), as adopted, provides registered SDRs with the authority and discretion to establish the content, format, and mode of dissemination through its policies and procedures, as long as it does so in compliance with the information required to be disseminated by Rule 901(c).

Rule 902(b), as proposed and re-proposed, addressed how a registered SDR would be required to publicly disseminate transaction reports of block trades. As discussed in more detail above, the Commission is not adopting Rule 902(b).

Rule 902(c), as adopted, prohibits a registered SDR from disseminating: (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 a registered SDR, any information disclosing the business transactions and market positions of any person; (3) any information regarding a security-based swap reported pursuant to Rule 901(i); (4) any non-mandatory report;

[1091] See Rule 907(a)(4).

(5) any information regarding a security-based swap that is required to be reported pursuant to Rule 901 and Rule 908(a)(1) but is not required to be publicly disseminated pursuant to Rule 908(a)(2); (6) any information regarding certain clearing transactions; and (7) any information regarding the allocation of a security-based swap.

Rule 902(d) provides that 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 reporting side transmits the primary trade information about the security-based swap to a registered SDR.

2. Use of Information

The public dissemination requirements contained in Rule 902 are designed to promote post-trade transparency of security-based swap transactions.

3. Respondents

The collection of information associated with the Rule 902 will apply to registered SDRs. As noted above, the Commission believes that an estimate of ten registered SDRs is reasonable for purposes of its analysis of burdens under the PRA.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

Rule 13n-5(b) sets forth requirements for collecting and maintaining transaction data that each SDR will be required to follow.[1092] The SDR Adopting Release describes the relevant burdens and costs that complying with Rule 13n-5(b) will entail.[1093]

In the Regulation SBSR Proposing Release, the Commission stated its preliminary belief that a registered SDR would be able to integrate the capability to publicly disseminate security-

1092 See SDR Adopting Release, Section VI(E)(1).

1093 See SDR Adopting Release, Section VII(D)(2).

based swap transaction reports required under Rule 902 as part of its overall system development for transaction data.[1094] Based on discussions with industry participants, the Commission estimates that, to implement and comply with the public dissemination requirement of Rule 902, each registered SDR will incur a burden equal to an additional 20% of the first-year and ongoing burdens discussed in the SDR Registration Proposing Release.[1095] This estimate was first proposed in the Regulation SBSR Proposing Release and reiterated in the Cross-Border Proposing Release, and the Commission believes that it remains valid.[1096]

Based on the above, the Commission estimates that the initial one-time aggregate burden imposed by Rule 902 for development and implementation of the systems needed to disseminate the required transaction information, including the necessary software and hardware, will be approximately 8,400 hours and a dollar cost of $2 million for each registered SDR, which aggregates to 84,000 hours and a dollar cost of $20 million for all SDR respondents.[1097] In addition, the Commission estimates that annual aggregate burden (initial and ongoing) imposed by the Rule 902 will constitute approximately 5,040 hours and a dollar cost of $1.2 million for each registered SDR, which aggregates to 50,400 hours and a dollar cost of $12 million for all

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1094 See Regulation SBSR Proposing Release, 75 FR at 75252.

1095 See Regulation SBSR Proposing Release, 75 FR at 75252. See also SDR Adopting Release, Section VII(D)(2). This estimate was based on discussions with industry members and market participants, including entities that may register as SDRs under Title VII, and includes time necessary to design and program a registered SDR's system to calculate and disseminate initial and subsequent trade reports.

1096 See Regulation SBSR Proposing Release, 75 FR at 75252. See also Cross-Border Proposing Release, 78 FR at 31198.

1097 See SDR Adopting Release, Section VII(D)(2) for the total burden associated with establishing SDR technology systems. The Commission derived this estimated burden from the following: [((Attorney at 1,400 hours) + (Compliance Manager at 1,600 hours) + (Programmer Analyst at 4,000 hours) + (Senior Business Analyst at 1,400 hours)) x (10 registered SDRs)] = 84,000 burden hours, which corresponds to 8,400 hours per registered SDR.

SDR respondents.[1098] Thus, the Commission estimates that the total first-year (initial) aggregate annualized burden on registered SDRs associated with public dissemination requirement under Rule 902 will be approximately 134,400 hours and a dollar cost of $32 million, which corresponds to a burden of 13,440 hours and a dollar cost of $3.2 million for each registered SDR.[1099]

5. Recordkeeping Requirements

Pursuant to Rule 13n-7(b) under the Exchange Act, a registered SDR is required to keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Exchange Act and the rules or regulations thereunder, for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.[1100] This requirement encompasses all security-based swap transaction reports disseminated by a registered SDR pursuant to Rule 902 and are required to be retained for not less than five years.

6. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

1098 See SDR Adopting Release, Section VII(D)(2) for the total ongoing annual burdens associated with operating and maintaining SDR technology systems. The Commission derived this estimated burden from the following: [((Attorney at 840 hours) + (Compliance Manager at 960 hours) + (Programmer Analyst at 2,400 hours) + (Senior Business Analyst at 840 hours)) x (10 registered SDRs)] = 50,400 burden hours, which corresponds to 5,040 hours per registered SDR.

1099 These estimates are based on the following: [(84,000 one-time burden hours) + (50,400 annual burden hours)] = 134,400 burden hours, which corresponds to 13,440 hours per registered SDR; [($20 million one-time dollar cost burden) + ($12 million annual dollar cost burden)] = $32 million cost burden, which corresponds to $3.2 million per registered SDR.

1100 See SDR Adopting Release, Section VI(G)(2).

Most of the information required under Rule 902 will be widely available to the public to the extent it is incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to Rule 902. However, Rule 902(c) prohibits public dissemination of certain kinds of transactions and certain kinds of transaction information. An SDR, pursuant to Sections 13(n)(5) of the Exchange Act and Rules 13n-4(b)(8) and 13n-9 thereunder will be under an obligation to maintain the privacy of this security-based swap information.[1101] To the extent that the Commission receives confidential information pursuant to this collection of information, such information must be kept confidential, subject to the provisions of applicable law.

D. Coded Information—Rule 903

Regulation SBSR, as adopted, permits or, in some instances, requires security-based swap counterparties to report coded information to registered SDRs using UICs. These UICs will be used to identify products, transactions, and persons, as well as certain business units and employees of legal persons.[1102] Rule 903 establishes standards for assigning and using coded information in security-based swap reporting and dissemination to help ensure that codes are assigned in an orderly manner and that relevant authorities, market participants, and the public are able to interpret coded information stored and disseminated by registered SDRs.

In the Regulation SBSR Proposing Release, the Commission stated its belief that Rule 903 would not be a "collection of information" within the meaning of the PRA because the rule would merely permit reporting parties and registered SDRs to use codes in place of certain data

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1101 See SDR Adopting Release, Sections VI(D)(2) and VI(I)(1).

1102 See supra Section II (describing UICs that must be reported to registered SDRs pursuant to Regulation SBSR).

elements, subject to certain conditions.[1103] In re-proposing Rule 903 in the Cross-Border Proposing Release, the Commission made only technical and conforming changes to Rule 903 to incorporate the use of the term "side."[1104] Rule 903, as adopted, includes a requirement that, if the Commission has recognized an IRSS that assigns UICs to persons, each participant of a registered SDR shall obtain a UIC from or through that IRSS.[1105] Because the Commission also is recognizing the GLEIS—which issues LEIs—as an IRSS, any person who is a participant of one or more registered SDRs will have to obtain an LEI from or through the GLEIS. Therefore, the Commission now believes that Rule 903 constitutes a "collection of information" within the meaning of the PRA. The title of this collection is "Rule 903—Coded Information."

1. Summary of Collection of Information

Rule 903(a) provides that, if an IRSS that meets certain criteria 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), all registered SDRs must use that UIC in carrying out their responsibilities under Regulation SBSR. If no such system has been recognized by the Commission, or if such a 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 SDR must assign a UIC to that person, unit of a person, or product using its own methodology (or endorse a methodology for assigning transaction IDs). The following UICs are contemplated by Regulation SBSR: branch ID, broker ID, counterparty ID execution agent ID, platform ID, product ID, trader ID, trading desk ID, transaction ID, and ultimate parent ID. UICs are intended

1103 See Regulation SBSR Proposing Release, 75 FR at 75252-53.

1104 See Cross-Border Proposing Release, 78 FR at 31117.

1105 See supra Section X(B)(2).

to allow registered SDRs and the Commission and other relevant authorities to aggregate transaction information across a variety of vectors. For example, the trader ID will allow the Commission and other relevant authorities to identify all trades carried out by an individual trader. The product ID will allow the Commission and other relevant authorities to identify all transactions in a particular security-based swap product. The transaction ID will allow counterparties and the registered SDR to link a series of life cycle events to each other and to the original transaction. As discussed in Section X(B)(2), supra, the Commission has recognized the GLEIS as an IRSS that meets the criteria of Rule 903. Therefore, if an entity has an LEI issued by or through the GLEIS, that LEI must be used for all purposes under Regulation SBSR. Furthermore, 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.

2. Use of Information

The information provided pursuant to Rule 903 is necessary to for any person who is a participant of at least one registered SDR to be identified by an LEI for reporting purposes under Regulation SBSR.

3. Respondents

Rule 903 applies to any person who is a participant of at least one registered SDR. The Commission estimates that there may be up to 4,800 security-based swap counterparties that are participants of one or more registered SDRs.[1106] The Commission recognizes that, since the publication of the Regulation SBSR Proposing Release, many persons who are likely to become participants of one or more registered SDRs already have LEIs issued by or through the GLEIS. As a result, the burdens and costs actually incurred by participants as a result of the adoption of Regulation SBSR are likely to be less than the burdens and costs calculated herein. Specifically, as discussed in further detail in Section XXII(C)(4)(b), infra, based on transaction data from DTCC-TIW, the Commission believes that no fewer than 3,500 of approximately 4,800 accounts that participated in the market for single-name CDS in 2013 currently have LEIs.[1107] The Commission assumes that no market participants that currently have LEIs would continue to maintain their LEIs in the absence of Rule 903(a) in order to arrive at an upper bound on the ongoing costs associated with Rule 903(a). The Commission believes that this is a conservative approach, since regulators in certain other jurisdictions mandate the use of an LEI.[1108] Consequently, the Commission estimates, for purposes of the PRA, that there may be as many as

1106 As noted in Section XXII(B)(1), infra, the available data do not include transactions between two foreign security-based swap market participants on foreign underlying reference entities. As a result, this estimate may not include certain foreign counterparties to security-based swaps.

1107 Some counterparties reported in the transaction data may be guarantors of other non-U.S.-person-direct counterparties and, if so, may be responsible for obtaining and maintaining more than one LEI. As such, precisely quantifying the number of LEIs required by Rule 903(a) is not possible at this time. However, because many of these direct non-U.S.-person counterparties are likely from jurisdictions where regulators mandate the use of LEIs, the Commission believes that these counterparties will already have registered LEIs and will continue to maintain them.

1108 The European Market Infrastructure Regulation requires use of codes to identify counterparties. See "Trade Reporting" (available at: http://www.esma.europa.eu/page/Trade-reporting) (last visited January 10, 2015).

1,300 participant respondents who will need to obtain and LEI and as many as 4,800 participants who will need to maintain an LEI.[1109]

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission estimates that first-year aggregate burden imposed by Rule 903 will be 1,300 hours, which corresponds to 1 hour per participant, to account for the initial burdens of obtaining an LEI.[1110] The Commission estimates that the ongoing burden imposed by Rule 903 will be 4,800 hours, which corresponds to 1 hour per participant, to account for ongoing administration of the LEI.[1111] In addition, for these participants, the assignment of an LEI will entail both one-time and ongoing costs assessed by local operation units ("LOUs") of the GLEIS. The current cost for registering a new LEI is approximately \$220, with an additional cost of \$120 per year for maintaining an LEI.[1112] For those participants that do not already have an LEI, the

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1109 In the Regulation SBSR Proposing Release, the Commission used an estimate of 5,000 participant respondents that might incur reporting duties under Regulation SBSR. This estimate included an estimated 1,000 entities regularly engaged in the CDS marketplace as well as 4,000 potential security-based swap counterparties that were expected to transact security-based swaps less frequently but that nonetheless would be considered "participants." See Regulation SBSR Proposing Release, 75 FR at 75254. Based on more recent data, the Commission has revised the estimated number of participant respondents to 4,800. The Commission notes that registered security-based swap dealers and major security-based swap participants will, for some transactions, be the non-reporting side and are therefore included in this estimate.

1110 This figure is based on the following: [Compliance Attorney at 1 hour/year) x (1,300 participants)] = 1,300 burden hours.

1111 This figure is based on the following: [(Compliance Attorney at 1 hour/year) x (4,800 participants)] = 4,800 burden hours.

1112 See "GMEI Utility: Frequently Asked Questions" (available at: https://www.gmeiutility.org/frequentlyAskedQuestions.jsp, detailing registration and maintenance costs for LEIs issued by GMEI, an endorsed pre-LOU of the interim GLEIS) (last visited January 4, 2015).

initial one-time cost would be $286,000, or $220 per participant.[1113] All participants would be required to maintain their LEI resulting in an annual cost of $576,000, or $120 per participant.[1114]

5. Recordkeeping Requirements

The applications that participants must complete in order to obtain an LEI issued by or through the GLEIS are not subject to any specific recordkeeping requirements for participants, to the extent that these participants are non-registered persons.[1115] The Commission expects, however, that in the normal course of their business a participant of a registered SDR would keep records of the information entered in connection with its LEI application, such as the participant's legal name, registered address, headquarters address, and the entity's legal form.

6. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

The Commission believes that information submitted by participants in order to obtain an LEI issued by or through the GLEIS generally will be public.

E. Operating Hours of Registered SDRs—Rule 904

1113 This figure is based on the following: [($220 registration cost) x (1,300 participants not currently registered)] = $286,000.

1114 This figure is based on the following: [($120 annual maintenance cost) x (4,800 participants not currently registered)] = $576,000. The Commission notes that, for those participants obtaining an LEI in the first year, the annual maintenance cost will be incurred beginning in the year following registration.

1115 See Securities Exchange Act Release No. 71958 (April 17, 2014), 79 FR 25193 (May 2, 2014) ("SD/MSP Recordkeeping Proposing Release") (proposing recordkeeping and reporting requirements for security-based swap dealers, major security-based swap participants, and broker-dealers).

Rule 904, as adopted, requires a registered SDR to have systems in place to continuously receive and disseminate information regarding security-based swap data with certain exceptions. Certain provisions of Rule 904 contain "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 904—Operating Hours of Registered SDRs."

1. Summary of Collection of Information

Rule 904 requires a registered SDR to operate continuously, subject to two exceptions. First, under Rule 904(a) a registered SDR may establish normal closing hours during periods when, in its estimation, the U.S. market and major foreign markets are inactive. A registered SDR is required to provide reasonable advance notice to participants and to the public of its normal closing hours. Second, under Rule 904(b) a registered SDR may declare, on an ad hoc basis, special closing hours to perform system maintenance that cannot wait until normal closing hours. A registered SDR is required, to the extent reasonably possible under the circumstances, to avoid scheduling special closing hours during 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.

Rule 904(c) specifies requirements for handling and disseminating reported data during a registered SDR's normal and special closing hours. During normal closing hours and, to the extent reasonably practicable, during special closing hours, a registered SDR is required to have the capability to receive and hold in queue transaction data it receives.[1116] Pursuant to Rule 904(d), immediately upon system re-opening, the registered SDR is required to publicly disseminate any transaction data required to be reported under Rule 901(c) that it received and

1116 See Rule 904(c).

held in queue, in accordance with the requirements of Rule 902. Pursuant to Rule 904(e), if a registered SDR cannot hold in queue transaction data to be reported, immediately upon re-opening the SDR is required to send a message to all participants that it has resumed normal operations. Thereafter, any participant that had an obligation to report transaction information to the registered SDR, but could not due to the registered SDR's inability to receive and hold in queue such transaction information, must promptly report the information to the registered SDR.[1117]

The Commission originally stated its belief that there were not any costs or burdens applicable to participants as a result of Rule 904(e).[1118] The Commission continues to believe that this conclusion is appropriate. Specifically, the Commission believes that the process by which the registered SDR will notify participants that it has resumed operations would be automated. As a result, the Commission believes that the costs associated with building out the systems necessary for such notifications have already been accounted for in the costs of developing the registered SDRs systems associated with the receipt of security-based swap information under Rule 901.[1119] As a result, the Commission continues to believe that Rule 904(e) is not a collection of information for participants.

2. Use of Information

The information provided pursuant to Rule 904 is necessary to allow participants and the public to know the normal and special closing hours of the registered SDR, and to allow

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1117 See Rule 904(e).

1118 See Regulation SBSR Proposing Release, 75 FR at 75253.

1119 See id.

participants to take appropriate action in the event that the registered SDR cannot accept security-based swap transaction reports from participants.[1120]

3. Respondents

Rule 904 applies to all registered SDRs. As noted above, the Commission estimates that there will be ten registered SDRs.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission continues to estimate that that the one-time, initial burden, as well as ongoing annualized burden for each registered SDR associated with Rule 904 will be only minor additional burden beyond that necessary to ensure its basic operating capability under both Regulation SBSR and the SDR Registration Rules. The Commission estimates that the annual aggregate burden (first-year and ongoing) imposed by Rule 904 will be 360 hours, which corresponds to 36 hours per registered SDR.[1121]

One commenter asserted that the proposed requirement for a registered SDR to receive and hold in the queue the data required to be reported during its closing hours "exceeds the capabilities of currently-existing reporting infrastructures."[1122] However, the Commission notes that this comment was submitted in January 2011; since the receipt of this comment, provisionally registered CFTC SDRs that are likely also to register as SDRs with the Commission appear to have developed the capability of receiving and holding data in queue

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1120 The Commission does not believe that Rule 904(c) will result in any burden within the meaning of the PRA. Rule 904(c) does not create new or additional duties to report security-based swap transactions.

1121 See Regulation SBSR Proposing Release, 75 FR at 75253. This figure is based on the following: [(Operations Specialist at 3 hours/month) x (12 months/year) x (10 registered SDRs)] = 360 burden hours.

1122 Markit I at 4.

during their closing hours.[1123] Thus, the Commission continues to believe that requiring registered SDRs to hold data in queue during their closing hours would not create a significant burden for registered SDRs.

The Commission does not believe Rule 904 imposes any separate collection of information on participants of registered SDRs not already accounted for under Rule 901.[1124] Any respondent unable to report to a registered SDR, because such registered SDR was unable to receive the transaction report, would have to delay the submission of the transaction report. The Commission does not believe that the number of transaction reports impacted by this requirement would impact the burdens contained in this PRA.

5. Recordkeeping Requirements

Rule 13n-7(b) under the Exchange Act requires an SDR to keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Exchange Act and the rules or regulations thereunder, for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.[1125] This requirement encompasses notices issued by a registered SDR to its participants under Rule 904.

6. Collection of Information is Mandatory

1123 See, e.g., DDR Rulebook, Section 7.1 (DDR System Accessibility) ("Data submitted during DDR System down time is stored and processed once the service has resumed"), available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/DDR_Rulebook.pdf (last visited October 7, 2014).

1124 The requirement in Rule 904(e) for participants to report information to the registered SDR upon receiving a notice that the registered SDR resumed its normal operations is already considered as part of the participant's reporting obligations under Rule 901 and thus is already included in the burden estimate for Rule 901.

1125 See SDR Adopting Release, Section VI(G)(2)

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

Any notices issued by a registered SDR to its participants, such as the notices required under Rule 904, would be publicly available.

F. Correction of Errors in Security-Based Swap Information—Rule 905

Rule 905, as adopted, establishes procedures for correcting errors in reported and disseminated security-based swap information.

Certain provisions of Rule 905 of Regulation SBSR contain "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 905—Correction of Errors in Security-Based Swap Information."

1. Summary of Collection of Information

Rule 905 establishes duties for security-based swap counterparties and registered SDRs to correct errors in information that previously has been reported.

Counterparty Reporting Error. Under Rule 905(a)(1), where 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 must promptly notify the reporting side of the error. Under Rule 905(a)(2), where a reporting side for a security-based swap transaction 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 must promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction. The amended report must be submitted to the registered SDR in a manner consistent with the policies and procedures of the registered SDR required pursuant to Rule 907(a)(3).

Duty of Registered SDR to Correct. Rule 905(b) sets forth the duties of a registered SDR relating to corrections. If the registered SDR either discovers an error in a transaction on its system or receives notice of an error from a reporting side, Rule 905(b)(1) requires the registered SDR to verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information contained in its system. Rule 905(b)(2) further requires that, if such erroneous information relates to a security-based swap that the registered SDR previously disseminated and falls into any of the categories of information enumerated in Rule 901(c), the registered SDR must 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.

2. Use of Information

The security-based swap transaction information required to be reported pursuant to Rule 905 will be used by registered SDRs, participants, the Commission, and other relevant authorities. Participants will be able to use such information to evaluate and manage their own risk positions and satisfy their duties to report corrected information to a registered SDR. A registered SDR will need the required information to correct security-based swap transaction records, in order to maintain an accurate record of a participant's positions as well as to disseminate corrected information. The Commission and other relevant authorities will need the corrected information to have an accurate understanding of the market for surveillance and oversight purposes.

3. Respondents

Rule 905 applies to all participants of registered SDRs. As noted above, the Commission estimates that there will be approximately 300 reporting sides that incur the duty to report security-based swap transactions pursuant to Rule 901. In addition, the Commission estimates that there may be up to 4,800 security-based swap counterparties that are participants of one or more registered SDRs. Because any of these counterparties who are participants could become aware of errors in their reported transaction data, the Commission estimates that there may be as many as 4,800 respondents for purposes of the PRA.

Rule 905 also applies to registered SDRs. As noted above, the Commission estimates there will be ten registered SDRs.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The duty to promptly submit amended transaction reports to the appropriate registered SDR after discovery of an error, as required under Rule 905(a)(2), will impose burdens on reporting sides. The duty to promptly notify the relevant reporting side after discovery of an error, as required under Rule 905(a)(1), will impose burdens on non-reporting-side participants.

With respect to reporting sides, the Commission believes that Rule 905(a) will impose an initial, one-time burden associated with designing and building the reporting side's reporting system to be capable of submitting amended security-based swap transactions to a registered SDR. The Commission believes that designing and building appropriate reporting system functionality to comply with Rule 905(a)(2) will be a component of, and represent an incremental "add-on" to, the cost to build a reporting system and develop a compliance function as required under Rule 901. Based on discussions with industry participants, the Commission estimates this incremental burden to be equal to 5% of the one-time and annual burdens associated with designing and building a reporting system that is in compliance with Rule 901, plus 10% of the corresponding one-time and annual burdens associated with developing the reporting side's overall compliance program required under Rule 901. This estimate is based on similar calculations contained in the Regulation SBSR Proposing Release,[1126] updated to reflect new estimates relating to the number of reportable events and the number of reporting sides. Thus, for reporting sides, the Commission estimates that Rule 905(a) will impose an initial (first-year) aggregate burden of 15,015 hours, which is 50.0 burden hours per reporting side,[1127] and an ongoing aggregate annualized burden of 7,035 hours, which is 23.5 burden hours per reporting side.[1128]

The Commission believes that the actual submission of amended transaction reports required under Rule 905(a)(2) will not result in a material burden because this will be done electronically though the reporting system that the reporting side must develop and maintain to comply with Rule 901. The overall burdens associated with such a reporting system are addressed in the Commission's analysis of Rule 901.

1126 See Regulation SBSR Proposing Release, 75 FR at 75254.

1127 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [((((172 burden hours for one-time development of reporting system) x (0.05)) + ((33 burden hours annual maintenance of reporting system) x (0.05)) + ((180 burden hours one-time compliance program development) x (0.1)) + ((218 burden hours annual support of compliance program) x (0.1))) x (300 reporting sides)] = 15,015 burden hours, which is 50 burden hours per reporting side. The burden hours for annual maintenance of the reporting system has been updated to reflect new information on the number of reportable events. See supra note 1075.

1128 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [(((33 burden hours annual maintenance of reporting system) x (0.05)) + ((218 burden hours annual support of compliance program) x (0.1))) x (300 reporting sides)] = 7,035 burden hours, which is 23.5 burden hours per reporting side. The burden hours for annual maintenance of the reporting system has been updated to reflect new information on the number of reportable events. See supra note 1075.

With regard to non-reporting-side participants, the Commission believes that Rule 905(a) will impose an initial and ongoing burden associated with promptly notifying the relevant reporting party after discovery of an error as required under Rule 905(a)(1). The Commission estimates that the annual burden will be 998,640 hours, which corresponds to 208.05 burden hours per non-reporting-side participant.[1129] This figure is based on the Commission's estimate of (1) 4,800 participants; and (2) 1 transaction per day per non-reporting-side participant.[1130] The burdens of Rule 905 on reporting sides and non-reporting-side participants will be reduced to the extent that complete and accurate information is reported to registered SDRs in the first instance pursuant to Rule 901.

Rule 905(b) requires a registered SDR to develop protocols regarding the reporting and correction of erroneous information. The Commission believes, however, that this duty would represent only a minor extension of other duties for which the Commission is estimating burdens, and consequently, will not impose substantial additional burdens on a registered SDR. A registered SDR will be required to have the ability to collect and maintain security-based swap transaction reports and update relevant records under the rules adopted in the SDR Adopting Release. Likewise, a registered SDR must have the capacity to disseminate additional, corrected security-based swap transaction reports under Rule 902. The burdens associated with Rule

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1129 This burden was calculated using the same methodology as was used in the Regulation SBSR Proposing Release, updated to account for new estimates of the number of error notifications resulting from updates in the number of reportable events. See Regulation SBSR Proposing Release, 75 FR at 75255. This figure is based on the following: [(1.14 error notifications per non-reporting-side participant per day) x (365 days/year) x (Compliance Clerk at 0.5 hours/report) x (4,800 participants)] = 998,640 burden hours, which corresponds to 208.05 burden hours per non-reporting-side participant.

1130 This figure is based on the following: [((2,000,000 estimated annual security-based swap transactions) / (4,800 participants)) / (365 days/year)] = 1.14 transactions per day, on average.

905—including systems development, support, and maintenance—are addressed in the Commission's analysis of those other rules. Thus, the Commission believes that Rule 905(b) will impose only an incremental additional burden on registered SDRs. The Commission estimates that developing and publicly providing the necessary procedures will impose on each registered SDR an initial one-time burden on each registered SDR of approximately 730 burden hours.[1131] The Commission estimates that to review and update such procedures on an ongoing basis will impose an annual burden on each SDR of approximately 1,460 burden hours.[1132]

Accordingly, the Commission estimates that the initial (first-year) aggregate annualized burden on registered SDRs under Rule 905 will be 21,900 burden hours, which corresponds to 2,190 burden hours for each registered SDR.[1133] The Commission further estimates that the ongoing aggregate annualized burden on registered SDRs under Rule 905 will be 14,600 burden hours, which corresponds to 1,460 burden hours for each registered SDR.[1134] This estimated burden is consistent with what the Commission proposed in the Regulation SBSR Proposing Release.

5. Recordkeeping Requirements

1131 See Regulation SBSR Proposing Release, 75 FR at 75255. This figure is based on the following: [(Sr. Programmer at 80 hours) + (Compliance Manager at 160 hours) + (Compliance Attorney at 250 hours) + (Compliance Clerk at 120 hours) + (Sr. System Analyst at 80 hours) + (Director of Compliance at 40 hours)] = 730 burden hours.

1132 See Regulation SBSR Proposing Release, 75 FR at 75255. This figure is based on the following: [(Sr. Programmer at 160 hours) + (Compliance Manager at 320 hours) + (Compliance Attorney at 500 hours) + (Compliance Clerk at 240 hours) + (Sr. System Analyst at 160 hours) + (Director of Compliance at 80 hours)] = 1,460 burden hours.

1133 This figure is based on the following: [(730 burden hours to develop protocols) + (1,460 burden hours annual support)) x (10 registered SDRs)] = 21,900 burden hours, which corresponds to 2,190 burden hours per registered SDR.

1134 This figure is based on the following: [(1,460 burden hours annual support) x (10 registered SDRs)] = 14,600 burden hours, which corresponds to 1,460 burden hours per registered SDR.

Security-based swap transaction reports received pursuant to Rule 905 are subject to Rule 13n-5(b)(4) under the Exchange Act. This rule requires an SDR to maintain the transaction data and related identifying information for not less than five years after the applicable security-based swap expires and historical positions for not less than five years.[1135]

With respect to information disseminated by a registered SDR in compliance with Rule 905(b)(2), Rule 13n-7(b) under the Exchange Act requires an SDR to keep and preserve at least one copy of all documents, including all policies and procedures required by the Exchange Act and the rules or regulations thereunder, for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.[1136] This requirement encompasses amended security-based swap transaction reports disseminated by the registered SDR.

6. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

Information collected pursuant to Rule 905 will be widely available to the extent that it corrects information previously reported pursuant to Rule 901(c) and incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to Rule 902. Most of the information required under Rule 902 will be widely available to the public to the extent it is incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to Rule 902. However, Rule 902(c) prohibits public dissemination of certain kinds of transactions and certain kinds of transaction

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1135 See SDR Adopting Release, Section VI(E)(4).

1136 See SDR Adopting Release, Section VI(G)(2).

information. An SDR, pursuant to Sections 13(n)(5) of the Exchange Act and Rules 13n-4(b)(8) and 13n-9 thereunder is required to maintain the privacy of this security-based swap information. To the extent that the Commission receives confidential information pursuant to this collection of information, such information will be kept confidential, subject to the provisions of applicable law.

G. Other Duties of Participants—Rule 906

Rule 906(a), as adopted, establishes procedures designed to ensure that a registered SDR obtains UICs for both counterparties to a security-based swap. Rule 906(b) requires each participant of a registered SDR to provide to the registered SDR information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered SDR. Rule 906(c) requires each participant that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures (updated at least annually) that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR.

Certain provisions of Rule 906 of Regulation SBSR contain "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 906—Duties of All Participants."

Although the Commission is adopting Rule 906 with certain minor changes from the version re-proposed in the Cross-Border Proposing Release, these changes do not increase the number of respondents to Rule 906 or affect the estimated burdens on respondents to Rule 906. Therefore, the Commission is not revising its estimate of the burdens associated with Rule 906.

1. Summary of Collection of Information

Rule 906(a) sets forth a procedure designed to ensure that a registered SDR obtains relevant UICs for both sides of a security-based swap, not just of the reporting side. Rule 906(a) requires a registered SDR to identify any security-based swap reported to it for which the registered SDR does not have a counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID of each counterparty. Rule 906(a) further requires the registered SDR, once a day, to send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID. A participant that receives such a report must provide the missing ID information to the registered SDR within 24 hours.

Rule 906(b) requires each participant of a registered SDR to provide the registered SDR with information sufficient to identify the participant's ultimate parent(s) and any affiliate(s) of the participant that are also participants of the registered SDR.

Rule 906(c) requires each participant that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR. In addition, Rule 906(c) requires each such participant to review and update its policies and procedures at least annually.

2. Use of Information

The information required to be provided by participants pursuant to Rule 906(a) will complete missing elements of security-based swap transaction reports so that the registered SDR has, and can make available to the Commission and other relevant authorities, accurate and complete records for reported security-based swaps.

Rule 906(b) will be used to ensure that the registered SDR has, and can make available to the Commission and other relevant authorities, group-wide security-based swap position information. This information will assist the Commission and other relevant authorities with monitoring systemic risks in the security-based swap market.

The policies and procedures required under Rule 906(c) will be used by participants to aid in their compliance with Regulation SBSR, and also used by the Commission as part of its ongoing efforts to monitor and enforce compliance with the federal securities laws, including Regulation SBSR.

3. Respondents

Rules 906(a) and 906(b) apply to all participants of registered SDRs. Based on the information currently available to the Commission, the Commission now believes that there may be up to 4,800 participants.[1137] Rule 906(c) applies to participants that are registered security-based swap dealers or registered major security-based swap participants. The Commission estimates that there will be 55 registered security-based swap dealers and registered major security-based swap dealers.

Rule 906 also imposes certain duties on registered SDRs. As noted above, the Commission estimates that there will be ten registered SDRs.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

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1137 The Commission originally estimated that there would be up to 5,000 participants. As discussed above, based on more updated and granular information available to the Commission, this estimate has been revised. See Regulation SBSR Proposing Release, 75 FR at 75256.

a. For Registered SDRs

Rule 906(a) requires a registered SDR, once a day, to send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, any security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID. The Commission estimates that there will be a one-time, initial burden of 112 burden hours for a registered SDR to create a report template and develop the necessary systems and processes to produce a daily report required by Rule 906(a).[1138] Further, the Commission estimates that there will be an ongoing annualized burden of 308 burden hours for a registered SDR to generate and issue the daily reports, and to enter into its systems the ID information supplied by participants in response to the daily reports.[1139]

Accordingly, the Commission estimates that the initial aggregate annualized burden for registered SDRs under Rule 906(a) will be 4,200 burden hours for all SDR respondents, which corresponds to 420 burden hours per registered SDR.[1140] The Commission estimates that the

1138 See Regulation SBSR Proposing Release, 75 FR at 75256. The Commission has derived the total estimated burdens based on the following estimates, which are based on the information provided to the Commission: (Senior Systems Analyst at 40 hours) + (Sr. Programmer at 40 hours) + (Compliance Manager at 16 hours) + (Director of Compliance at 8 hours) + (Compliance Attorney at 8 hours) = 112 burden hours.

1139 See Regulation SBSR Proposing Release, 75 FR at 75256-57. The Commission has derived the total estimated burdens based on the following estimates, which are based on the information provided to the Commission: (Senior Systems Analyst at 24 hours) + (Sr. Programmer at 24 hours) + (Compliance Clerk at 260 hours) = 308 burden hours.

1140 See Regulation SBSR Proposing Release, 75 FR at 75256-57. The Commission derived its estimate from the following: [(112 + 308 burden hours) x (10 registered SDRs)] = 4,200 burden hours, which corresponds to 420 burden hours per registered SDR.

ongoing aggregate annualized burden for registered SDRs under Rule 906(a) will be 3,080 burden hours, which corresponds to 308 burden hours per registered SDR.[1141]

b. For Participants

i. Rule 906(a)

Rule 906(a) requires any participant of a registered SDR that receives a report from that registered SDR to provide the missing UICs to the registered SDR within 24 hours. Because all SDR participants will likely be the non-reporting side for at least some transactions to which they are a counterparty, the Commission believes that all participants will be impacted by Rule 906(a). The Commission estimates that the initial and ongoing annualized burden under Rule 906(a) for all participants will be 199,728 burden hours, which corresponds to 41.6 burden hours per participant.[1142] This figure is based on the Commission's estimates of (1) 4,800 participants; and (2) approximately 1.14 transactions per day per participant.[1143]

ii. Rule 906(b)

Rule 906(b) requires every participant to provide the registered SDR an initial parent/affiliate report and subsequent reports, as needed. The Commission estimates that there

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1141 See Regulation SBSR Proposing Release, 75 FR at 75256-57. The Commission derived its estimate from the following: [(308 burden hours) x (10 registered SDRs)] = 3,080 burden hours, which corresponds to 308 burden hours per registered SDR.

1142 This burden was calculated using the same methodology as was used in the Regulation SBSR Proposing Release, updated to account for new estimates of the number of missing information reports resulting from updates in the number of reportable events. See Regulation SBSR Proposing Release, 75 FR at 75256-57. This figure is based on the following: [(1.14 missing information reports per participant per day) x (365 days/year) x (Compliance Clerk at 0.1 hours/report) x (4,800 participants) = 199,728 burden hours, which corresponds to 41.6 burden hours per participant.

1143 This figure is based on the following: [((2,000,000 estimated annual security-based swap transactions) / 4,800 participants)) / (365 days/year)] = 1.14 transactions per day, or approximately 1 transaction per day.

will be 4,800 participants, that each participant will connect to two registered SDRs on average, and that each participant will submit two reports each year.[1144] Accordingly, the Commission estimates that the initial and ongoing aggregate annualized burden associated with Rule 906(b) will be 9,600 burden hours, which corresponds to 2 burden hours per participant.[1145] The aggregate burden represents an upper estimate for all participants; the actual burden will likely decrease because certain larger participants are likely to have multiple affiliates, and one member of the group could report ultimate parent and affiliate information on behalf of all of its affiliates at the same time.

b. For Covered Participants

Rule 906(c) requires each participant that is a registered security-based swap dealer or registered major security-based swap participant (each, a "covered participant") to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation. Rule 906(c) also requires the review and updating of such policies and procedures at least annually. The Commission estimates that the one-time, initial burden for each covered participant to adopt written policies and procedures as required under Rule 906(c) will be approximately 216 burden hours.[1146] As discussed in the Regulation SBSR Proposing

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1144 The Commission estimates that, during the first year, each participant will submit an initial report and one update report and, in subsequent years, will submit two update reports.

1145 See Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Compliance Clerk at 0.5 hours per report) x (2 reports/year/SDR connection) x (2 SDR connections/participant) x (4,800 participants)] = 9,600 burden hours, which corresponds to 2 burden hours per participant.

1146 See Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Sr. Programmer at 40 hours) + (Compliance Manager at 40 hours) + (Compliance Attorney at 40 hours) + (Compliance Clerk at 40 hours) + (Sr. Systems

Release,[1147] this figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, the Commission estimates the burden of maintaining such policies and procedures, including a full review at least annually, as required by Rule 906(c), will be approximately 120 burden hours for each covered participant.[1148] This figure includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing. Accordingly, the Commission estimates that the initial aggregate annualized burden associated with Rule 906(c) will be 18,480 burden hours, which corresponds to 336 burden hours per covered participant.[1149] The Commission estimates that the ongoing aggregate annualized burden associated with Rule 906(c) will be 6,600 burden hours, which corresponds to 120 burden hours per covered participant.[1150]

Analyst at 32 hours) + (Director of Compliance at 24 hours)] = 216 burden hours per covered participant.

1147 See Regulation SBSR Proposing Release, 75 FR at 75257.

1148 See Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Sr. Programmer at 8 hours) + (Compliance Manager at 24 hours) + (Compliance Attorney at 24 hours) + (Compliance Clerk at 24 hours) + (Sr. Systems Analyst at 16 hours) + (Director of Compliance at 24 hours)] = 120 burden hours per covered participant.

1149 This figure is based on the following: [(216 + 120 burden hours) x (55 covered participants)] = 18,480 burden hours.

1150 This figure is based on the following: [(120 burden hours) x (55 covered participants)] = 6,600 burden hours.

Therefore, the Commission estimates that the total initial aggregate annualized burden associated with Rule 906 will be 232,008 burden hours,[1151] and the total ongoing aggregate annualized burden will be 219,008 burden hours for all participants.[1152]

5. Recordkeeping Requirements

The daily reports that participants complete in order to provide missing UICs to a registered SDR pursuant to Rule 906(a) and the initial parent/affiliate reports and subsequent reports required by Rule 906(b) are not subject to any specific recordkeeping requirements for participants to the extent that these participants are non-registered persons.[1153] With regard to these reports, as well as any other information that a registered SDR may receive from participants pursuant to Rule 906, Rule 13n-5(b)(4) requires an SDR to maintain this information for not less than five years after the applicable security-based swap expires.[1154]

The Commission has proposed but not yet adopted recordkeeping requirements for registered security-based swap dealers and registered major security-based swap participants.[1155]

6. Collection of Information is Mandatory

1151 This figure is based on the following: [(4,200 burden hours for registered SDRs under Rule 906(a)) + (199,728 burden hours for participants under Rule 906(a)) + (9,600 burden hours for participants under Rule 906(b)) + (18,480 burden hours for covered participants under Rule 906(c))] = 232,008 burden hours.

1152 This figure is based on the following: [(3,080 burden hours for registered SDRs under proposed Rule 906(a)) + (199,728 burden hours for participants under proposed Rule 906(a)) + (9,600 burden hours for participants under proposed Rule 906(b)) + (6,600 burden hours for covered participants under proposed Rule 906(c))] = 219,008 burden hours.

1153 See Securities Exchange Act Release No. 71958 (April 17, 2014), 79 FR 25193 (May 2, 2014) ("SD/MSP Recordkeeping Proposing Release") (proposing recordkeeping and reporting requirements for security-based swap dealers, major security-based swap participants, and broker-dealers).

1154 See SDR Adopting Release, Section VI(E)(4).

1155 See SD/MSP Recordkeeping Proposing Release, 79 FR 25193.

Each collection of information discussed above is mandatory.

7. Confidentiality of Responses to Collection of Information

The collection of information required by Rule 906 will not be widely available. To the extent that the Commission receives confidential information pursuant this collection of information, such information will be kept confidential, subject to applicable law.

H. Policies and Procedures of Registered SDRs—Rule 907

Rule 907, as adopted, requires each registered SDR to establish and maintain policies and procedures addressing various aspects of Regulation SBSR compliance. Certain provisions of Rule 907 of Regulation SBSR contain "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 907—Policies and Procedures of Registered SDRs."

1. Summary of Collection of Information

Rule 907(a) requires a registered SDR to establish and maintain written policies and procedures that detail how it will receive and publicly disseminate security-based swap transaction information. Rule 907(a)(4) requires policies and procedures for assigning "special circumstances" flags to the necessary transaction reports.

Rule 907(c) requires a registered SDR to make its policies and procedures available on its website. Rule 907(d) requires a registered SDR to review, and update as necessary, the policies and procedures that it is required to have by Regulation SBSR at least annually. Rule 907(e) requires a registered SDR to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to Regulation SBSR and the registered SDR's policies and procedures established thereunder.

2. Use of Information

The policies and procedures required under Rules 907(a) and 907(b) will be used by reporting sides to understand the specific data elements of security-based swap transactions that they must report and the specific data formats and other reporting protocols that they will be required to use. These policies and procedures will be used generally by registered SDRs to aid in their compliance with Regulation SBSR, and also by the Commission as part of its ongoing efforts to monitor and enforce compliance with the federal securities laws, including Regulation SBSR. Finally, any information or reports provided to the Commission pursuant to Rule 907(e) will be used by the Commission to assess the timeliness, accuracy, and completeness of reported transaction data and assist the Commission's efforts to enforce applicable security-based swap reporting rules.

3. Respondents

Rule 907 applies to registered SDRs. As noted above, the Commission estimates that there will be ten registered SDRs.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission estimates that the one-time, initial burden for a registered SDR to adopt written policies and procedures as required under Rule 907 will be approximately 15,000 hours.[1156] As discussed in the Regulation SBSR Proposing Release, this figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary

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1156 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(Sr. Programmer at 1,667 hours) + (Compliance Manager at 3,333 hours) + (Compliance Attorney at 5,000 hours) + (Compliance Clerk at 2,500 hours) + (Sr. System Analyst at 1,667 hours) + (Director of Compliance at 833 hours)] = 15,000 burden hours per registered SDR. These burdens are the result of Rule 907 only and do not account for any burdens that result from the SDR Rules. Such burdens are addressed in a separate release. See SDR Adopting Release, Section VII.

testing.[1157] In addition, the Commission estimates the annual burden of maintaining such policies and procedures, including a full review at least annually, making available its policies and procedures on the registered SDR's website, and information or reports on non-compliance, as required under Rule 907(e), will be approximately 30,000 hours for each registered SDR.[1158] As discussed in the Regulation SBSR Proposing Release, this figure includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining relevant systems and internal controls systems, performing necessary testing, monitoring participants, and compiling data.

The Commission estimates that the initial annualized burden associated with Rule 907 will be approximately 45,000 hours per registered SDR, which corresponds to an initial annualized aggregate burden of approximately 450,000 hours.[1159] The Commission estimates that the ongoing annualized burden associated with Rule 907 will be approximately 30,000 hours per registered SDR,[1160] which corresponds to an ongoing annualized aggregate burden of approximately 300,000 hours.[1161]

1157 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure also includes time necessary to design and program systems and implement policies and procedures to assign certain UICs, as required by Rule 907(a)(5).

1158 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(Sr. Programmer at 3,333 hours) + (Compliance Manager at 6,667 hours) + (Compliance Attorney at 10,000 hours) + (Compliance Clerk at 5,000 hours) + (Sr. System Analyst at 3,333 hours) + (Director of Compliance at 1,667 hours)] = 30,000 burden hours per registered SDR.

1159 This figure is based on the following: [((15,000 burden hours per registered SDR) + (30,000 burden hours per registered SDR)) x (10 registered SDRs)] = 450,000 initial annualized aggregate burden hours during the first year.

1160 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(Sr. Programmer at 3,333 hours) + (Compliance Manager at 6,667 hours) + (Compliance Attorney at 10,000 hours) + (Compliance Clerk at 5,000 hours) + (Sr.

5. Recordkeeping Requirements

Rule 13n-7(b) under the Exchange Act requires an SDR to keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Exchange Act and the rules or regulations thereunder, for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination. This requirement will encompass policies and procedures established by a registered SDR pursuant to Rule 907, and any information or reports provided to the Commission pursuant to Rule 907(e).

6. Collection of Information is Mandatory

Each collection of information discussed is mandatory.

7. Confidentiality of Responses to Collection of Information

All of the policies and procedures required by Rule 907 will have to be made available by a registered SDR on its website and will not, therefore, be confidential. Any information obtained by the Commission from a registered SDR pursuant to Rule 907(e) relating to the timeliness, accuracy, and completeness of data reported to the registered SDR will be kept confidential subject to the provisions of applicable law.

I. Cross-Border Matters—Rule 908

Rule 908(a), as adopted, defines when a security-based swap transaction will be subject to regulatory reporting and/or public dissemination. Specifically, Rule 908(a)(1)(i), as adopted, provides that a security-based swap shall be subject to regulatory reporting and public

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System Analyst at 3,333 hours) + (Director of Compliance at 1,667 hours)] = 30,000 burden hours per registered SDR.

1161 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(30,000 burden hours per registered SDR) x (10 registered SDRs)] = 300,000 ongoing, annualized aggregate burden hours.

dissemination if "[t]here is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction." Rule 908(a)(1)(ii), as adopted, provides that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]he security-based swap is submitted to a clearing agency having its principal place of business in the United States." Rule 908(a)(2), as adopted, provides that a security-based swap not included within the above provisions would 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."

Regulation 908(b), as adopted, defines when a person might incur obligations under Regulation SBSR. Specifically, Rule 908(b) provides that, notwithstanding any other provision of Regulation SBSR, a person shall not incur any obligation under Regulation SBSR unless it is a U.S. person, a registered security-based swap dealer or registered major security-based swap participant.

Rules 908(a) and 908(b) do not impose any collection of information requirements. To the extent that a security-based swap transaction or counterparty is subject to Rule 908(a) or 908(b), respectively, the collection of information burdens are calculated as part of the underlying rule (e.g., Rule 901, which imposes the basic duty to report security-based swap transaction information).

Rule 908(c), as adopted, sets forth the requirements surrounding requests for substituted compliance. As adopted, Rule 908(c)(1) sets forth the general rule that 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 Rule 908(c)(2), provided that at least one of the direct counterparties is either a non-U.S. person or a foreign branch.

Rule 908(c) contains "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 908(c)—Substituted Compliance."

1. Summary of Collection of Information

A party that potentially would comply with requirements under Regulation SBSR 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 requesting that the Commission make a substituted compliance determination pursuant to Rule 0-13 under the Exchange Act.[1162] Such entity will be required to provide the Commission with any supporting documentation as the Commission may request, in addition to information that the entity believes is necessary for the Commission to make a determination, such as information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements.

2. Use of Information

The Commission will use the information collected pursuant to Rule 908(c)(2)(ii) to evaluate requests for substituted compliance with regard to regulatory reporting and public dissemination of security-based swaps.

3. Respondents

In the Cross-Border Proposing Release, the Commission preliminarily estimated that requests for substituted compliance determinations might arise in connection with security-based

[1162] See 17 CFR 200.0-13; Cross-Border Adopting Release, 79 FR 47357-60.

swap market participants and transactions in up to 30 discrete jurisdictions.[1163] Because only a small number of jurisdictions have substantial OTC derivatives markets and are implementing OTC derivatives reforms, the Commission preliminarily estimated that it would receive approximately ten requests in the first year for substituted compliance determinations with respect to regulatory reporting and public dissemination pursuant to Rule 908(c)(2)(ii), and two requests each subsequent year.[1164] Although the range of entities that are allowed to submit applications for substituted compliance has increased, the Commission does not believe that this warrants a change in its estimate of the number of requests that the Commission will receive. The Commission continues to believe that other considerations will determine the number of applications that it will receive, such as which jurisdictions have regulatory structures similar enough to the Commission's as to merit a request and the number of entities potentially impacted by Regulation SBSR.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

Rule 908(c)(2)(ii), as adopted, applies to any person that requests a substituted compliance determination with respect to regulatory reporting and public dissemination of security-based swaps. In connection with each request, the requesting party must provide the Commission with any supporting documentation that the entity believes is necessary for the Commission to make a determination, including information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with

1163 See Cross-Border Proposing Release, 78 FR at 31109-10.

1164 See id. at 31110. Rule 908(c)(2)(ii), as adopted, allows "[a] party that potentially would comply with requirements under [Regulation SBSR]...or any foreign financial regulatory authority or authorities supervising such a person's security-based swap activities may file an application."

those requirements. The Commission initially estimated, in the Cross-Border Proposing Release, that the total paperwork burden associated with submitting a request for a substituted compliance determination with respect to regulatory reporting and public dissemination will be approximately 1,120 hours, plus $1,120,000 for 14 requests.[1165] This estimate includes all collection burdens associated with the request, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps. Furthermore, this estimate assumes that each request will be prepared de novo, without any benefit of prior work on related subjects. The Commission notes, however, that as such requests are developed with respect to certain jurisdictions, the cost of preparing such requests with respect to other foreign jurisdictions could decrease.[1166]

Assuming ten requests in the first year, the Commission staff estimated an aggregated burden for the first year will be 800 hours, plus $800,000 for the services of outside professionals.[1167] The Commission preliminarily estimated that it would receive 2 requests for substituted compliance determinations pursuant to Rule 908(c)(2)(ii) in each subsequent year.

1165 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) will be approximately 80 of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400). See id., Cross-Border Proposing Release, 78 FR at 31110

1166 If and when the Commission grants a request for substituted compliance, subsequent applications might be able to leverage work done on the initial application. However, the Commission is unable to estimate the amount by which the cost could decrease without knowing the extent to which different jurisdictions have similar regulatory structures.

1167 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 242.908(c)(2)(ii) will be up to approximately 800 hours (80 hours of in-house counsel time x 10 respondents), plus $800,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x 10 respondents). See Cross-Border Proposing Release, 78 FR at 31110.

Assuming the same approximate time and costs, the aggregate burden for each year following the first year will be up to 160 hours of company time and $160,000 for the services of outside professionals.[1168]

5. Recordkeeping Requirements

Rule 908(c)(2)(ii) does not impose any recordkeeping requirements on entities that submit requests for a substituted compliance determination. The Commission has proposed but not yet adopted recordkeeping requirements for registered security-based swap dealers.

6. Collection of Information is Mandatory

The collection of information discussed above is mandatory for any entity seeking a substituted compliance determination from the Commission regarding regulatory reporting and public dissemination of security-based swaps.

7. Confidentiality of Responses to Collection of Information

The Commission generally intends to make public the information submitted to it pursuant to any request for a substituted compliance determination under Rule 908(c)(2)(ii), including supporting documentation provided by the requesting party. However, a requesting party may submit a confidential treatment request pursuant to Rule 24b-2 under the Exchange Act to object to public disclosure.

J. Registration of SDRs as Securities Information Processors—Rule 909

Rule 909 requires a registered SDR also to register with the Commission as a SIP on Form SDR. Previously, in the Regulation SBSR Proposing Release, the Commission had

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1168 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 242.908(c)(2)(ii) would be up to approximately 160 hours (80 hours of in-house counsel time x 2 respondents) + plus $160,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x 2 respondents). See Cross-Border Proposing Release, 78 FR at 31110.

proposed the use of a separate form, Form SIP. Based on the use of that form, the Commission stated in the Regulation SBSR Proposing Release that Rule 909 contained "collection of information requirements" within the meaning of the PRA and thus, the Commission preliminarily estimated certain burdens on registered SDRs that would result from Rule 909.[1169] As a result of the consolidation of SDR and SIP registration on a single form, the Commission now believes that Rule 909 does not constitute a separate "collection of information" within the meaning of the PRA.[1170]

XXII. Economic Analysis

The Commission is sensitive to the economic consequences and effects, including costs and benefits, of its rules. Some of these costs and benefits stem from statutory mandates, while others are affected by the discretion exercised in implementing the mandates. The following economic analysis identifies and considers the costs and benefits—including the effects on efficiency, competition, and capital formation—that may result from the rules, as adopted . These costs and benefits are discussed below and have informed the policy choices described throughout this release.

The Dodd-Frank Act amended the Exchange Act to require the regulatory reporting and public dissemination of all security-based swaps. To implement these requirements, Regulation SBSR requires that all security-based swaps to be reported to a registered SDR, and requires the registered SDR immediately to disseminate a subset of that information to the public. Regulation SBSR specifies the security-based swap information that must be reported, who has the duty to report, and the timeframes for reporting and disseminating information. Regulation

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1169 See Regulation SBSR Proposing Release, 75 FR at 75261.

1170 See SDR Adopting Release, Section VI(A)(1)(c).

SBSR also requires registered SDRs to establish policies and procedures governing the reporting and dissemination process, including procedures for utilizing unique identification codes for legal entities, units of legal entities (such as branches, trading desks, and individual traders), products, and transactions. In the Regulation SBSR Proposing Release, the Commission highlighted certain overarching benefits to the security-based swap markets that it preliminarily believed would result from the adoption of Regulation SBSR. These potential benefits include, generally, improved market quality, improved risk management, greater efficiency, and improved Commission oversight.[1171]

In the Cross-Border Proposing Release, the Commission re-proposed Regulation SBSR in its entirety and considered the changes to the initial assessments of costs and benefits associated with the re-proposed rules. In doing so, the Commission explained that Regulation SBSR is intended to further the goals highlighted in the Regulation SBSR Proposing Release, while further limiting, to the extent practicable, the overall costs to the security-based swap market associated with regulatory reporting and public dissemination in cross-border situations.[1172] The adopted rules are designed to limit overall costs by imposing reporting duties and the associated costs on those parties who are most likely to have the necessary infrastructure in place to carry out the reporting function.[1173] As the Commission noted, many of the revisions

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1171 See Regulation SBSR Proposing Release, 75 FR at 75261-62.

1172 See Cross-Border Proposing Release, 78 FR at 31196-97.

1173 While certain parties that generally will have the heaviest duties to report transactions (e.g., registered security-based swap dealers and registered major security-based swap participants) will incur costs, the costs of those parties generally will be lower than they would be for other parties (e.g., non-dealers) because those parties may already have the necessary infrastructure in place to report transactions and they will benefit from economies of scale due to the high volume of transactions that flows through them compared to other parties. Although security-based swap dealers and major security-based swap participants might pass on these costs, at least in part, to their non-reporting set forth in the re-proposal were suggested by commenters to the initial proposal and were designed, among other things, to better align reporting duties with larger entities that have greater resources and capability to report and to reduce the potential for duplicative reporting. The Commission stated that the revisions should help to limit, to the extent practicable, the overall costs to the security-based swap market associated with reporting in cross-border situations.[1174]

The Commission is now adopting Regulation SBSR, with certain revisions discussed in Sections I through XVII, supra.

In assessing the economic impact of the rules, the Commission refers to the broader costs and benefits associated with the application of the adopted rules as "programmatic" costs and benefits. These include the costs and benefits of applying the substantive Title VII requirements to the reporting of transactions by market participants, as well as to the functions performed by infrastructure participants (such as SDRs) in the security-based swap market. In several places the Commission also considers how the programmatic costs and benefits might change when comparing the adopted approach to other alternatives suggested by comment letters. The Commission's analysis also considers "assessment" costs—those that arise from current and future market participants expending resources to determine whether they are subject to Regulation SBSR, and could incur expenses in making this determination even if they ultimately are not subject to rules for which they made an assessment.

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counterparties, the costs that are passed on to non-reporting parties are likely to be lower than the costs that the non-reporting parties would face if they had direct responsibility to report these transactions.

1174 See Cross-Border Proposing Release, 78 FR at 31192.

The Commission's analysis also recognizes that certain market participants are subject to Regulation SBSR while potentially also being subject to requirements imposed by other regulators. Concurrent, and potentially duplicative or conflicting, regulatory requirements could be imposed on persons because of their resident or domicile status or because of the place their security-based swap transactions are conducted. Rule 908(c) establishes a mechanism whereby market participants who would be subject to both Regulation SBSR and a foreign regulatory regime could, subject to certain conditions, "substitute compliance" with the foreign regulatory regime for compliance with Regulation SBSR.

A. Broad Economic Considerations

Among the primary economic considerations for promulgating the rules on the regulatory reporting and public dissemination of security-based swap information are the risks to financial stability posed by security-based swap activity and exposures and the effect that the level of transparency in the security-based swap market may have on market participants' ability to efficiently execute trades. For example, on one hand, an increased level of transparency may make trading more efficient since market participants have additional information on which to base their trading decisions. On the other hand, if post-trade transparency makes hedging of large trades or trades in illiquid securities more difficult, it may make execution of these trades less efficient.[1175]

As the Commission has noted previously,[1176] the security-based swap market allows participants opportunities for efficient risk sharing. By transacting in security-based swaps, firms can lay off financial and commercial risks that they are unwilling to bear to counterparties

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1175 See Analysis of Post-Trade Transparency, in which Commission staff describes the effects of post-trade transparency on relatively illiquid swaps.

1176 See Cross-Border Adopting Release, 79 FR at 47283-85.

who may be better-equipped to bear them. Risk transfer is accomplished through contractual obligations to exchange cash flows with different risk characteristics. These opportunities for risk sharing, however, also represent opportunities for risk transmission through a variety of channels. For instance, a credit event that triggers a large payout to one counterparty by a seller of credit protection, may render that protection seller unable to meet other payment obligations, placing its other counterparties under financial strain. In addition to the risk of sequential counterparty default, security-based swap relationships can transmit risks across asset classes and jurisdictional boundaries through liquidity and asset price channels.

Unlike most other securities transactions, security-based swaps entail ongoing financial obligations between counterparties during the life of a transaction that could span several years. As a result of these ongoing obligations, market participants are exposed not only to the market risk of assets that underlie a security-based swap contract, but also to the credit risk of their counterparties until the transaction is terminated. These exposures create a web of financial relationships in which the failure of a single large firm active in the security-based swap market can have consequences beyond the firm itself. A default by such a firm, or even the perceived lack of creditworthiness of that firm, could produce contagion through sequential counterparty default or reductions in liquidity, willingness to extend credit, and valuations for financial instruments.[1177]

Currently, the security-based swap market is an OTC market without standardized

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1177 See, e.g., Markus K. Brunnermeier and Lasse Heje Pedersen, "Market Liquidity and Funding Liquidity," Review of Financial Studies (2009); Denis Gromb and Dimitri Vayanos, "A Model of Financial Market Liquidity," Journal of the European Economic Association (2010).

reporting or public dissemination requirements.[1178] Market participants observe only the details of transactions for which they are a counterparty, and there is no comprehensive and widely available source of information about transactions after they occur (post-trade transparency). As a result, the ability of a market participant to evaluate a potential transaction depends on its own transaction history and indicative (non-binding) quotes that it may obtain through fee-based services, and OTC market participants with the largest order flow have an informational advantage over other market participants. The value of private information to large dealers may, in part, explain why security-based swap market participants do not have sufficient incentive to voluntarily implement post-trade transparency.[1179] Additionally, unless all market participants are subject to reporting rules, market participants who may prefer a more transparent market structure may not believe that the benefits of disseminating data about their own limited order flow justifies the costs associated with building and paying for the necessary infrastructure to support public dissemination of transaction information.

The discussion below presents an overview of the OTC derivatives markets, a consideration of the general costs and benefits of the regulatory reporting and public dissemination requirements, and a discussion of the costs and benefits of each rule within Regulation SBSR. The economic analysis concludes with a discussion of the potential effects of Regulation SBSR, as adopted, on efficiency, competition, and capital formation.

1178 There is voluntary reporting as well as voluntary clearing, as discussed in Section XXII(B). However, transaction level information is not made public through these channels. Only limited information (e.g., trading volume and notional outstanding) is available publicly on an aggregate basis, and often with a delay.

1179 Throughout Section XXII, the term "dealers" refers to security-based swap market participant that engage in dealing activities while the term "registered dealers" are those required to register with the Commission. See Intermediary Definitions Adopting Release, 77 FR at 30596; Cross-Border Adopting Release, 79 FR at 47277.

B. Baseline

To assess the economic impact of the final rules described in this release, the Commission is using as a baseline the security-based swap market as it exists at the time of this release, including applicable rules adopted by the Commission but excluding rules that have been proposed but not yet finalized. The analysis includes the statutory and regulatory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act. The Commission also has considered, where appropriate, the impacts on market practice of other regulatory regimes.

1. Current Security-Based Swap Market

The Commission's analysis of the state of the current security-based swap market is based on data obtained from DTCC-TIW, particularly data regarding the activity of market participants in the single-name credit default swap (CDS) market during the period from 2008 to 2013. Some of the Commission staff's analysis regarding the impact of CFTC trade reporting rules entails the use of open positions and transaction activity data for index credit default swap (index CDS) and single-name CDS during the period from July 1, 2011 to June 30, 2013, obtained from the DTCC-TIW and through the DTCC public website of weekly stock and volume reports.[1180] The data for index CDS encompasses CDS on both broad-based security indices and narrow-based security indices, and "security-based swap" in relevant part encompasses swaps based on single securities or on narrow-based security indices.[1181]

1180 The DTCC public website can be found at http://www.dtcc.com/repository-otc-data.aspx, last visited September 22, 2014. See also Analysis of Post-Trade Transparency.

1181 See Section 3(a)(68) of the Exchange Act. See also Product Definitions Adopting Release, 77 FR at 48208.

While other trade repositories may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for these products (or other products that are security-based swaps). As such, the Commission is unable to analyze security-based swaps other than those described above. However, the Commission believes that the single-name CDS data are representative of the market and therefore can directly inform the analysis of the state of the current security-based swap market.[1182]

The Commission believes that the data underlying its analysis provides reasonably comprehensive information regarding the single-name CDS transactions and composition of the single-name CDS market participants. The Commission notes that the data available from DTCC-TIW do not encompass those CDS transactions that both: (1) do not involve U.S. counterparties[1183]; and (2) are based on reference entities domiciled outside the United States (non-U.S. reference entities). Notwithstanding this limitation, the Commission believes that the DTCC-TIW data provide information that is sufficient for the purpose of identifying the types of market participants active in the security-based swap market and the general characteristics of transactions within that market.[1184]

a. Security-Based Swap Market Participants

The available data supports the characterization of the security-based swap market as one that relies on intermediation by a small number of entities that engage in dealing activities. In addition to this small number of dealing entities, thousands of other participants appear as

1182 See Cross-Border Proposing Release, 78 FR at 31120.

1183 The Commission notes that DTCC-TIW's entity domicile determinations may not reflect the definition of "U.S. person" in Rule 900(ss).

1184 Commission staff estimates, using data from 2013, that the transaction data include 77% of all single-name CDS transactions reported to DTCC-TIW.

counterparties to security-based swap contracts in the sample, and include, but are not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies. Most non-dealer users of security-based swaps do not directly engage in the trading of swaps with other non-dealers, but use dealers, banks, or investment advisers as intermediaries or agents to establish their positions. Based on an analysis of the counterparties to trades reported to the DTCC-TIW, there are 1,800 entities that engaged directly in trading between November 2006 and December 2013.

Table 1, below, highlights that close to three-quarters of these entities (DTCC-defined "firms" shown in DTCC-TIW, which are referred to here as "transacting agents") were identified as investment advisers, of which approximately 40% (about 30% of all transacting agents) were registered investment advisers under the Investment Advisers Act of 1940.[1185] Although investment advisers comprise the vast majority of transacting agents, the transactions that they executed account for only 9.7% of all single-name CDS trading activity reported to the DTCC-TIW, measured by number of transaction-sides.[1186] The vast majority of transactions (84.1%) measured by number of transaction-sides were executed by ISDA-recognized dealers.[1187]

1185 See 15 U.S.C. 80b1-80b21. Transacting agents engage in the security-based swap market, without relying on an intermediary, on behalf of principals. For example, a university endowment may hold a position in a security-based swap that is built up by an investment adviser that transacts on the endowment's behalf. In this case, the university endowment is a principal that uses the investment adviser as a transacting agent.

1186 Each transaction has two transaction sides, i.e., two transaction counterparties.

1187 The 1,800 entities included all DTCC-defined "firms" shown in DTCC-TIW as transaction counterparties that report at least one transaction to DTCC-TIW as of December 2013. The staff in the Division of Economic and Risk Analysis classified these firms, which are shown as transaction counterparties, by machine matching names to known third-party databases and by manual classification. This is consistent with the methodology used in the re-proposal. See Cross-Border Proposing Release, 78 FR at 31120 note 1304. Manual classification was based in part on searches of the EDGAR and Bloomberg databases, the Commission's Investment Adviser Public Disclosure

Table 1. The number of transacting agents by counterparty type and the fraction of total trading activity, from November 2006 through December 2013, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment Advisers	1,347	74.8%	9.7%
- SEC registered	*529*	*29.4%*	*5.9%*
Banks	256	14.2%	5.0%
Pension Funds	29	1.6%	0.1%
Insurance Companies	36	2.0%	0.2%
ISDA-Recognized Dealers[1188]	17	0.9%	84.1%
Other	115	6.4%	1.0%
Total	1,800	100%	100%

Principal holders of CDS risk exposure are represented by "accounts" in the DTCC-TIW.[1189] The staff's analysis of these accounts in DTCC-TIW shows that the 1,800 transacting agents classified in Table 1 represent over 10,054 principal risk holders. Table 2, below, classifies these principal risk holders by their counterparty type and whether they are represented

database, and a firm's public website or the public website of the account represented by a firm. The staff also referred to ISDA protocol adherence letters available on the ISDA website.

1188 For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo, and Nomura. See, e.g., http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf (last visited September 22, 2014).

1189 "Accounts" as defined in the DTCC-TIW context are not equivalent to "accounts" in the definition of "U.S. person" provided by Rule 3a71-3(a)(4)(i)(C) under the Exchange Act. They also do not necessarily represent separate legal persons. One entity or legal person may have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

by a registered or unregistered investment adviser.[1190] For instance, 256 banks in Table 1 allocated transactions across 369 accounts, of which 30 were represented by investment advisers. In the remaining 339 instances, banks traded for their own accounts. Meanwhile, 17 ISDA-recognized dealers in Table 1 allocated transactions across 69 accounts.

Among the accounts, there are 1,086 special entities[1191] and 636 investment companies registered under the Investment Company Act.[1192] Private funds comprise the largest type of account holders that the Commission was able to classify, and although not verified through a recognized database, most of the funds that could not be classified appear to be private funds.[1193]

[1190] Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act and may include investment advisers registered with a state or a foreign authority.

[1191] See Section 15F(h)(2)(C) of the Exchange Act, 15 U.S.C. 78o-10(h)(2)(C) (defining "special entity" to include a federal agency; a state, state agency, city, county, municipality, or other political subdivision of a state; any employee benefit plan; any governmental plan; or any endowment).

[1192] There remain over 4,000 DTCC "accounts" unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

[1193] Private funds for the purpose of this analysis encompass various unregistered pooled investment vehicles, including hedge funds, private equity funds, and venture capital funds.

Table 2. The number and percentage of account holders—by type—who participate in the security-based swap market through a registered investment adviser, an unregistered investment adviser, or directly as a transacting agent, from November 2006 through December 2013.

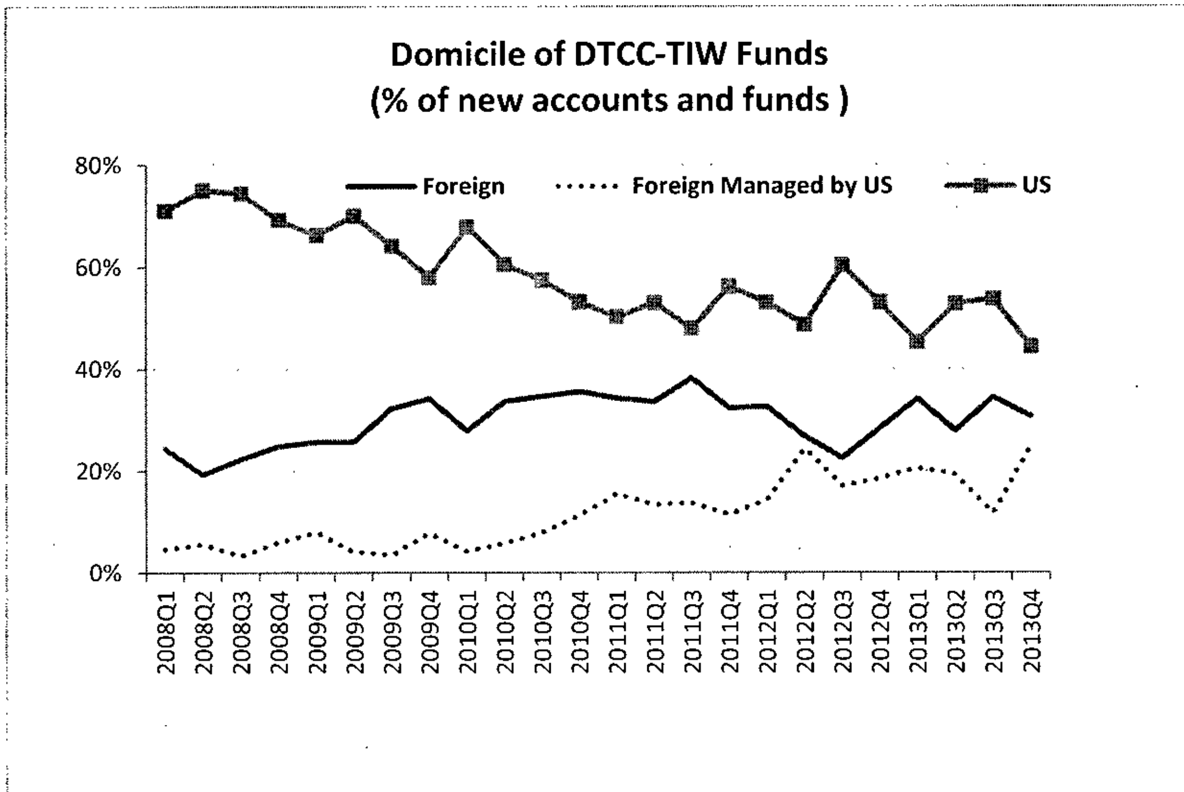
Account Holders by Type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent[1194]	
Private Funds	2,914	1,395	48%	1,496	51%	23	1%
DFA Special Entities	1,086	1,050	97%	12	1%	24	2%
Registered Investment Companies	636	620	97%	14	2%	2	0%
Banks (non-ISDA-recognized dealers)	369	25	7%	5	1%	339	92%
Insurance Companies	224	144	64%	21	9%	59	26%
ISDA-Recognized Dealers	69	0	0%	0	0%	69	100%
Foreign Sovereigns	63	45	71%	2	3%	16	25%
Non-Financial Corporations	57	39	68%	3	5%	15	26%
Finance Companies	10	5	50%	0	0%	5	50%
Other/Unclassified	4,626	3,130	68%	1,294	28%	200	4%
All	10,054	6,453	64%	2,847	28%	752	7%

i. Participant Domiciles

The security-based swap market is global in scope, with counterparties located across multiple jurisdictions. A U.S.-based holding company may conduct dealing activity through a foreign subsidiary that faces both U.S. and foreign counterparties, and the foreign subsidiary may be guaranteed by its parent, making the parent responsible for performance under these security-based swaps.

1194 This column reflects the number of participants who are also trading for their own accounts.

Figure 1: The percentage of (1) new accounts with a domicile in the United States (referred to as "US"), (2) new accounts with domicile outside the United States (referred to below as "Foreign"), and (3) new accounts outside the United States but managed by a U.S. person, account of a foreign branch of a U.S. person, and account of a foreign subsidiary of a U.S. person (collectively referred to below as "Foreign Managed by US").[1195] Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2013.



As depicted in Figure 1, over time a greater share of accounts entering the market either have a foreign domicile, or have a foreign domicile while being managed by a U.S. person. The increase in foreign accounts may reflect an increase in participation by foreign accountholders

1195 Following publication of the Warehouse Trust Guidance on CDS data access, DTCC-TIW surveyed market participants, asking for the physical address associated with each of their accounts (i.e., where the account is organized as a legal entity). This is designated the registered office location by the DTCC-TIW. When an account does not report a registered office location, the Commission has assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. This treatment assumes that the registered office location reflects the place of domicile for the fund or account.

while the increase in foreign accounts managed by U.S. persons may reflect the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other stimuli. There are, however, alternative explanations for the shifts in new account domicile that can be observed in Figure 1. Changes in the domicile of new accounts through time may reflect improvements in reporting by market participants to DTCC-TIW.[1196] Additionally, because the data include only accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties, or transact in single-name CDS with U.S. reference entities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

ii. Current Estimates of Dealers and Major Participants

In its economic analysis of rules defining "security-based swap dealer" and "major security-based swap participant," the Commission noted, using DTCC-TIW data for the year ending in December 2012, that it expected 202 entities to engage in dealer de minimis analysis.[1197] Further, the Commission's analysis of single-name CDS transactions data suggested that only a subset of these entities engage in dealing activity and estimated 50 registered dealers as an upper bound based on the threshold for the de minimis exception adopted in that release.[1198] The Commission also undertook an analysis of the number of security-based swap market participants likely to register as major security-based swap participants, and

1196 See supra note 3.

1197 See Cross-Border Adopting Release, 79 FR at 47331.

1198 Id. at 47296, note 150 (describing the methodology employed by the Commission to estimate the number of potential security-based swap dealers).

estimated a range of between zero and five such participants.[1199] Based on data for the year ending in December 2013, the Commission continues to believe that 50 represents an upper bound on the number of dealers expected to register and between zero and five major participants will register. As a result of further experience with the DTCC-TIW data, the Commission now estimates, based on data for the year ending in December 2013, that the number of participants likely to engage in dealer de minimis analysis is approximately 170. Forty-eight of these participants are domiciled outside of the United States and have $2 billion in transactions with U.S. counterparties or that otherwise may have to be counted for purposes of the de minimis analysis.

iii. Security-Based Swap Data Repositories

There are currently no SDRs registered with the Commission. However, the CFTC has provisionally registered four swap data repositories to accept credit derivatives. The Commission believes that these entities may register with the Commission as SDRs. Because most participants in the security-based swap market also participate in the swap market,[1200] other persons might, in the future, seek to register with both the CFTC and the Commission as SDRs. In addition, once a swap data repository has established infrastructure sufficient to allow it to register with the CFTC, the costs for it to also register with the Commission as an SDR and adapt its business for security-based swap activity will likely be low relative to the costs for a wholly new entrant.

1199 Id. at 47297, note 153 (describing the methodology employed by the Commission to estimate the number of potential major security-based swap participants).

1200 See infra Section XXII(B)(3).

b. Security-Based Swap Transaction Activity

Single-name CDS contracts make up the vast majority of security-based swap products and most are written on corporate issuers, corporate debt securities, sovereign countries, or sovereign debt securities (reference entities and reference securities). Figure 2, below, describes the percentage of global, notional transaction volume in U.S. single-name CDS reported to the DTCC-TIW between January 2008 and December 2013, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty.

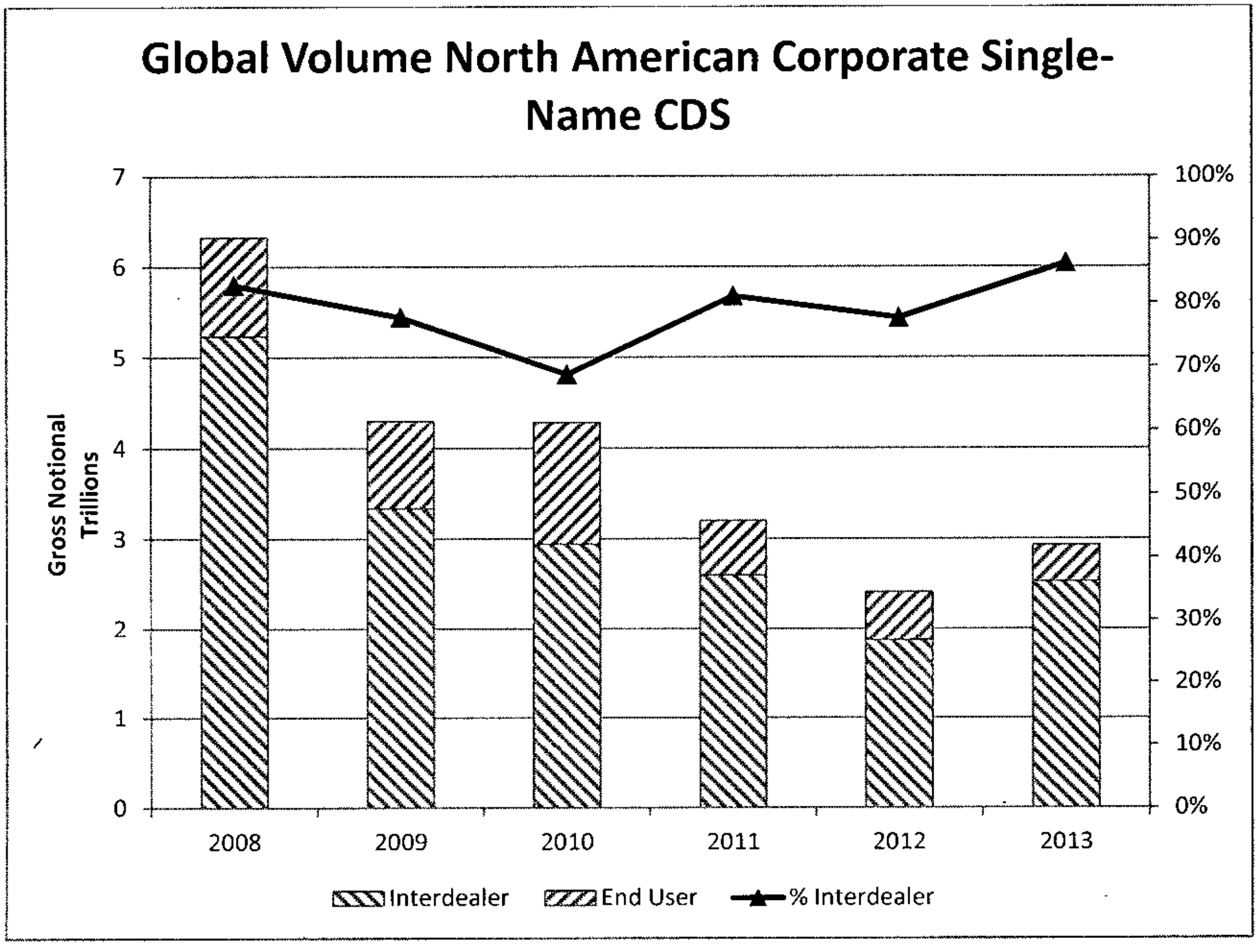
The level of trading activity with respect to U.S. single-name CDS in terms of notional volume has declined from more than $6 trillion in 2008 to less than $3 trillion in 2013.[1201] While notional volume has declined over the past six years, the share of interdealer transactions has remained fairly constant and interdealer transactions continue to represent the bulk of trading activity, whether measured in terms of notional value or number of transactions (see Figure 2).

The high level of interdealer trading activity reflects the central position of a small number of dealers who each intermediate trades among many hundreds of counterparties. While

1201 The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder. For the purpose of establishing an economic baseline, this seems to indicate that CDS market demand shrank prior to the enactment of the Dodd-Frank Act, and therefore the causes of trading volume declines may be independent of those related to the development of security-based swap market regulation. If the security-based swap market experiences further declines in trading activity, it would be difficult to identify the effects of the newly-developed security-based swap market regulation apart from changes in trading activity that may be due to natural market forces or the anticipation of (or reaction to) proposed (or adopted) Title VII requirements. These estimates differ from previous estimates as a result of staff experience with transaction-level data provided by DTCC-TIW. First, the aggregate level of transaction activity presented in Figure 2 more accurately reflects the notional amounts associated with partial assignments and terminations of existing security-based swap contracts. Second, the treatment of assignments in Figure 2 includes the counterparty type (dealer or non-dealer) of counterparties vacating trades in assignments as well as those entering.

the Commission is unable to quantify the current level of trading costs for single-name CDS, it appears that the market power enjoyed by dealers as a result of their small number and the large proportion of order flow they privately observe is a key determinant of trading costs in this market.

Figure 2: Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer.



Against this backdrop of declining North American corporate single-name CDS activity, about half of the trading activity in North American corporate single-name CDS reflected in the set of data that the Commission analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad. Basing counterparty domicile on the self-reported registered office location of the DTCC-TIW accounts, the Commission estimates that only 13%

of the global transaction volume by notional volume between 2008 and 2013 was between two U.S.-domiciled counterparties, compared to 48% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 39% entered into between two foreign-domiciled counterparties (see Figure 3).[1202]

When the domicile of DTCC-TIW accounts are instead defined according to the domicile of their ultimate parents, headquarters, or home offices (e.g., classifying a foreign branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 29%, and to 53% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.

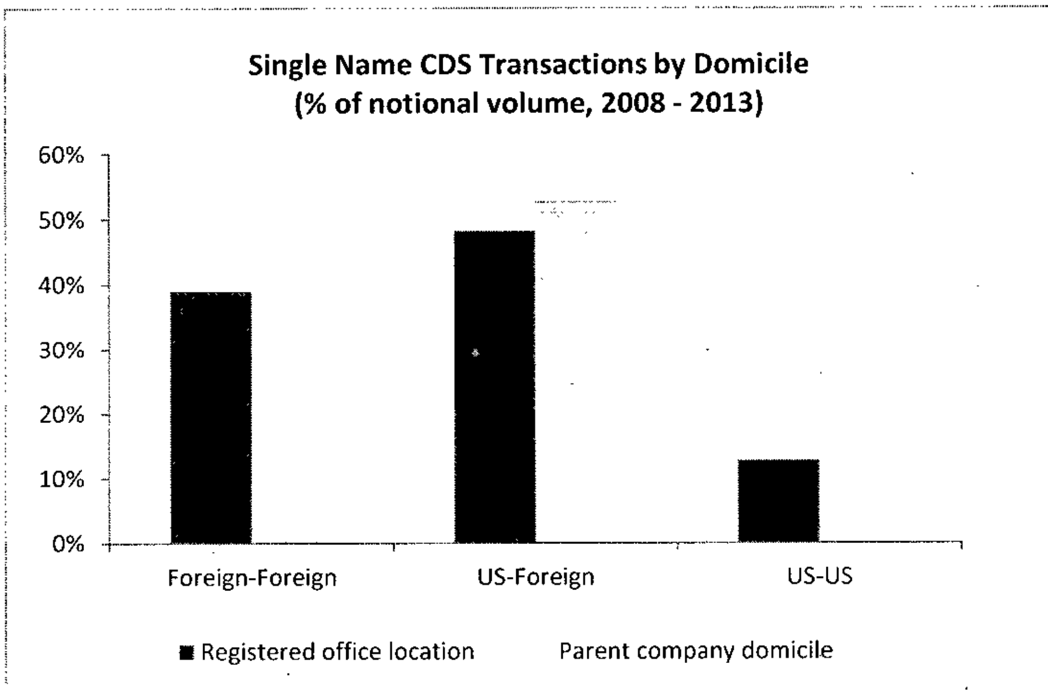
Differences in classifications across different definitions of domicile illustrate the effect of participant structures that operate across jurisdictions. Notably, the proportion of activity between two foreign-domiciled counterparties drops from 39% to 18% when domicile is defined as the ultimate parent's domicile. As noted earlier, foreign subsidiaries of U.S. persons, foreign branches of U.S. persons, and U.S. subsidiaries of foreign persons, and U.S. branches of foreign persons may transact with U.S. and foreign counterparties. However, this decrease in share suggests that the activity of foreign subsidiaries of U.S. persons and foreign branches of U.S. persons is generally higher than the activity of U.S. subsidiaries of foreign persons and U.S. branches of foreign persons.

By either of those definitions of domicile, the data indicate that a large fraction of North American corporate single-name CDS transaction volume is entered into between counterparties domiciled in two different jurisdictions or between counterparties domiciled outside the United

1202 See supra notes 788 and 1183.

States. For the purpose of establishing an economic baseline, this observation indicates that a large fraction of security-based swap activity would be affected by the scope of any cross-border approach we take in applying the Title VII requirements. Further, the large fraction of North American corporate single-name CDS transactions between U.S.-domiciled and foreign-domiciled counterparties also highlights the extent to which security-based swap activity transfers risk across geographical boundaries, both facilitating risk sharing among market participants and allowing for risk transmission between jurisdictions.

Figure 3: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2013.



Figures 4 and 5 present the frequency distribution of trades by size for two subsamples of transactions observed in 2013. A salient feature of the trade size distribution is that trades tend to be clustered at "round" numbers: $1 million, $5 million, $10 million, etc. While large and very large trades do occur, less than 1% of the transactions in our sample were for notional amounts greater than $100 million.

Figure 4: Distribution of notional trading volumes in North American corporate single-name CDS for transactions in 2013 with notional value of at most $30 million.[1203]

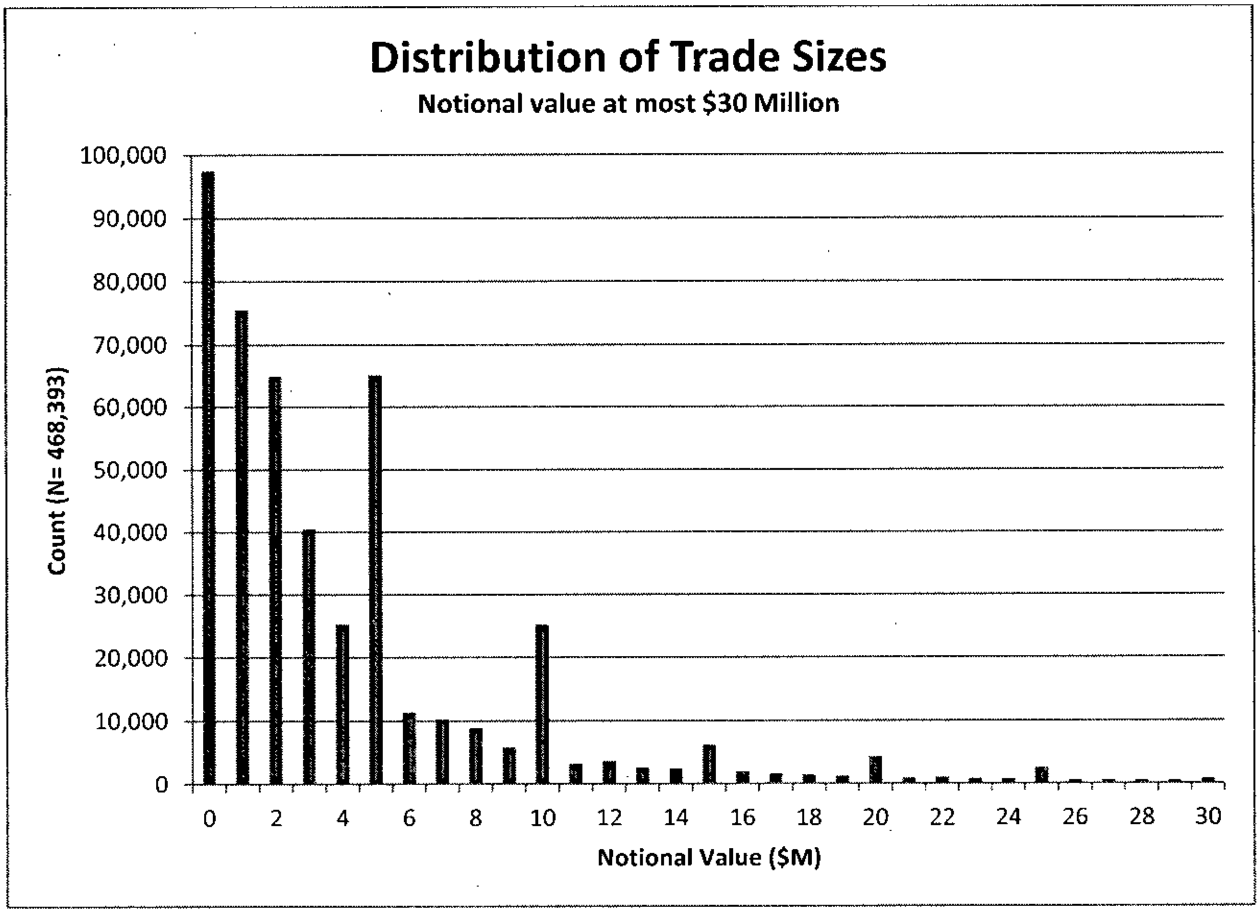
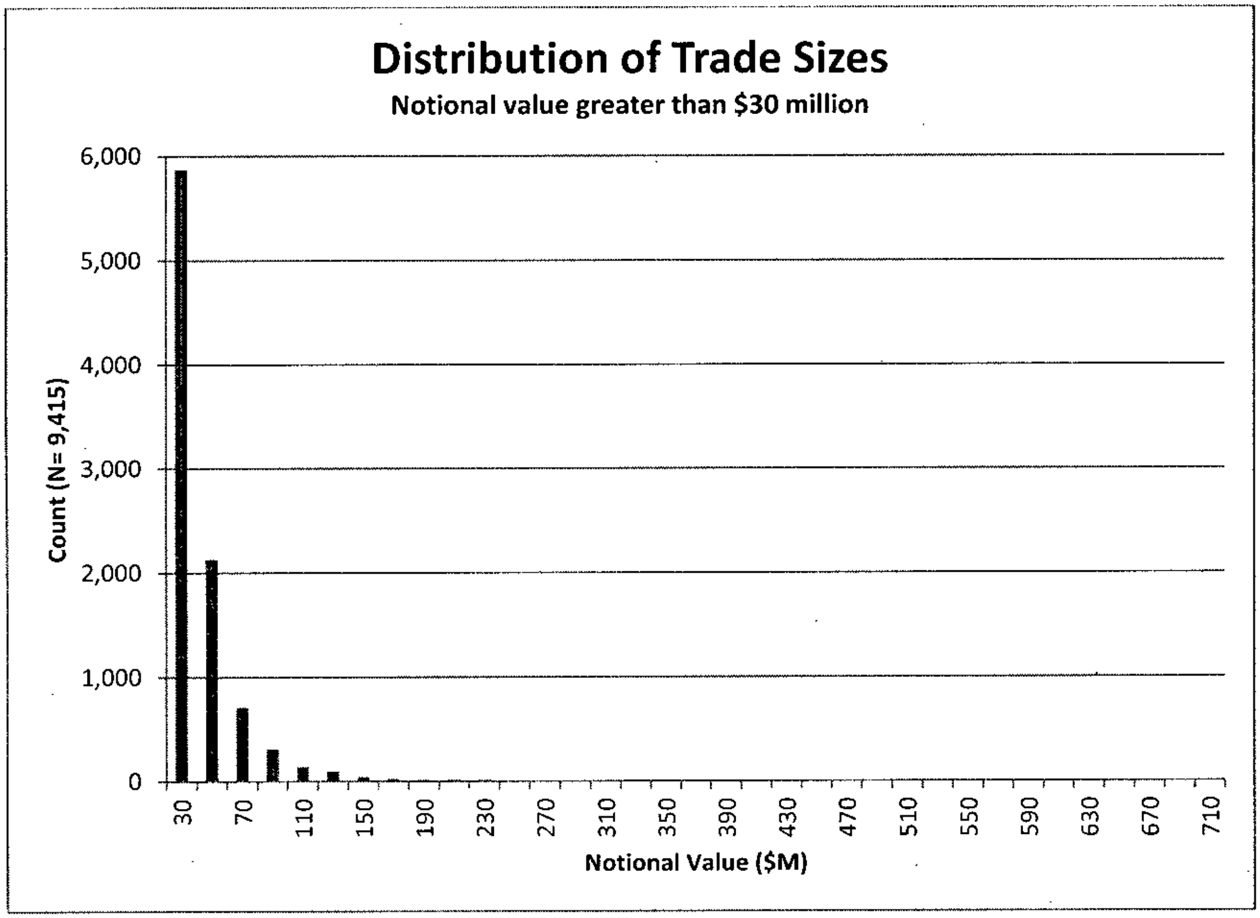


Figure 5: Distribution of notional trading volumes in North American corporate single-name CDS for transactions in 2013 with notional value of more than $30 million.[1204]

1203 The left-most bar, labeled "0", represents the number of trades with notional values greater than $0 and less than $1 million, while the next bar represents the number of trades with notional values greater than or equal to $1 million and less than $2 million, and so on. The right-most bar, labeled "30", represents the number of trades with notional values of exactly $30 million.



c. Counterparty Reporting

While there is no mandatory reporting requirement for the single-name CDS market yet, virtually all market participants voluntarily report their trades to DTCC-TIW, in some cases with

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1204 The left-most bar, labeled "30", represents the number of trades with notional values greater than $30 and less than $50 million, while the next bar represents the number of trades with notional values greater than or equal to $50 million and less than $70 million, and so on. The right-most bar, labeled "710", represents the number of trades with notional value greater than $710 million.

the assistance of post-trade processors, which maintains a legal record of transactions.[1205] Among other things, this centralized record-keeping facilitates settlement of obligations between counterparties when a default event occurs as well as bulk transfers of positions between accounts at a single firm or between firms. In addition, while there is not yet a mandatory clearing requirement in the single-name CDS market, market participants may choose to clear transactions voluntarily. However, neither voluntary reporting nor voluntary clearing results in data that are available to the public on a trade-by-trade basis.

In the Regulation SBSR Proposing Release, the Commission preliminarily estimated that there would be 1,000 reporting parties[1206] and 15.5 million reportable events per year.[1207] In the Cross-Border Proposing Release, the Commission revised its estimate of the number of reporting sides from 1,000 to 300 and revised its estimate of the number of reportable events from 15.5 million to approximately 5 million.[1208] These revised estimates were a result of the Commission obtaining additional and more granular data regarding participation in the security-based swap market from DTCC-TIW. As discussed above, since issuing the Cross-Border Proposing Release, the Commission has obtained additional and even more granular data regarding participation in the security-based swap market from DTCC-TIW. As a result, the Commission is now further revising its estimate of the number of reportable events. Accordingly, the

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1205 See "ISDA CDS Marketplace: Exposures and Activity" (available at http://www.isdacdsmarketplace.com/exposures_and_activity (last visited September 22, 2014).

1206 See 75 FR at 75247.

1207 See id. at 75248.

1208 See 78 FR at 31114.

Commission now estimates that 300 reporting sides will be required to report an aggregate total of approximately 3 million reportable events per year under Rule 901, as adopted.[1209]

Table 3: Trade reports by transaction type, 2013.

	Count
Interdealer	1,231,796
Dealer - Non-Dealer	482,860
Clearinghouse	546,041
Total	2,260,577

d. Sources of Security-Based Swap Information

There currently is no robust, widely accessible source of information about individual security-based swap transactions. Nevertheless, market participants can gather certain limited information for the single-name CDS[1210] market from a variety of sources. First, indicative quotes can be obtained through market data vendors such as Bloomberg or Markit. These quotes typically do not represent firm commitments to buy or sell protection on particular reference entities. Since there is no commitment to buy or sell associated with indicative quotes, there are fewer incentives for market participants that post indicative quotes to quote prices that accurately reflect the fundamental value of the asset to be traded. However, market participants can glean information from indicative quotes that may inform their trading.

Second, there is limited, publicly-disseminated information about security-based swap market activity presented at an aggregate level. As mentioned above, market participants

1209 See supra note 1070.

1210 Regulation SBSR would also cover equity swaps (other than broad-based equity index swaps). However, the Commission has access to limited information concerning the equity swap market. As a result, the Commission's analysis is largely focused on the single-name CDS market, for which the Commission has information.

sometimes voluntarily clear their transactions, e.g., through ICE Clear Credit.[1211] To support their risk management activities, clearing agencies compute and disseminate information such as end-of-day prices and aggregated volume to their clearing members. ICE Clear Credit also provides aggregated volume data.[1212] Additionally, some large multilateral organizations periodically report measures of market activity. For example, the Bank for International Settlements ("BIS") reports gross notional outstanding for single-name CDS and equity forwards and swaps semiannually.[1213]

Finally, market intermediaries may draw inferences about security-based swap market activity from observing their customers' order flow or through inquiries made by other market participants who seek liquidity. This source of information is most useful for market participants with a large market share. As noted above, the ability to observe a larger amount of order flow allows for more precise estimates of demand.

The paucity of publicly-available security-based swap data suggests a number of frictions that likely characterize the current state of efficiency, competition, and capital formation in the security-based swap market. As noted in Section XXII(A), without public dissemination of transaction information, security-based swap market participants with the largest order flow have an informational advantage over smaller competitors and counterparties. Moreover, as suggested by Table 1, there is a great deal of heterogeneity in the level of order flow observed by market

[1211] Based on the transaction data from the DTCC-TIW, Commission staff has estimated that, during the three-year period from January 2011 until December 2013, approximately 21% of all transactions in CDS with North American single-name corporate reference entities and approximately 21% of all transactions in CDS with European single-name corporate reference entities were cleared.

[1212] Available at https://www.theice.com/marketdata/reports/98 (last visited October 20, 2014).

[1213] Available at http://www.bis.org/statistics/derstats.htm (last visited October 20, 2014).

participants, with a small group of large dealers participating in most transactions. These large market participants can use this advantage to consolidate their own market power by strategically filling orders when it is to their advantage and leaving less profitable trades to competitors.

Asymmetric information and dealer market power can result in financial market inefficiencies. With only a small number of liquidity suppliers competing for order flow, bid-ask spreads in the market may be wider than they would be under perfect competition between a larger number of liquidity suppliers. If this is the case, then it is possible that certain non-dealers who might otherwise benefit from risk-sharing afforded by security-based swap positions may avoid participating in the market because it is too costly for them to do so. For instance, if wide bid-ask spreads in the CDS market reduced the level of credit risk hedging by market participants, the result could be an inefficient allocation of credit risk in the economy as a whole. Additionally, financial market participants may avoid risk-sharing opportunities in the security-based swap market if they determine that lack of oversight by relevant authorities leaves the market prone to disruption. For example, if the threat of sequential counterparty default reduces security-based swap dealers' liquidity, then market participants may reduce their participation if they perceive a high risk that they will be unable to receive the contractual cash flows associated with their security-based swap positions. These sources of inefficiency can adversely affect capital formation if an inability for lenders and investors to efficiently hedge their economic exposures diminishes their willingness to fund certain borrowers and issuers with risky but profitable investing opportunities.

Lack of publicly-available transaction information could affect capital formation in other ways. Information about security-based swap transactions can be used as input into valuation models. For example, the price of a single-name CDS contract can be used to produce estimates of default risk for a particular firm and these estimates can, in turn, be used by managers and investors to value the firm's projects. In the absence of last-sale information in the CDS market, market participants may build models of default risk using price data from other markets. They may, for instance, look to the firm's bond and equity prices, the prices of swaps that may have similar default risk exposure, or to the prices of comparable assets more generally.

2. Global Regulatory Efforts

a. Dealer and Major Swap Participant Definitions for Cross-Border Security-Based Swaps

The Commission adopted final rules governing the application of the "security-based swap dealer" and "major security-based swap participant" definitions with respect to cross-border security-based swap activity and exposures.[1214] The final rules generally require, among other things, that non-U.S. persons assess whether their dealing activities with and exposures against U.S. persons or with recourse guarantees against U.S. persons rise above de minimis levels.[1215] In the Cross-Border Adopting Release, the Commission discussed the costs that non-U.S. persons would incur in order to perform this assessment and the likely number of participants whose activity and exposures would likely be large enough to make such an assessment prudent.[1216] These costs included amounts related to collecting, analyzing, and monitoring representations about the U.S.-person status of counterparties, and whether particular transactions had recourse guarantees against U.S. persons.[1217]

1214 See Cross-Border Adopting Release, 79 FR at 47278.

1215 See id. at 47301.

1216 See id. at 47315.

1217 See id. at 47332.

b. International Regulatory Developments

International efforts to coordinate the regulation of the OTC derivatives markets are underway, and suggest that many foreign participants will face substantive regulation of their security-based swap activities that resemble rules the Commission is implementing. In 2009, leaders of the Group of 20 ("G20")—whose membership includes the United States, the European Union, and 18 other countries—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets.[1218] In subsequent summits, the G20 leaders have reiterated their commitment to OTC derivatives regulatory reform and encouraged international consultation in developing standards for these markets.[1219] The FSB is a forum for international coordination of OTC derivatives reform and provides progress reports to the G20.[1220]

Jurisdictions with major OTC derivatives markets have taken steps toward substantive regulation of these markets, though the pace of regulation varies. Rulemaking and legislation has focused on four general areas: post-trade reporting and public dissemination of transaction

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1218 See G20 Meeting, Pittsburgh, United States, September 2009, available at: http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf (last visited September 22, 2014).

1219 See, e.g., G20 Meeting, St. Petersburg, Russia, September 2013, para. 71, available at https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf (last visited September 22, 2014); G20 Meeting, Cannes, France, November 2011, available at https://www.g20.org/sites/default/files/g20_resources/library/Declaration_eng_Cannes.pdf (last visited September 22, 2014).

1220 The FSB has published seven progress reports on OTC derivatives markets reform implementation that are available at http://www.financialstabilityboard.org/list/fsb_publications/index.htm.

data, moving OTC derivatives onto centralized trading platforms, clearing of OTC derivatives, and margin requirements for OTC derivatives transactions.

Transaction reporting requirements have entered into force in Europe, Australia, Singapore, and Japan, with other jurisdictions in the process of proposing legislation and rules to implement these requirements. For example, in Canada, Ontario, Quebec, and Manitoba have transaction reporting requirements in force, while other provinces have proposed rules in that area. The European Union is currently considering updated rules for markets in financial instruments that will address derivatives market transparency and trading derivatives on regulated trading platforms.

3. Cross-Market Participation

A single-name CDS contract covers default events for a single reference entity or reference security. These entities and securities are often part of broad-based indices on which market participants write index CDS. Index CDS contracts make payouts that are contingent on the default of one or more index components and allow participants to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. As a result of this construction, a default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name and index CDS, prices of these products depend upon one another.

Because payoffs associated with these single-name CDS and index CDS are dependent, hedging opportunities exist across these markets. Participants who sell protection on reference entities through a series of single-name CDS transactions can lay off some of the credit risk of their resulting positions by buying protection on an index that includes those reference entities. Entities that are active in one market are likely to be active in the other. Commission staff analysis of approximately 4,200 DTCC-TIW accounts that participated in the market for single-name CDS in 2013 revealed that approximately 2,200 of those accounts, or 52%, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2013 suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 62%; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 15%.

The CFTC's cross-border guidance and swap reporting rules have likely influenced the information that market participants collect and maintain about the swap transactions they enter into and the counterparties that they face.[1221] Compliance with the CFTC's cross-border guidance and swap reporting rules would require swap counterparties to collect and maintain data items required by the CFTC regulation if they had not done so before. To the extent that the same or similar information is needed to comply with Regulation SBSR, market participants can use infrastructure already in place as a result of CFTC regulation to comply with Regulation SBSR and the costs to these market participants would be reduced.

[1221] See "Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations" (July 17, 2013), 78 FR 45292 (July 26, 2013) ("CFTC Cross-Border Guidance"). See also Sec. Indus. & Fin. Mkts. Ass'n v. CFTC, Civil Action No. 13-1916 (PLF), slip op. at 89 (D.D.C. September 16, 2014).

Commenters generally expressed concern about potential differences between CFTC rules and rules promulgated by the Commission.[1222] In adopting Regulation SBSR, the Commission has been cognizant of the parallel rules imposed by the CFTC and the costs that would be imposed on market participants that must comply with both agencies' rules.

C. Programmatic Costs and Benefits of Regulation SBSR

The Commission preliminarily identified certain benefits of Regulation SBSR in both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release. After careful consideration of all the issues raised by commenters, the Commission continues to believe that Regulation SBSR will result in certain benefits. These include promoting price discovery and lowering trading costs by improving the level of information to all market participants and by providing a means for the Commission and relevant authorities to gain a better understanding of the trading behaviors of participants in the security-based swap market and to identify large counterparty exposures.[1223] Additionally, the Commission believes that Regulation SBSR will improve risk management by those market participants that choose to supplement their existing risk management programs with publicly disseminated data. Risk management relies on accurate pricing, and valuation models generally yield better estimates with last-sale information being available as input.

1222 See, e.g., SIFMA/FIA/Roundtable Letter at 3.

1223 See Sections XXII(B)(1)(b), XXII(C)(2), and XXII(D)(2)(b). See also Amy K. Edwards, Lawrence Harris, & Michael S. Piwowar, Corporate Bond Market Transparency and Transaction Costs, J. of Fin., Vol. 62, at 1421-1451 (2007). It should be noted that Michael Piwowar, one of the co-authors of the first article cited, is currently an SEC Commissioner, and Amy Edwards, another of that article's co-authors, currently serves as an Assistant Director in the Commission's Division of Economic and Risk Analysis.

1. Regulatory Reporting

a. Programmatic Benefits

Rule 901, as adopted, requires all security-based swaps that are covered transactions[1224] to be reported to a registered SDR, establishes a "reporting hierarchy" that determines which side must report the transaction, and sets out the data elements that must be reported. The Commission believes that requiring regulatory reporting of covered transactions will yield a number of benefits. First, Rule 901 will provide a means for the Commission and other relevant authorities to gain a better understanding of the security-based swap market,[1225] including the size and scope of that market, as the Commission would have access to transaction data held by any registered SDR. The Commission and other relevant authorities can analyze the security-based swap market and potentially identify exposure to risks undertaken by individual market participants or at various levels of aggregation, as well as credit exposures that arise between counterparties. Additionally, regulatory reporting will help the Commission and other relevant authorities in the valuation of security-based swaps. For example, an improved ability of relevant authorities to value security-based swap exposures may assist these authorities in assessing compliance with rules related to capital requirements by entities that maintain such exposures on their balance sheets. Taken together, regulatory data will enable the Commission and other relevant authorities to conduct robust monitoring of the security-based swap market for potential risks to financial markets and financial market participants.

Second, data reported pursuant to Rule 901 should improve relevant authorities' ability to oversee the security-based swap market to detect, deter, and punish market abuse. The

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1224 See supra notes 11-12 and accompanying text.

1225 Such relevant authorities are enumerated in Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G). See supra note 64.

Commission and other relevant authorities will be able, for example, to observe trading activity at the level of both trading desk and individual trader, using trading desk IDs and trader IDs, respectively. While the Commission acknowledges commenters' concerns regarding the costs associated with establishing and maintaining UICs, it has considered these costs in light of its belief that aggregation of the information contained in registered SDRs using appropriate UICs—such as broker ID, trader ID, and trading desk ID—will facilitate the ability of the Commission and other relevant authorities to examine for noncompliance and pursue enforcement actions, as appropriate.[1226]

Rule 901 could result in benefits by encouraging the creation and widespread use of generally accepted standards for reference information by security-based swap market participants and infrastructure providers (such as SDRs and clearing agencies). For example, Rule 901(c)(1) requires the reporting of a product ID, for security-based swaps that can be categorized as belonging to a product group. The development and wider usage of product IDs could result in greater efficiencies for market participants, infrastructure providers, and regulators, as identifying information about security-based swap products can be conveyed with a single ID code in place of several, perhaps dozens, of separate data elements. The development and wider usage of UICs generally will provide market participants with a more reliable means of identifying to each other the same products, persons, units of persons, and transactions. The costs associated with misidentifying these aspects of a transaction include additional time and resources spent to reconcile differing data elements across transaction records. Misidentification could also result in the cancellation of a transaction if, for example, it

[1226] See supra notes 160 and 162.

reveals disagreement between counterparties about the economic attributes of the transaction, such as the reference obligation underlying a CDS contract.

UICs also could lead to greater regulatory efficiencies, as the Commission and other relevant authorities would have greater ability to aggregate transactions along a number of different vectors. Relevant authorities will have greater ability to observe patterns and connections in trading activity, such as whether a trader had engaged in questionable trading activity across different security-based swap products. The reporting of this information will facilitate more effective oversight, enforcement, and surveillance of the security-based swap market by the Commission and other relevant authorities. These identifiers also will facilitate aggregation and monitoring of the positions of security-based swap counterparties, which could be of significant benefit to the Commission and other relevant authorities.

The time stamp and transaction ID requirements under Rules 901(f) and 901(g), respectively, should facilitate data management by the registered SDR, as well as market supervision and oversight by the Commission and other regulatory authorities. The transaction ID required by Rule 901(g) also will provide an important benefit by facilitating the linking of subsequent, related security-based swap transactions that may be submitted to a registered SDR (e.g., a transaction report regarding a security-based swap life cycle event, or report to correct an error in a previously submitted report). Counterparties, the registered SDR, the Commission, and other relevant authorities also will benefit by having the ability to track changes to a security-based swap over the life of the contract, as each change can be linked to the initially reported transaction using the transaction ID.

By requiring reporting of pre-enactment and transitional security-based swap transactions to the extent the information is available, Rule 901(i) will provide the Commission and other relevant authorities with insight as to outstanding notional size, number of transactions, and number and type of participants in the security-based swap market. To the extent pre-enactment and transitional security-based swap transaction information is available and reported, Rule 901(i) may contribute to the development of a well regulated market for security-based swaps by providing a benchmark against which to assess the development of the security-based swap market over time. The data reported pursuant to Rule 901(i) also could help the Commission prepare the reports that it is required to provide to Congress. At the same time, Rule 901(i) limits the scope of the transactions, and the information pertaining to those transactions, that must be reported in a manner designed to minimize undue burdens on security-based swap counterparties. First, Rule 901(i) requires reporting only of those security-based swaps that were open as of the date of enactment (July 21, 2010) or opened thereafter. As discussed in Section II(C)(2), supra, Rule 901(i) requires reporting of the information required by Rules 901(c) and 901(d) only to the extent such information is available. Finally, the duty to report historical security-based swaps in a particular asset class is triggered only when there exists a registered SDR that can accept security-based swaps in that asset class.

b. Programmatic Costs

i. Reporting Security-Based Swap Transactions to a Registered SDR—Rule 901

The security-based swap reporting requirements contained in Rule 901 will impose initial and ongoing costs on reporting sides.[1227] The Commission continues to believe that certain of

[1227] Certain estimates used throughout this Section XXII (e.g., the number of impacted entities, the number of reportable events, and the hourly cost rates used for each job category) have been updated from those estimated in the Cross-Border Proposing Release to reflect the rule text of Regulation SBSR, as adopted, as well as additional information and data now available to the Commission.

these costs would be a function of the number of reportable events and the data elements required to be submitted for each reportable event. The Commission continues to believe that security-based swap market participants will face three categories of costs to comply with Rule 901. First, each reporting side will likely have to establish and maintain an internal OMS capable of capturing relevant security-based swap transaction information so that it could be reported. Second, each reporting side will have to implement a reporting mechanism. Third, each reporting side will have to establish an appropriate compliance program and support for operating any OMS and reporting mechanism.[1228] Such systems and mechanisms would likely be necessary to report data within the timeframe set forth in Rule 901(j), as it is unlikely that manual processes could capture and report the numerous required data elements relating to a security-based swaps. Many market participants may already have OMSs in place to facilitate voluntary reporting of security-based swap transactions or clearing activity. As a result, any additional costs related to systems and infrastructure will be limited to those reporting sides that either invest in new systems or must upgrade existing systems to meet minimum requirements for reporting. To the extent that the cost estimates discussed below do not take this cost limiting fact into account, they are an upper bound for the estimated costs.

Although the Commission initially estimated that there would be 1,000 reporting sides,[1229] in the Cross-Border Proposing Release the Commission revised that estimate to 300.[1230] No comments were received on the number of entities that would be reporting sides under Regulation SBSR. The Commission notes that, since issuing the Regulation SBSR Proposing

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1228 See also Regulation SBSR Proposing Release, 75 FR at 75264.

1229 See id. at 75247.

1230 See Cross-Border Proposing Release, 78 FR at 31113.

Release, the Commission has obtained additional and more granular data regarding its estimate of the number of reporting sides. These historical data suggest that, among these 300 reporting sides, approximately 50 are likely to be required to register with the Commission as security-based swap dealers and up to five are likely to register as major security-based swap participants.[1231] These data further suggest that these 55 potential registrants likely will account for the vast majority of recent security-based swap transactions and transaction reports that will need to be reported by reporting sides, and that there are only a limited number of security-based swap transactions that do not include at least one of these potential registrants on either side.[1232]

The Commission estimates that internal order management costs related to Rule 901 will result in initial one-time aggregate costs of approximately $30,600,000, which corresponds to approximately $102,000 for each reporting side.[1233] The Commission continues to estimate that the cost to establish and maintain connectivity to a registered SDR to facilitate the reporting required by Rule 901 would impose an annual (first-year and ongoing) aggregate cost of

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1231 See id. at 31103.

1232 As a result, the Commission generally will use 300 as an estimate of the number of reporting sides for §§ 900-909 of Regulation SBSR. In cases where a rule is more limited in its application, for example Rule 906(c), the Commission may use a different number that reflects some subset of the estimated 300 reporting sides.

1233 This estimate is based on the following: [((Sr. Programmer (160 hours) at $303 per hour) + (Sr. Systems Analyst (160 hours) at $260 per hour) + (Compliance Manager (10 hours) at $283 per hour) + (Director of Compliance (5 hours) at $446 per hour) + (Compliance Attorney (20 hours) at $334 per hour)) x 300 reporting sides)] = $30,546,000, or approximately $30,600,000, or approximately $102,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75264. These estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides. All hourly cost figures are based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the SEC staff to account for an 1800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead).

approximately $60,000,000, which corresponds to $200,000 for each reporting side.[1234] The Commission continues to estimate, as a result of having to establishing a reporting mechanism for security-based swap transactions, reporting sides will experience certain development, testing and support costs. Such costs would amount to an initial one-time aggregate cost of approximately $14,700,000, which corresponds to an initial one-time cost of approximately $49,000 for each reporting side.[1235] The Commission estimates that internal order management costs related to Rule 901 will impose ongoing annual aggregate costs of approximately $23,100,000, which corresponds to approximately $77,000 per reporting side.[1236] In addition,

1234 This estimate is based on discussions of Commission staff with various market participants, as well as the Commission's experience regarding connectivity between securities market participants for data reporting purposes. The Commission derived the total estimated expense from the following: ($100,000 hardware- and software-related expenses, including necessary backup and redundancy, per SDR connection) x (2 SDR connections per reporting side) x (300 reporting sides) = $60,000,000, or $200,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75265. These estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides.

1235 This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer (80 hours) at $303 per hour) + (Sr. Systems Analyst (80 hours) at $260 per hour) + (Compliance Manager (5 hours) at $283 per hour) + (Director of Compliance (2 hours) at $446 per hour) + (Compliance Attorney (5 hours) at $334 per hour) x (300 reporting sides)] = $14,705,100, or approximately $14,700,000, or approximately $49,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75265, adjusted to reflect the Commission's new estimate of the number of reporting sides.

1236 This estimate is based on the following: [((Sr. Programmer (32 hours) at $303 per hour) + (Sr. Systems Analyst (32 hours) at $260 per hour) + (Compliance Manager (60 hours) at $283 per hour) + (Compliance Clerk (240 hours) at $64 per hour) + (Director of Compliance (24 hours) at $446 per hour) + (Compliance Attorney (48 hours) at $334 per hour)) x 300 reporting sides)] = $23,127,600, or approximately $23,100,000, or approximately $77,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75264-5, adjusted to reflect the Commission's new estimate of the number of reporting sides.

the Commission estimates that all reporting sides will incur an initial and ongoing aggregate annual cost of $300,000, which corresponds to $1,000 for each reporting side.[1237]

The Commission, in the Regulation SBSR Proposing Release, estimated that reporting specific security-based swap transactions to a registered SDR as required by Rule 901 will impose an annual aggregate cost (first-year and ongoing) of approximately $5,400 for each reporting party.[1238] This estimate was revised in the Cross-Border Proposing Release and this adopting release to reflect improved information relating to the number of transactions and reporting sides. The Commission believes that the cost of reporting initial security-based swap transactions under Rule 901(c) will be approximately $340,000, or approximately $1,100 per reporting side.[1239] The Commission further believes that the cost of reporting life cycle events under Rule 901(e) will be approximately $415,000, or approximately $1,400 per reporting side.[1240] As a result, the Commission believes that the total cost (first-year and ongoing) of

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1237 This estimate is based on discussion of Commission staff with various market participants and is calculated as follows: [$250/gigabyte of storage capacity x (4 gigabytes of storage) x (300 reporting sides)] = $300,000, or $1,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75265, adjusted to reflect the Commission's new estimate of the number of reporting sides.

1238 See Regulation SBSR Proposing Release, 75 FR 75208, notes 195 and 299.

1239 The Commission believes that 900,000 of the 2 million reportable events will be the result of reporting the initial security-based swap transaction under Rule 901(c). As a result, the Commission estimates: ((900,000 x 0.005 hours per transaction) / (300 reporting sides)) = 15 burden hours per reporting side, or 4,500 total burden hours. The resulting cost of such reporting would be: [((Compliance Clerk (7.5 hours) at $64 per hour) + (Sr. Computer Operator (7.5 hours) at $87 per hour)) x (300 reporting sides)] = approximately $340,000, or $1,133 per reporting side.

1240 The Commission believes that 1,100,000 of the 2 million reportable events will be the result of reporting life cycle events under Rule 901(e). As a result, the Commission estimates: ((1,100,000 x 0.005 hours per transaction) / (300 reporting sides)) = 18.33 burden hours per reporting side, or 5,500 total burden hours. The resulting cost of such reporting would be: [((Compliance Clerk (9.17 hours) at $64 per hour) + (Sr. Computer reporting security-based swap transactions under Rule 901, as adopted, will be approximately $750,000, or $2,500 per reporting side.[1241]

The Commission estimates that designing and implementing an appropriate compliance and support program will impose an initial one-time aggregate cost of approximately $16,200,000, which corresponds to a cost of approximately $54,000 for each reporting side.[1242]

The Commission estimates that maintaining its compliance and support program would impose an ongoing annual aggregate cost of approximately $11,550,000, which corresponds to a cost of approximately $38,500 for each reporting side.[1243]

Operator (9.17 hours) at $87 per hour)) x (300 reporting sides)] = approximately $415,000, or $1,383 per reporting side.

1241 The Commission believes that the per reportable event transaction cost will not change and that only approximately 2 million of these events will be reported by the reporting sides. As a result, the Commission now estimates: ((2 million x 0.005 hours per transaction) / (300 reporting sides)) = 33.3 burden hours per reporting side, or 10,000 total burden hours. The Commission therefore estimates the total cost to be: [((Compliance Clerk (16.7 hours) at $64 per hour) + (Sr. Computer Operator (16.7 hours) at $87 per hour)) x (300 reporting sides)] = approximately $750,000, or $2,500 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75208, notes 195 and 299. These estimates have been adjusted to reflect the Commission's new estimates of the number of reporting sides and number of reportable events.

1242 This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer (100 hours) at $303 per hour) + (Sr. Systems Analyst (40 hours) at $260 per hour) + (Compliance Manager (20 hours) at $283 per hour) + (Director of Compliance (10 hours) at $446 per hour) + (Compliance Attorney (10 hours) at $334 per hour) x (300 reporting sides)] = approximately $16,200,000, or $54,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75266. These estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides.

1243 This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer (16 hours) at $303 per hour) + (Sr. Systems Analyst (16 hours) at $260 per hour) + (Compliance Manager (30 hours) at $283 per hour) + (Compliance Clerk (120 hours) at $64 per hour) + (Director of Compliance (12 hours) at $446 per hour) + (Compliance Attorney (24 hours) at $334 per hour) x (300 reporting sides)] = $11,563,800, or approximately $11,550,000, or approximately $38,500 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75266. These

Summing these costs, the Commission estimates that the initial, aggregate annual costs associated with Rule 901 would be approximately $157,200,000, which corresponds to approximately $524,000 per reporting side.[1244] The Commission estimates that the ongoing aggregate annual costs associated with Rule 901 will be approximately $95,700,000, which corresponds to approximately $319,000 per reporting side.[1245]

The Commission continues to believe that the costs associated with required reporting pursuant to Regulation SBSR could represent a barrier to entry for new, smaller firms that might not have the ability to comply with the proposed reporting requirements or for whom the expected benefits of compliance might not justify the costs of compliance. To the extent that Regulation SBSR might deter new firms from entering the security-based swap market, this would be a cost of the regulation and could negatively impact competition. Nevertheless, the Commission continues to believe that the reporting requirements will not impose insurmountable barriers to entry, as firms that are reluctant to acquire and build reporting infrastructure could engage with third-party service providers to carry out any reporting duties incurred under Regulation SBSR.[1246]

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estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides.

1244 This estimate is based on the following: (($102,000 + $200,000 + $49,000 + $2,500 +$54,000 +$77,000 + $1,000 + $38,500) x (300 reporting sides)) = $157,200,000, which corresponds to approximately $524,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75264-6. These estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides.

1245 This estimate is based on the following: (($200,000 +$2,500 + $77,000 + $1,000 + $38,500) x (300 reporting sides)) = $95,700,000, or approximately $319,000 per reporting side. See Regulation SBSR Proposing Release, 75 FR at 75264-66. These estimates have been adjusted to reflect the Commission's new estimate of the number of reporting sides.

1246 See also Regulation SBSR Proposing Release, 75 FR at 75266.

In the Cross-Border Proposing Release, the Commission stated its preliminary belief that the infrastructure-related costs identified in the Regulation SBSR Proposing Release associated with Rule 901, on a per-entity basis, would remain largely unchanged as a result of the re-proposal. The Commission preliminarily estimated and continues to believe that the marginal burden of reporting additional transactions once a respondent's reporting infrastructure and compliance systems are in place would be de minimis when compared to the costs of putting those systems in place and maintaining them over time. This is because the only additional costs of reporting an individual transaction would be entering the required data elements into the firm's OMS, which could subsequently deliver the required transaction information to a registered SDR. In many cases, particularly with increased standardization of instruments and use of electronic trading, transaction information could more frequently be generated and maintained in electronic form, which could then be provided to a registered SDR through wholly automated processes. The Commission does not believe that the additional changes made to Rule 901 in this adopting release will have any measureable impact on the costs previously discussed in both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release. As a result, the Commission believes that these previous estimates remain applicable.

In the Cross-Border Proposing Release, the Commission noted that each reporting side would be required to report, on average, more security-based swap transactions than envisioned under the original proposal. The Commission further noted that smaller unregistered counterparties, that would have been required to report a small number of security-based swap transactions under the original proposal would, under re-proposed Rule 901(a), be less likely to have to incur reporting duties under Regulation SBSR, and thus less likely to have to incur the initial infrastructure-related costs of reporting.[1247] The Commission noted its preliminary agreement with certain commenters[1248] that basing the reporting duty primarily on status as a security-based swap dealer or major security-based swap participant rather than on whether or not the entity is a U.S. person would, in the aggregate, reduce costs to the security-based swap market.

In the Cross-Border Proposing Release, the Commission noted two additional factors that could serve to limit the average per-transaction costs across all affected entities. First, to the extent that security-based swap instruments become more standardized and trade more frequently on electronic platforms (rather than manually), the act of reporting transactions to a registered SDR should become less costly. These trends are likely to reduce the number of transactions that would necessitate the manual capture of bespoke data elements, which is likely to take more time and be more expensive than electronic capture. Second, the larger entities that would incur additional reporting duties under re-proposed Rules 901(a) and 908(a)(1)(iii)—i.e., non-U.S. person security-based swap dealers and major security-based swap participants—can benefit from certain economies of scale in carrying out reporting duties that might elude smaller, unregistered counterparties. The Commission continues to believe that these factors could limit the average per-transaction costs across all affected entities. However, the extent of these effects

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1247 The Commission notes, however, that non-reporting sides would be required to provide certain information about a reportable transaction. See Rule 906(a), as originally proposed (requiring reporting, if applicable, of participant ID, broker ID, trading desk ID, and trader ID). See also Regulation SBSR Proposing Release, 75 FR at 75221 (discussing rationale for proposed Rule 906(a)).

1248 See, e.g., DTCC II at 8; ICI Letter at 5; Cleary III at 31. See also Vanguard Letter at 6; Cleary III at 28 (stating that requiring U.S. end users to report security-based swaps entered into with non-U.S. person security-based swap dealers would be unduly burdensome for end users and could negatively impact the competitiveness of affected U.S. markets).

is difficult to quantify. It is difficult to predict how many transactions each reporting side will report under manual versus electronic capture. Furthermore, the Commission currently does not have information about the exact reporting systems and the associated cost structures of reporting sides. Therefore, while the Commission has considered the likely effects of electronic trade capture and more concentrated reporting obligations qualitatively, as above, the Commission is not able to quantify these effects.

After reviewing comment letters received in response to the Regulation SBSR Proposing Release and the Cross-Border Proposing Release, as well as evaluating the most recent data available to the Commission, the Commission believes that these cost estimates, as adjusted to account for more recent data on the number of reporting sides, remain valid. The Commission has received no comments to the contrary.

ii. Registered SDRs—Receipt and Processing of Security-Based Swap Transactions—Rule 901

Rule 901, as adopted, requires all security-based swaps that are covered transactions[1249] to be reported to a registered SDR, establishes a "reporting hierarchy" that determines which side must report the transaction, and sets out the data elements that must be reported. Together, sections (a), (b), (c), (d), (e), and (h) of Rule 901 set forth the parameters that govern how reporting sides must report security-based swap transactions. Rule 901(i) addresses the reporting of pre-enactment and transitional security-based swaps.

In both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release, the Commission discussed the potential costs to registered SDRs resulting from Rule 901. The Commission preliminarily estimated that the number of registered SDRs would not

[1249] See supra notes 11-12 and accompanying text.

exceed ten in both releases. No comments discussed the potential number of entities that might register with the Commission as SDRs and incur duties under Regulation SBSR. The Commission continues to believe that it is reasonable to estimate ten registered SDRs for purposes of evaluating the costs and benefits of Regulation SBSR.

As discussed above, Rule 901 imposes certain minor, additional requirements on registered SDRs, in addition to the major duties imposed on SDRs by Rules 902 and 907 of Regulation SBSR and the rules adopted as part of the SDR Adopting Release. Rule 901(f) requires a registered SDR to time stamp, to the lowest second increment practicable but in any event no greater than a second, its receipt of any information submitted to it pursuant to Rules 901(c), (d), or (e). Rule 901(g) requires a registered SDR to assign a transaction ID to each security-based swap reported or establish or endorse a methodology for transaction IDs to be assigned by third parties. Consequently, the Commission estimates that Rules 901(f) and 901(g) will impose an initial aggregate one-time cost of approximately $360,000, which corresponds to $36,000 per registered SDR.[1250] With regard to ongoing costs, the Commission estimates that Rules 901(f) and 901(g) would impose an ongoing aggregate annual cost of $455,000, which corresponds to $45,500 per registered SDR.[1251] This figure represents an estimate of the support

1250 This figure is calculated follows: [((Sr. Programmer (80 hours) at $303 per hour) + (Sr. Systems Analyst (20 hours) at $260 per hour) + (Compliance Manager (8 hours) at $283 per hour) + (Director of Compliance (4 hours) at $446 per hour) + (Compliance Attorney (8 hours) at $334 per hour) x (10 registered SDRs)] = $361,600, or approximately $360,000. All hourly cost figures are based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the SEC staff to account for an 1,800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead). See also Regulation SBSR Proposing Release, 75 FR at 75266, note 309.

1251 This figure is calculated as follows: [((Sr. Programmer (60 hours) at $303 per hour) + (Sr. Systems Analyst (48 hours) at $260 per hour) + (Compliance Manager (24 hours) at $283 per hour) + (Director of Compliance (12 hours) at $446 per hour) + (Compliance and maintenance costs for the time stamp and transaction ID assignment elements of a registered SDR's systems.

The Commission estimates that the initial aggregate annual cost associated with Rules 901(f) and 901(g) will be approximately $815,000, which corresponds to $81,500 per registered SDR.[1252] The above costs per registered SDR are generally consistent with those set forth in the Cross-Border Proposing Release. It is possible, however, that the costs may be lower than previously estimated, as the Commission is now estimating fewer reportable events per year (5 million in the Cross-Border Proposing Release versus 2 million events to be reported by the reporting sides).[1253] In addition, to the extent that those persons planning on registering as SDRs have already expended resources in anticipation of the adoption of Regulation SBSR and as a result of CFTC regulations that are already in place, the costs to become a registered SDR could be significantly lower. As a result, the Commission's estimates should be viewed as an upper bound of the potential costs of Regulation SBSR.

After reviewing comment letters received in response to the Regulation SBSR Proposing Release and Cross-Border Proposing Release, as well as evaluating the most recent data available to the Commission, the Commission continues to believe that its overall approach to

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Attorney (8 hours) at $334 per hour) x (10 registered SDRs)] = $454,760, or approximately $455,000. See also Regulation SBSR Proposing Release, 75 FR at 75266, note 310.

1252 This figure is based on the following: (($36,160 + $45,476) x (10 registered SDRs) = $816,360, or approximately $815,000, which corresponds to $81,636, or approximately $81,500 per registered SDR. See also Regulation SBSR Proposing Release, 75 FR at 75266, note 311.

1253 See supra Section XXII (PRA discussion revising the Commission's estimate of the number of reportable events).

the estimate of costs imposed on registered SDRs remain valid. The Commission received no comments to the contrary.

2. Public Dissemination

Rule 902 requires the public dissemination of security-based swap transaction information. Rule 902(a), as adopted, sets out the core requirement that a registered SDR, immediately upon receipt of a transaction report of a security-based swap or life cycle event, must publicly disseminate information about the security-based swap or life cycle event, plus any condition flags contemplated by the registered SDR's policies and procedures that are required by Rule 907.

a. Programmatic Benefits

There are benefits to public dissemination of security-based swap information, as is required by Rule 902. Among other things, by reducing information asymmetries, post-trade transparency has the potential to facilitate price discovery and price competition,[1254] lower implicit transaction costs,[1255] improve valuation of security-based swap products, and increase liquidity in the security-based swap market.[1256]

1254 See Edwards, et al., supra note 1223 supra.

1255 As noted in Section XXII(B)(1)(b), dealing activity in the single-name CDS market is concentrated among a small number of firms that each enjoy informational advantages as a result of the large quantity of order flow they privately observe. Implicit transaction costs are the difference between the transaction price and the fundamental value, which could reflect adverse selection or could reflect compensation for inventory risk. In addition to these implicit transaction costs, security-based swap market participants may face explicit transaction costs such as commissions and other fees that dealers might charge non-dealers for access to the market.

1256 See infra Section XXII(D)(2)(b). See also Regulation SBSR Proposing Release, 75 FR at 75267.

Requiring public dissemination of security-based swap transactions will provide all market participants and market observers with more extensive and more accurate information upon which to make trading and valuation determinations. In the absence of post-trade transparency, larger dealers possess private information in the form of transactions prices and volumes, and larger dealers enjoy a greater informational advantage than smaller dealers. As noted above in Section XXII(B), the bulk of security-based swap activity is dealer-intermediated. Non-dealers and small dealers who perceive the informational advantage of their counterparties may be less willing to trade. By reducing the information advantage of large dealers, the public dissemination of security-based swap data may improve the negotiating position of smaller market participants such as non-dealers and small dealers, allowing them to access liquidity and risk sharing opportunities in the security-based swap market at lower implicit transaction costs.

While the Commission has not yet adopted rules governing trading of security-based swaps on centralized venues such as exchanges and SB SEFs, post-trade transparency may have particular benefits for exchange or SB SEF trading.[1257] In particular, providers of liquidity can use publicly disseminated transaction data as a key input into their orders and quotations, thereby increasing the efficiency of price formation. Market participants seeking liquidity can use recent last-sale prices in the same or similar products as a basis for initiating negotiations with liquidity providers. Liquidity seekers also can use public dissemination of other market participants' recent transactions in the same or similar products to evaluate the quality of quotes being offered or the quality of an execution given by a liquidity provider. Furthermore, public dissemination

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1257 The size of benefits arising from the use of publicly disseminated transaction data for SB SEF trading depend on the trading models that SB SEFs support pursuant to rules ultimately adopted by the Commission. See SB SEF Proposing Release, 76 FR at 10948.

of all transactions may suggest to all market participants profitable opportunities to offer or take liquidity, based on the prices at which recent transactions were effected.

Moreover, the Commission believes that post-trade pricing and volume information could allow valuation models to be adjusted to reflect how security-based swap counterparties have valued a security-based swap product at a specific moment in time. Post-trade transparency of security-based swap transactions also could improve market participants' and market observers' ability to value security-based swaps, especially in opaque markets or markets with low liquidity where recent quotations or last-sale prices may not exist or, if they do exist, may not be widely available. For example, a single-name CDS contract that expires in five years may yield information relevant for pricing other five-year CDS on the same firm, and will also provide information on default probabilities that may help price other CDS on the same firm with different maturities, or on other firms in the same industry.

By improving valuations, post-trade transparency of security-based swap transactions could contribute to more efficient capital allocation. In particular, under the post-trade transparency regime of Regulation SBSR, market observers, whether or not they engage in the security-based swap transactions, could use information produced and aggregated by the security-based swap market as an input to both real investment decisions as well as financial investments in related markets for equity and debt.[1258] Improved valuation, together with more efficient prices, that may arise as a result of publicly disseminated transaction information, could

[1258] See Philip Bond, Alex Edmans, and Itay Goldstein, "The Real Effects of Financial Markets," Annual Review of Financial Economics, Vol. 4 (October 2012) (reviewing the theoretical literature on the feedback between financial market price and the real economy). See also Sugato Chakravarty, Huseyin Gulen, and Stewart Mayhew, "Informed Trading in Stock and Option Markets," Journal of Finance, Vol. 59, No. 3 (2004) (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10% to 20%).

directly contribute to efficiency of capital allocation by firms whose obligations are referenced by security-based swaps.

A number of studies of the corporate bond market have found that post-trade transparency, resulting from the introduction of TRACE, has reduced implicit transaction costs.[1259] Post-trade transparency could have the same effect in the security-based swap market. The Commission acknowledges that the differences between the security-based swap market and other securities markets might be sufficiently great that post-trade transparency might not have the same effects in the security-based swap market.[1260] Nevertheless, similarities in the way the security-based swap market and corporate bond market are structured—both markets evolved as dealer-centric OTC markets with limited pre- or post-trade transparency—suggest that some of the benefits that result from post-trade transparency in the corporate bond market also would arise in the security-based swap market as well.

Public dissemination of security-based swap transactions is also designed to promote better valuation of security-based swaps themselves, as well as of underlying and related assets. In transparent markets with sufficient liquidity, valuations generally can be derived from recent quotations and/or last-sale information. However, in opaque markets or markets with low liquidity—such as the current market for security-based swaps—recent quotations or last-sale

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1259 See, e.g., Edwards, et al., supra note 1223; Hendrik Bessembinder, William F. Maxwell, & Kumar Venkataraman, Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds, J. of Fin. Econ., Vol. 82, at 251-288 (2006).

1260 In the Regulation SBSR Proposing Release, the Commission requested comment on whether post-trade transparency would have a similar effect on the security-based swap market as it has in other securities markets—and if not, why not. No commenters responded to the Commission's request.

information may not exist for many products or, if they do exist, may not be widely available.[1261] Therefore, market participants holding assets that trade in opaque markets or markets with low liquidity frequently rely instead on pricing models to value their positions. These models could be imprecise or be based on assumptions subject to the evaluator's discretion. Thus, market participants holding the same or similar assets but using different valuation models might arrive at significantly different valuations.

All other things being equal, valuation models—particularly for assets in illiquid markets, such as corporate bonds or security-based swaps—that include last-sale information in the valuation models generally will be more informative than models that do not or cannot include such inputs. Models without such inputs could be imprecise or be based on assumptions subject to the evaluator's discretion without having last-sale information to help identify or correct flawed assumptions. As discussed in Section XXII(B)(1)(d), valuation models typically have many inputs even in the absence of last-sale information. However, in general, models improve if the information set is broadened to include additional data related to fundamental value, and last-sale information is of particular relevance for pricing models. Research suggests that post-trade transparency helps reduce the range of valuations of assets that trade infrequently,[1262] and it is likely that the security-based swap market participants and market observers will devise means to incorporate last-sale reports of the asset to be valued, reports of related assets, or reports of benchmark products that include the asset to be valued or closely related assets into their valuation models. This should result in more accurate valuations of security-based swaps

1261 See supra Section XXII(B)(1)(b) (describing current level of trading activity and liquidity in the security-based swap market).

1262 See Gjergji Cici, Scott Gibson, and John J. Merrick, Jr., "Missing the Marks? Dispersion in Corporate Bond Valuations Across Mutual Funds," Journal of Financial Economics, Volume 101, Issue 1 (July 2011), at 206-26.

generally, as all market participants and market observers would have the benefit of knowing how counterparties to a security-based swap valued the security-based swap at a specific moment in the recent past.

In addition, post-trade transparency of security-based swaps that are CDS should promote better valuation of debt instruments and better understanding of the creditworthiness of debt issuers generally. CDS are contracts that offer protection against events of default by a debt issuer, such as a bankruptcy, debt restructuring, or a failure to pay. All other things being equal, CDS protection on a more creditworthy issuer costs less than CDS protection on a less creditworthy issuer. Furthermore, the cost of CDS protection on a single issuer may change over time: If the issuer's financial position strengthens, it is less likely to default on its debt and the cost of CDS protection on the issuer generally will decrease; if the issuer's financial condition weakens, the cost of CDS protection on the issuer generally will increase. Mandatory post-trade transparency of CDS transactions will offer market participants and market observers the ability to assess the market's view of the creditworthiness of entities underlying CDS contracts, which often are large and systemically significant debt issuers. Currently, last-sale information of CDS transactions generally is known only to the participants involved in a transaction (such as dealers who execute with clients and brokers who may be involved in negotiating transactions). Public dissemination of security-based swap transactions—both CDS and equity-based swaps—as required by Regulation SBSR, will reduce the information asymmetry between insiders who are involved in particular transactions and all others, and is thus designed to promote greater price efficiency in security-based swap markets, the related index swap markets, and the markets for the underlying securities.[1263]

Public dissemination of transactions in CDS that are based on reference entities that issue TRACE-eligible debt securities should reinforce the pricing signals derived from individual transactions in debt securities generated by TRACE. Since prices in debt securities of an issuer and prices of CDS with that debt security as reference entity are related, any pricing signal received as a result of a trade in one asset market may inform prices in the other. In addition, if prices of debt securities in TRACE and last-sale information of related CDS are not consistent with each other, market participants may avail themselves of arbitrage opportunities across these two markets, thereby aligning the respective prices and enhancing price efficiency in both markets. Similarly, public dissemination of transactions in single-name security-based swaps should reinforce the pricing signals derived from public dissemination of transactions in index swaps, where the index includes those individual securities. In addition, post-trade transparency of security-based swap CDS under Regulation SBSR should indirectly bring greater transparency into the market for debt instruments (such as sovereign debt securities) that are not subject to mandatory public dissemination through TRACE or any other means by providing indirect pricing information. For example, last-sale information for CDS referencing sovereign debt may inform prices of the underlying sovereign debt.

b. Programmatic Costs

Market participants may experience costs as a result of revealing the true size of their trades if public dissemination of this information makes it more difficult to hedge their positions.

1263 See, e.g., Chakravarty, et al., note 1258, supra (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10 to 20%).

Further, public dissemination of true transaction sizes could result in higher costs if it allows market participants to infer the identities of particular counterparties. Thus, some commenters have argued for dissemination of the notional amount of block trades through a "masking" or "size plus" convention comparable to that used by TRACE, in which transactions larger than a specified size would be reported as "size plus."[1264] The Commission considered this alternative, but has elected to require a registered SDR to publicly disseminate (for all dissemination-eligible transactions[1265]), immediately upon receipt of the transaction report, all of the elements required by Rule 901(c), including the true notional amount of the transaction. The Commission notes, first of all, that a dissemination cap could deprive the market of important information about overall exposure. With a cap in place, market participants would not have information about the true size of very large trades, thereby reducing the precision with which they could estimate the level of risk arising from those large trades. Furthermore, as noted above in Section VII(B)(4), the Commission believes that a 24-hour timeframe for reporting of transaction information during the interim phase of Regulation SBSR should address any concerns about disseminating the true notional amount of any transaction and give market participants who choose to hedge adequate time to accomplish a majority of their hedging activity[1266] before transaction data are publicly disseminated. During the interim phase, the Commission will be able to collect and

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1264 See WMBAA II at 7; ISDA/SIFMA I at 5; ISDA/SIFMA Block Trade Study at 2, 26-27; Vanguard Letter at 5; Goldman Sachs Letter at 6; SIFMA I at 5; J.P. Morgan Letter at 12-13; MFA I at 4; MFA III at 8; UBS Letter at 2; FIA/FSF/ISDA/SIFMA Letter at 6.

1265 See Rule 902(c) (requiring that certain types of security-based swaps not be publicly disseminated).

1266 Market participants typically hedge only a small fraction of large trades and, if they hedge, they tend to do so within one day. See Hedging Analysis.

analyze transaction information to develop an understanding of how market participants are reacting to the introduction of mandated post-trade transparency.

Under Rule 902(a), a registered SDR will be required to publicly disseminate a condition flag indicating whether two counterparties to a security-based swap are registered security-based swap dealers. The Commission received one comment expressing concern that disseminating such information would reduce the anonymity of counterparties, ultimately resulting in "worse pricing and reduced liquidity for end-users."[1267] Public dissemination of this information will indicate that a transaction involved two counterparties that are dealers. Although flagging transactions between two registered security-based swap dealers does indeed provide information to the public that the transaction involved two dealers, thus restricting the set of possible counterparties, the Commission believes that, since the majority of transactions in the security-based swap market are between dealers, market observers are unlikely to be able to identify particular counterparties using this information.

Another potential cost of post-trade transparency is that it may increase inventory risks. Dealers often enter trades with their customers as a liquidity supplier. Dealers trying to hedge inventory following a trade might be put in a weaker bargaining position relative to subsequent counterparties if transactions prices and volumes are publicly-disseminated. With mandated post-trade transparency, the market will see when a large transaction or a transaction in an illiquid security occurs and is aware that the dealer who took the other side may attempt to hedge the resulting position. As a result, other market participants may change their pricing unfavorably for the dealer, making it more expensive for the dealer to hedge its position. Dealers could respond either by raising the liquidity premium charged to their clients or refusing to

1267 ISDA IV at 16.

accommodate such trades. Such behavior could lead to lower trading volume or reduce the ability of certain market participants to manage risk, either of which could adversely affect all market participants. An increase in post-trade transparency could also drive trades to other markets or instruments that offer the opacity desired by traders, which could increase fragmentation, since trading would occur at more trading centers, or potentially reduce liquidity. This possibility is consistent with the argument that large, informed traders may prefer a less transparent trading environment that allows them to minimize the price impact of their trades. Public dissemination of security-based swap transaction information, therefore, could cause certain market participants to trade less frequently or to exit the market completely. A reduction in market activity by these participants, especially if they are large, informed traders, could have an adverse effect on market liquidity.

We are currently unable to quantify the costs associated with market exit or reduced liquidity that might result from post-trade transparency. This is due to two factors: (1) lack of robust data; and (2) lack of experimental conditions necessary for identifying the impact of post-trade transparency on the costs of hedging. As noted above, Commission staff has undertaken a study that attempts to identify instances of hedging behavior by dealers in the single-name CDS market. Subject to the data limitations described in the study, the low levels of such behavior suggest that, in aggregate, post-trade transparency is unlikely to drive down liquidity or increase the liquidity premium charged by dealers to non-dealers as a result of increasing the cost of hedging.[1268] Commission staff has also undertaken a study of the effects of the introduction of mandatory post-trade transparency in the index CDS market pursuant to CFTC rules. Subject to the data limitations in the study, and the fact that the security-based swap and the swap markets

[1268] See Hedging Analysis.

are related but not identical, staff found little empirical evidence that the introduction of mandatory post-trade transparency in the index CDS market resulted in reduced trading activity, liquidity, or risk exposure in the index CDS market.[1269] Moreover, studies of the corporate bond market, another largely OTC market, do not find evidence of market exit or reduced liquidity associated with post-transparency.[1270]

Another potential cost of post-trade transparency as required under Rule 902 is that market observers could misinterpret or place undue importance on particular last-sale information that might not accurately reflect the market. For example, if a large market participant failed, it could be required to liquidate its portfolio at "fire sale" prices. If market observers were not aware of any unusual conditions surrounding particular transaction prints, they might interpret fire sale prices to indicate changes to the economic fundamentals of security-based swap positions that they hold. If some of these market participants mark down the value of their portfolios, the result could be additional margin calls and further market stress. In these circumstances, use of valuation models that include last-sale data, but do not condition those data on the information about unusual conditions could lead to market de-stabilization.[1271]

Rule 902(a) requires a registered SDR to publicly disseminate a transaction report of any security-based swap immediately upon receipt of transaction information about the security-based swap, except in in certain limited circumstances.[1272] The published transaction report must

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1269 See Analysis of Post-Trade Transparency.

1270 See supra note 1259.

1271 See, e.g., Brunnermeier and Pedersen; Gromb and Vayanos, note 1177, supra.

1272 See supra Section VI(D). In addition, registered SDRs shall not publicly disseminate reports of pre-enactment or transitional security-based swaps.

consist of all the information reported pursuant to Rule 901(c), plus the execution time stamp and any necessary flags required by the registered SDR to which the transaction is reported.

Implementing and complying with the public dissemination requirement of Rule 902 will add 20% to the start-up and ongoing operational expenses that would otherwise be required of a registered SDR.[1273] In particular, the Commission continues to estimate that the initial one-time aggregate costs for development and implementation of the systems needed to disseminate the required transaction information would be $20,000,000, which corresponds to $2,000,000 per registered SDR. Further, the Commission continues to estimate that aggregate annual costs for systems and connectivity upgrades associated with public dissemination would be approximately $12,000,000, which corresponds to $1,200,000 per registered SDR. Thus the initial aggregate costs associated with Rule 902 are estimated to be $32,000,000, which corresponds to $3,200,000 per registered SDR. To the extent that those market participants planning on registering as SDRs have already expended resources if they voluntarily report their transactions or because they are registered SDRs with the CFTC, the costs to become a registered SDR could be significantly lower. As a result, the Commission's estimates should be viewed as an upper bound of the potential costs of Regulation SBSR.

c. Alternative Approaches to Public Dissemination

The Commission considered alternative approaches to the public dissemination of transactions information. First, the Commission has considered, but is not adopting, an exemption from Regulation SBSR's regulatory reporting or public dissemination requirements for inter-affiliate security-based swaps, although the Commission generally believes that a

[1273] See SDR Adopting Release, Section VIII(D)(2). See also Regulation SBSR Proposing Release, 75 FR at 75269.

registered SDR should consider establishing a flag for inter-affiliate security-based swaps to help market observers better understand the information that is publicly disseminated.[1274]

Commenters had raised concerns about the public dissemination of inter-affiliate transactions, comments that the Commission carefully considered in its adoption of Rule 902.[1275] As an example, one commenter argued that "public reporting of inter-affiliate transactions could seriously interfere with the internal risk management practices of a corporate group" and that "[p]ublic disclosure of a transaction between affiliates could prompt other market participants to act in a way that would prevent the corporate group from following through with its risk management strategy by, for instance, causing adverse price movements in the market that the risk-carrying affiliate would use to hedge."[1276] As stated above, the Commission agrees generally that corporate groups should engage in appropriate risk management practices. However, the Commission does not agree that Regulation SBSR, as adopted, is inimical to effective risk management. The Commission notes that, during the interim phase of Regulation SBSR, all security-based swaps—regardless of size—must be reported within 24 hours from the time of execution and—except with regard to transactions falling within Rule 908(a)(2)—immediately publicly disseminated. As discussed in Section VII above, this reporting timeframe is designed, in part, to minimize any potential for market disruption resulting from public dissemination of any security-based swap transaction during the interim phase of Regulation SBSR. The Commission anticipates that, during the interim period, it will collect and analyze data concerning the sizes of transactions that potentially affect liquidity in the market. The

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1274 See supra Sections VI(D) and VI(G).

1275 See supra Section XI(B).

1276 Cleary II at 17.

Commission sees no basis for concluding, at this time, that inter-affiliate security-based swaps are more difficult to hedge than other types of security-based swaps, or that the hedging of these transactions presents unique concerns that would not also arise in connection with the hedging of a security-based swap that was not an inter-affiliate transaction. Therefore, the Commission does not agree with the commenters' concern that public dissemination of inter-affiliate security-based swaps will impede the ability of corporate groups to hedge.

Second, the Commission considered other mechanisms for public dissemination, but has determined not to adopt any of them.[1277] In the Regulation SBSR Proposing Release, the Commission discussed a "first touch" approach to public dissemination, whereby a security-based swap dealer or major security-based swap participant that is a counterparty to a security-based swap would be responsible for dissemination. Under a "modified first touch" approach, a platform on which a transaction was effected would be required to publicly disseminate a transaction occurring on its market. However, under either of these alternate approaches, market observers would be required to obtain and consolidate information from potentially dozens of different sources. As the Commission stated in the Regulation SBSR Proposing Release: "Requiring registered SDRs to be the registered entities with the duty to disseminate information would produce some degree of mandated consolidation of [security-based swap] transaction data and help to provide consistency in the form of the reported information. This approach is designed to limit the costs and difficulty to market participants of obtaining and assembling data feeds from multiple venues that might disseminate information using different formats."[1278]

Moreover, even though the alternative approaches noted above would allow market

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1277 See Regulation SBSR Proposing Release, 75 FR at 75227-28.

1278 Id.

participants to circumvent registered SDRs while fulfilling the public dissemination requirement, neither alternative would reduce costs to market participants, since reporting sides would be required to report transactions to an SDR to fulfil the regulatory reporting requirement. The Commission received no comments that disagreed with the proposed approach imposing the duty to disseminate security-based swap transaction information on registered SDRs, and has adopted it as proposed.

3. Interim Phase for Reporting and Public Dissemination

As discussed in more detail above, the rules, as adopted, establish an interim phase of Regulation SBSR. During this interim phase, all covered transactions—regardless of their notional size—must be reported to a registered SDR no later than 24 hours after the time of execution.[1279] The registered SDR will be required to publicly disseminate a report of the transaction immediately upon receipt of the information, except for the information described in Rule 902(c).

Commission staff has undertaken an analysis of the inventory management of dealers in the market for single-name CDS based on transaction data from DTCC-TIW.[1280] The analysis shows that, when large trades in single-name CDS are hedged using offsetting trades in the single-name CDS with the same reference entity, the majority of hedging activity takes places within one day.[1281] The Commission acknowledges the concerns of a commenter that this

1279 If reporting would take place on a non-business day (i.e., a Saturday, Sunday, or U.S. federal holiday), then reporting would be required by the same time on the next day that is a business day.

1280 See Hedging Analysis.

1281 The Commission staff analysis represents an update and extension of earlier work by staff of the Federal Reserve Bank of New York (Chen et al.), which identified same-day and next-day same-instrument dealer hedging activity within a three-month (May 1, 2010—July 31, 2010) sample of DTCC-TIW transaction data. Similar to the analysis does not consider hedging activity that might occur between markets.[1282] For example, dealers may use index CDS contracts to hedge exposures in single-name CDS. However, the Commission notes that the presence of hedging opportunities in other markets – particularly more liquid markets such as the market for index CDS – may increase the speed with which dealers are able to hedge security-based swap exposures, and may limit the extent to which public dissemination of transaction data with 24 hours of execution impairs their ability to hedge large exposures.[1283]

The same commenter further argued that, if single-name CDS on a reference entity trade infrequently, dealers may not have opportunities to hedge using the same instrument in a short

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Commission staff analysis, these authors' results suggest that "large customer CDS trades are not typically hedged via offsetting trades in the same instrument soon after they have been transacted." The authors conclude by saying that "requiring same day reporting of CDS trading activity may not significantly disrupt same day hedging activity, since little such activity occurs in the same instrument." See Chen et al., supra note 510, at 17.

1282 See ISDA IV at 15 (stating that "participants may enter into risk mitigating transactions using other products that are more readily available at the time of the initial trade (for example CD index product [sic], CDS in related reference entities, bonds or loans issued by the reference entity or a related entity, equities or equity options))." The commenter further "interprets the data in the study to imply that such temporary hedges in other asset classes (rather than offsetting transactions in the precise reference entity originally traded) are the norm for an illiquid market." Id.

1283 The Commission notes that the impact of cross-market hedging may depend on the market characteristics for hedging assets. If dealers use corporate bonds to hedge large single-name CDS exposures, then the relative illiquidity of the corporate bond market may make dealers' ability to hedge sensitive to public dissemination of single-name CDS transaction information. However, the commenter did not provide support for the proposition that dealers rely on the corporate bond or equity markets to hedge single-name CDS exposure. Appropriate data are not currently available to the Commission. By contrast, if dealers use more liquid assets to hedge—such as index CDS—then the relative liquidity of the market for hedging assets may make it less likely that dealers' orders are identified as hedging demand. This, in turn, reduces the likelihood that dealers will face higher costs of hedging as a result of public dissemination of the original security-based swap transaction.

period of time.[1284] The Commission acknowledges that some market participants may take more than 24 hours to hedge exposures that result from large transactions in security-based swaps. As noted below, if a liquidity provider engages in a large trade in an illiquid security but cannot hedge its inventory risk within 24 hours, the result could be higher costs for liquidity provision. However, based on supplemental staff analysis of single-name CDS transaction data, the vast majority of large CDS transactions in the Hedging Analysis were written on reference entities with transaction activity occurring more than once per day, on average.[1285] Hence, based on the available data, the Commission does not conclude that the liquidity of the single-name CDS included in the Hedging Analysis was insufficient to allow dealers ample opportunities to hedge exposures within five days. Taking into consideration staff analysis and comments on this analysis, the Commission continues to believe that a 24-hour time frame for reporting of transaction information should allow market participants who choose to hedge adequate time to accomplish a majority of their hedging activity before transaction data is publicly disseminated.

1284 See id. (stating that "If a reference entity trades less frequently than once per day, and a particular reference entity/maturity combination trades less frequently than that, it is unlikely that a dealer could hedge a large transaction using CDS in the same reference entity even over a period of five days").

1285 In response to this comment, Commission staff examined the average trading frequency and volume of the reference entities represented in the sample of large transactions relative to reference entities in the overall sample. According to this supplemental analysis, for over 90% of the reference entities in the sample of "seed transactions" (as defined in the Hedging Analysis,) transaction activity took place, on average, one or more times per day between April 2013 and March 2014. Commission staff also examined transaction activity in the six-month period prior to the sample used in the Hedging Analysis to avoid confounding its measures of trading activity with the large transactions and subsequent hedging activity it identified within the original study period. In the six months prior to April 2013, approximately 85% of reference entities in the sample of seed transactions were involved in transaction activity an average of one or more times per day.

Although any reporting side could take a full 24 hours to report a given trade under the interim phase, the final rules may provide incentives for reporting sides to submit trade reports in substantially less than 24 hours. In particular, as discussed above in Section VII(B)(1), because Rule 902(d) embargos transaction information until the information is transmitted to a registered SDR, any SB SEF that wants to continue the use of work-ups must ensure that transactions are reported to a registered SDR no later than the time at which a completed transaction is broadcast to the users of the SB SEF. Reporting sides may choose to report trades in less than 24 hours because their gains from work-ups exceed costs stemming from public dissemination.

a. Programmatic Benefits

The Commission notes that the interim phase of Regulation SBSR will result in increased transparency in the security-based swap market, as compared to the current market. Several commenters expressed concern that a public dissemination regime with improper block trade thresholds could harm market liquidity.[1286] A phased approach seeks to create some measure of post-trade transparency in the security-based swap market while avoiding the creation of inappropriate block standards.

This interim phase will afford the Commission the opportunity to use data made available by registered SDRs to consider the potential impact, across different security-based swap asset classes, of various public dissemination times on transaction costs, hedging activity, and price efficiency for trades involving a range of notional amounts in instruments of varying liquidity.[1287] Analysis of additional data is important for two key reasons. First, while the

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1286 See supra note 486.

1287 See ISDA IV at 15 (noting that liquidity of CDS contracts on a reference entity may be a determinant of the risk management strategies of dealers attempting to hedge exposures generated when they engage in single-name CDS transactions).

Commission has used available data to inform its current approach to regulatory reporting, the Commission expects the market to evolve in response to substantive regulation pursuant to Regulation SBSR and other Title VII rulemaking. In particular, additional post-trade transparency afforded by the interim phase may alter market participants' trading strategies in ways that will likely affect what constitutes an appropriate block trade threshold in an environment with post-trade transparency. Such changes to the regulatory environment for security-based swap transactions make additional data analysis critical to robust determination of block thresholds and associated dissemination delays.

Second, the Commission believes that data elements such as reporting and execution time stamps required under Rule 901 will make data collected from registered SDRs more suitable than currently available data for examining relationships between reporting delays, notional amounts and other variables of economic interest. For example, as noted by Commission staff in its analysis of inventory risk management in the security-based swap market, although the CDS transaction data currently available to the Commission includes both the date and time at which DTCC received and recorded the transaction, only the date of the execution is reported to DTCC, and not the actual time of the execution.[1288] Under Regulation SBSR, Commission staff will be able to identify not only the execution time, to the second, but also the length of time between when a transaction is executed and when a registered SDR receives the associated transaction report.

Accordingly, the Commission is directing its staff to issue a report, for each asset class, regarding block thresholds and dissemination delays for large notional security-based swap transactions in each asset class. The reports are intended to inform the Commission's

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[1288] See Hedging Analysis.

specification of criteria for determining what constitutes a block trade and the appropriate time delay for reporting block trades. The Commission will take into account the reports, along with public comment on the reports, in determining block thresholds and associated reporting delays.

Each report will be linked to the availability of data from registered SDRs in that each report must be complete no later than two years following the initiation of public dissemination from the first registered SDR in that asset class. The Commission believes that this timeframe is necessary for a thorough analysis of the transaction data. First, a two-year timeframe will help ensure that Commission staff's econometric analysis will have statistical power sufficient to draw clear conclusions about the effects of notional amount and reporting delay on price impact, hedging activity, and price efficiency. Second, the Commission believes that this timeframe is sufficiently large to capture seasonal effects, such as periodic "rolls", that may affect trading behavior in the security-based swap market. Finally, a sufficiently long timeframe increases the likelihood that Commission staff can separate potential market impacts resulting from the introduction of mandated post-trade transparency from short-term macroeconomic trends and shocks that also could affect market behavior.

While allowing time for data gathering and analysis by Commission staff that will inform the Commission about appropriate block thresholds and reporting delays, the interim approach to reporting and public dissemination may moderate the economic effects flowing from public dissemination of transaction data. By providing reporting sides up to 24 hours during the interim phase of Regulation SBSR in which to report their transactions, market observers will experience delays in obtaining information about market activity compared to an alternative policy of implementing a requirement for real-time reporting and public dissemination at the present time. For example, if there is a spike in activity or a significant price movement in a particular security-based swap product, market observers might not become aware of this until 24 hours afterwards. Larger dealers that observe more order flow and execute more transactions than other market participants would, during the interim phase, continue to enjoy an informational advantage over others who are not yet aware of recently executed transactions.

b. Programmatic Costs

While the Commission has considered whether there could be a reduction in the programmatic benefits of public dissemination associated with providing too much time before a security-based swap transaction must be reported and publicly disseminated, the Commission also has considered that 24 hours might be too little time for liquidity providers to manage inventory risk. If a liquidity provider who engages in a large trade, or in a trade in an illiquid security, cannot offset the risk within 24 hours, the costs for providing liquidity could rise, resulting in less liquidity provision (i.e., less size provided at the desired price, or the same size provided at worse prices). This result might be avoided in a regulatory environment offering a longer delay between the time of execution of a security-based swap and the time that it must be reported and publicly disseminated.

4. Use of UICs

Rule 903(a) provides that, if an IRSS meeting certain criteria is recognized by the Commission and issues a UIC, that UIC must be used by all registered SDRs and their participants in carrying out duties under Regulation SBSR. Under Rule 903(a), if the Commission has recognized such an IRSS that assigns UICs to persons, each participant of a registered SDR shall obtain a UIC from or through that system. If no IRSS that can issue particular types of UICs has been recognized, the registered SDR is required to assign such UICs using its own methodology.

The following UICs are specifically required by Regulation SBSR: counterparty ID, product ID, transaction ID, broker ID, branch ID, trading desk ID, trader ID, execution agent ID, platform ID, and ultimate parent ID. The security-based swap market data typically include fee-based codes, and all market participants and market observers must pay license fees and agree to various usage restrictions to obtain the information necessary to interpret the codes. Under Rule 903(b), a registered SDR may permit information to be reported pursuant to Rule 901, and may publicly disseminate that information pursuant to Rule 902, using codes in place of certain data elements only if the information necessary to interpret those codes is widely available to users of the information on a non-fee basis.

a. Programmatic Benefits

UICs will provide market participants that use a common registered SDR with a uniform way to refer to their counterparties and other persons or business units that might be involved in a transaction (such as brokers, trading desks, and individual traders). UICs are designed to allow registered SDRs, relevant authorities, and other users of data to quickly and reliably aggregate security-based swap transaction information by UIC along several dimensions (e.g., by product, by individual trader, or by corporate group (i.e., entities having the same ultimate parent)). The requirement for a registered SDR to refer to each person, unit of a person, product, or transaction with a single identifying code is designed to facilitate the performance of market analysis studies, surveillance activities, and systemic risk monitoring by relevant authorities through the streamlined presentation of security-based swap transaction data. These benefits apply on an SDR level, as each registered SDR is required to assign UICs using its own methodology if a relevant UIC is not available from an IRSS.

To the extent that multiple SDRs use the same UICs, these benefits would apply across SDRs. In particular, because the Commission has recognized the GLEIS—through which LEIs can be obtained—as an IRSS that meets the criteria of Rule 903, if an entity has an LEI issued by or through the GLEIS, then that LEI must be used for all purposes under Regulation SBSR. The Commission believes that this will facilitate aggregation by relevant authorities for surveillance and monitoring purposes. Nevertheless, the Commission acknowledges potential impediments to uniformity of UICs across registered SDRs. While registered SDRs are required to use an LEI issued by the GLEIS to identify a counterparty to a reported transaction, this requirement extends to only those counterparties that have been assigned an LEI by the GLEIS. Under Rule 903(a), these counterparties will include all SDR participants that are U.S. persons, including special entities and investment advisers, as well as all SDR participants that are registered security-based swap dealers and registered major security-based swap participants. Additionally, these counterparties will include non-U.S. subsidiaries of U.S. persons, when their performance under security-based swaps is guaranteed by a U.S. affiliate. For a person who is a counterparty to a security-based swap reported on a mandatory basis to a registered SDR, who does not meet these conditions, and who has not obtained an LEI from the GLEIS, a registered SDR will be required to assign a UIC to that market participant using its own methodology. For such counterparties, this could result in the proliferation of multiple UIC assignments for the same entity to the extent that they are counterparties to security-based swaps that are reported across several SDRs that each assign a unique UIC.

This could pose challenges to the relevant authorities and other users of data to quickly and reliably aggregate security-based swap transaction information, and potentially impede the performance of market analysis studies and surveillance activities. In particular, mapping the unique identifiers across SDRs would entail a manual process of connecting like entities initially, and maintaining such a mapping over time to the extent that an entity's organizational structure changes in way that requires a change to the UIC. This manual process could slow or introduce errors into the analysis of transaction activity or economic exposures of such counterparties. Requiring all participants and the entities to which they provide guarantees to utilize LEIs under Regulation SBSR should minimize these potential difficulties. Using the same LEI for these counterparties across all registered SDRs eliminates the need for such mapping.

Even absent uniformity of UICs, the use of such codes by a registered SDR and its participants could give rise to other significant potential benefits. The use of codes could improve the accuracy of the trade reporting system by streamlining the provision of data to the registered SDR. The product ID, for example, replaces several data elements that otherwise would have to be reported separately, thus enforcing the internal consistency of those data elements and reducing the likelihood of reporting errors.

In adopting Rule 903, the Commission has considered not only the benefits of using unique identification codes generally, but also the benefits of ensuring that such codes can be readily understood. Rule 903(b), as adopted, provides that a registered SDR may permit the use of codes in place of certain data elements for use in regulatory reporting and public dissemination of security-base swap transaction information only if the information necessary to interpret such codes is widely available to users of the information on a non-fee basis. This provision is intended to prevent any person who develops identification codes that might be used for the reporting or public dissemination of security-based swap transactions to charge fees or require other compensation from market participants, registered SDRs, other market infrastructure providers, and users of security-based swap data. Open access to UICs will promote the usage of public information about the security-based swap market, thereby furthering the statutory goals of Title VII. Rule 903(b) eliminates the possibility that market participants could be compelled to include fee-based codes in the transaction information that they are required to provide to a registered SDR, or that registered SDRs could be compelled to pay fees to code creators to be able to interpret the transaction information that is reported to them, or that market observers are compelled to pay fees to code creators to be able to interpret the security-based swap transaction information that is publicly disseminated. Rule 903(b) is designed to reduce barriers to entry into the security-based swap market[1289] by counterparties as well as service providers, because it minimizes the need for them to pay fees to code creators as a cost of entry.

b. Programmatic Costs

Rule 903 could also impose certain costs on current security-based swap market participants. Currently, private coding systems exist in the security-based swap market.[1290] To the extent that owners of these private coding systems do not make information to understand these codes widely available on a non-fee basis, Rule 903 would prohibit the use of such codes in the reporting or public dissemination of security-based swap transaction information carried out pursuant to Regulation SBSR. As a result of Rule 903, owners of these coding systems that otherwise might be used to report security-based swap transaction information will be restricted

1289 The fees that a new entrant would have to pay for the use of fee-based codes are a cost that may deter a potential market participant from entering the security-based swap market. Currently, there is no mandated post-trade transparency and the security-based swap market is an OTC market and opaque, which is a barrier to enter for the market, as new entrants are at an informational disadvantage compared to established market participants, especially large dealers with significant order flow.

1290 The Commission is aware of one such product identification system that involves six-digit reference entity identifiers and three-digit reference obligations identifiers as well as a standard three-digit maturity identifier.

in their ability to profit from utilization of their codes for reporting under Regulation SBSR, although such codes could still be used for other purposes. To the extent that these owners currently generate revenue through fees charged to users of security-based swap data, Rule 903 could lower their revenues and cause them to increase revenues from other sources, including from those entities that wish to have identifiers assigned to them. Thus, Rule 903 may result in a reallocation of the costs associated with developing and maintaining UICs from users of data to producers of data.

Further, to the extent that market participants who currently utilized fee-based codes must reconfigure their systems and internal processes to use other codes (such as those issued by a registered SDR) that are compliant with Rule 903(b), the costs of such reconfiguration can be attributed to Rule 903(b). One commenter believed that reporting these UICs would require "great cost and effort" from firms, including the costs associated with establishing and maintaining UICs in the absence of a global standard.[1291] The Commission also acknowledges commenter concerns that there could be a certain degree of cost and effort associated with incorporating new UICs into firms' internal processes and record-keeping systems.[1292] However, the Commission believes that these costs are justified in the context of the programmatic benefits discussed in Section XXII(C)(4)(a), supra, such as the ability of relevant authorities to easily aggregate transaction reports on a variety of dimensions. The costs of developing such UICs are included in the discussion of the implementation of Rules 901 (detailing the data elements that

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1291 See ISDA III at 2.

1292 See supra Section XXII(C)(1)(c); Section XXII(E)(1)(a) (detailing the data elements that must be reported); Section XXII(C)(6)(d) (detailing the requirement that SDRs develop policies and procedures for the reporting of the required data elements). See also note 160, supra.

must be reported[1293]) and 907 (detailing the requirement that SDRs develop policies and procedures for the reporting of the required data elements[1294]).

Any person who is a participant of a registered SDR must obtain an LEI from or through the GLEIS. Based on transaction data from DTCC-TIW, the Commission believes that no fewer than 3,500 of approximately 4,800 accounts that participated in the market for single-name CDS in 2013 currently have LEIs and are likely to maintain these LEIs in the absence of Regulation SBSR.[1295] Therefore, the Commission believes that no more than approximately 1,300 DTCC-TIW accounts will have to obtain LEIs in order to comply with Rule 903(a). For these participants, the assignment of an LEI will result in one-time costs assessed by local operation units ("LOUs") of the GLEIS associated with registering a new LEI. In addition to registration costs, LOUs assess an annual fee for LEI maintenance. The Commission assumes that no market participants that currently have LEIs would continue to maintain their LEIs in the absence of Rule 903(a) in order to arrive at an upper bound on the ongoing costs associated with Rule 903(a).

The prices for registering a new LEI and maintaining an existing LEI vary by LOU. Commission staff collected registration and maintenance charges for nearly all of the pre-LOUs currently endorsed by the interim GLEIS.[1296] Based on these charges, the Commission

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1293 See supra Section XXII(C)(1).

1294 See supra Section XXII(C)(6)(d).

1295 See supra note 1109. Commission staff used counterparty information provided by Avox to match account numbers in the DTCC-TIW 2013 transactions data to their LEIs. Of 4,760 participating accounts, 3,533 had LEI information in their Avox counterparty record.

1296 See "Endorsed Pre-LOUs of the Interim Global Legal Entity Identifier System (GLEIS)", January 2, 2015 (available at http://www.leiroc.org/publications/gls/lou_20131003_2.pdf).

estimates a per-entity registration cost of between $84 and $220 and a per-entity maintenance cost of between $48 and $156.[1297]

The Commission is aware of two factors that may reduce these costs over time. First, the GLEIS operates on a cost-recovery model. If the marginal cost of an LEI is low, then an increase in the volume of LEIs will reduce the average cost of obtaining an LEI. These cost savings will be passed through to market participants in the form of lower prices. Second, the ability of market participants to port LEIs to the LOU of their choice will result in competitive pressure that may limit the prices that LOUs are able to charge for services. The governance system of the GLEIS is in place to help ensure that these economic factors will be operative.

The Commission expects that, in addition to the costs of obtaining an LEI from an LOU, each entity that registers a new LEI as a result of Rule 903(a) will incur start-up and ongoing administrative costs of no more than $334 per year.[1298] The Commission believes, therefore, that the upper bound on aggregate costs to market participants arising from the obligation to obtain an LEI lies between $500,000 and $700,000 in the first year and between $1,600,000 and $2,100,000 in subsequent years.[1299]

1297 Commission staff converted all foreign currency amounts to U.S. dollars and added taxes and surcharges where these amounts were available.

1298 This estimate is based on one hour of a compliance attorney at $334 per hour and is based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the SEC staff to account for an 1,800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead).

1299 The lower end of the range for costs in the first year is calculated as: [(LEI Registration) $84 + (Administration) $334] x 1,300 participants = $543,400. The upper end of the range for costs in the first year is calculated as: [(LEI Registration) $220 + (Administration) $334] x 1,300 participants = $720,200. The lower end of the range for costs in subsequent years is calculated as: [(LEI Maintenance) $48 + (Administration) $334] x 4,800 participants = $1,833,600. The upper end of the range for costs in subsequent years is calculated as: [(LEI Maintenance) $156 + (Administration) $334] x 4,800 participants = $2,352,000.

5. Cross-Border Aspects of Regulation SBSR

Rule 908(a)(1), as adopted, identifies the security-based swaps that will be subject to regulatory reporting and public dissemination. Rule 908(a)(2), as adopted, identifies the security-based swaps that will be subject to regulatory reporting but will not be publicly disseminated. Rule 908(b) provides that non-U.S. persons (except for non-U.S. persons that are registered security-based swap dealers or registered major security-based swap participants) have no duties under Regulation SBSR. Rule 908(c) provides that the Title VII requirements relating to regulatory reporting and public dissemination of security-based swaps may be satisfied by compliance with the rules of a foreign jurisdiction if the Commission determines that the jurisdiction has requirements that are comparable to those of Regulation SBSR.

As discussed further in Section XXII(D), the security-based swap market is a global market characterized by a high level of interconnectedness and significant information asymmetries. Because U.S. market participants and transactions regulated under Title VII are a subset of the overall global security-based swap market and the swap markets more generally, concerns surrounding risk and liquidity spillovers are part of the framework in which the Commission analyzes the effects of these rules. Additionally, relevant authorities in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets. Because a large portion of security-based swap activity involves both U.S.-person and non-U.S. person counterparties, a key consideration in the Commission's analysis of the economic effects of these rules is the extent to which their application complements or conflicts with rules promulgated by foreign regulators.

a. Programmatic Benefits

Rule 908 provides that a transaction will be subject to regulatory reporting if there is a direct or indirect counterparty on either or both sides that is a U.S. person, a registered security-based swap dealer, or a registered major security-based swap participant, or if the transaction is submitted to a clearing agency having its principal place of business in the United States.

The Commission anticipates that regulatory data that it receives from registered SDRs will aid in its understanding of counterparty relationships in the global security-based swap market that are most likely to affect the U.S. financial markets. Such market data will allow the Commission to view, for example, large security-based swap exposures of U.S. persons, registered security-based swap dealers, registered major security-based swap participants, and U.S. clearing agencies that could have the potential to destabilize U.S. financial markets. Moreover, because registered security-based swap dealers and members of U.S. clearing agencies are likely to participate in other asset markets, regulatory reporting could help the Commission estimate the risk that a corporate event could impair the ability of these market participants to trade in other asset markets. An improved ability to measure such risks could help the Commission evaluate the ability of the Title VII regulatory regime to limit the risk of contagion between the security-based swap market and other asset markets.

A second key programmatic benefit of regulatory reporting is that it would aid the Commission in detecting and taking appropriate action against market abuse. With comprehensive data on transaction volumes and prices involving U.S. persons, the Commission could help ensure that all market participants are able to benefit from the risk-sharing afforded by the security-based swap market on fair terms.

Finally, security-based swap transaction data reported to registered SDRs would aid the Commission and other relevant authorities in enforcing other Title VII rules and deter noncompliance. For example, the Cross-Border Adopting Release set forth de minimis levels of activity and exposures above which market participants would have to either register as security-based swap dealers or as major security-based swap participants.[1300] Regulatory reporting could help deter participants that engage in high transaction volume with counterparties that are expected to have a significant portion of their financial and legal relationships exist within the United States from avoiding the obligation to register with the Commission when their activity surpasses these thresholds.

Rule 908(a)(2) determines the scope of transactions subject to public dissemination requirements. A security-based swap must be publicly disseminated if there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction, or if the transaction is submitted to a clearing agency having its principal place of business in the United States. Certain of the programmatic benefits of public dissemination are similar to those of regulatory reporting. For instance, public dissemination of transaction prices will enable U.S. persons to compare a quote provided by a registered security-based swap dealer against recent transaction prices for security-based swaps referencing the same or similar underlying entities. In addition, market participants will be able to analyze whether the price they paid for credit protection is commensurate with prices revealed by transaction activity immediately following their transaction. In both of these cases, public dissemination enables market participants to evaluate the quality of the prices that dealers offer, providing registered security-based swap dealers with additional incentives to quote narrower spreads.

[1300] See Cross-Border Adopting Release, 79 FR at 47301.

Rule 908(c) provides that the Title VII requirements relating to regulatory reporting and public dissemination of security-based swaps may be satisfied by compliance with the rules of a foreign jurisdiction if the Commission determines that the jurisdiction has requirements that are comparable to those of Regulation SBSR. In addition, to the extent that a market participant is able to take advantage of a substituted compliance determination made under Rule 908(c), the Commission does believe some cost reduction may be realized. If a market participant does not report to an SDR registered with the Commission, such market participant (whether it be a reporting side or not) would be able to avoid those costs detailed in this adopting release. A market participant evaluating whether or not to take advantage of substituted compliance would consider these potential cost reductions along with the costs it would incur in assessing the feasibility of substituted compliance and meeting any conditions attached to a substituted compliance determination by the Commission.[1301] While, the Commission is, at this time, unable to estimate the net savings—as no substituted compliance determinations have been made—the highest level of savings possible for a reporting side that avails itself of substituted compliance is the aggregate cost of regulatory reporting under the final rules.[1302]

b. Programmatic Costs

Rules 908(a)(1) and (2) require regulatory reporting of transactions that involve U.S. person counterparties, are submitted to U.S. clearing agencies, or that involve registered security-based swap dealers or registered major security-based swap participants.

Other jurisdictions are developing rules relating to post-trade transparency for security-based swaps at different paces. The Commission is mindful that, in the near term and until full

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[1301] See Cross-Border Proposing Release, 78 FR at 31202.

[1302] See supra Section XXII(C)(1) (discussing the quantifiable costs of regulatory reporting).

implementation of post-trade transparency requirements in the other jurisdictions that are comparable to those in Regulation SBSR, Rule 908(a)(1) may intensify incentives for non-U.S. market participants to avoid contact with U.S. counterparties (whether acting directly or as guarantors of non-U.S. persons) in an effort to avoid the public dissemination requirements. This could result in reduced liquidity for U.S. market participants.[1303]

The Commission cannot readily quantify the costs that might result from reduced market access for U.S. persons or counterparties whose security-based swap activities benefit from recourse to U.S. persons because the Commission does not know what rules other jurisdictions may implement or the times at which they may implement their rules. However, while the Commission has not quantified these costs, it assessed them qualitatively and considered them in formulating the scope for requirements under the final rules.[1304]

As discussed in Section XXII(C)(5), supra, the Commission believes that most of the costs related to the cross-border application of Regulation SBSR are subsumed in the costs of Rules 901 and 902, with one exception. Specifically, requests for a substituted compliance determination would result in costs of preparing such requests. The Commission estimates the costs of submitting a request pursuant to Rule 908(c) would be approximately $110,000.[1305] The

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1303 The efficiency implications for public dissemination of cross-border activity is discussed in Section XXII(D)(4)(b), infra.

1304 See Cross-Border Adopting Release, 79 FR at 47278-372 (discussing recourse guarantees).

1305 This estimate is based on information indicating that the average costs associated with preparing and submitting an application to the Commission for an order for exemptive relief under Section 36 of the Exchange Act in accordance with the procedures set forth in Rule 0-12 under the Exchange Act, 17 CFR 240.0-12. A substituted compliance request contemplated by Rule 908(c) would be made under Rule 0-13 under the Exchange Act, which sets forth procedures similar to those used by the Commission in considering exemptive order applications under Section 36. The Commission estimates that preparation of a request would require approximately 80 hours of in-house counsel

Commission further estimates that it will receive 10 requests in the first year and two requests each subsequent year, for a total cost in the first year of $1,100,000 and a total cost in each subsequent year of $220,000. Once such request is made, however, other market participants in the same jurisdiction that wish to rely on substituted compliance with respect to regulatory reporting and public dissemination would be able to rely on the Commission's substituted compliance determination. Accordingly, the assessment costs would only need to be incurred once with respect to the same area of a foreign regulatory system.

c. Assessment Costs

The Commission believes that the assessment costs associated with determining the status of counterparties and the location of transactions should be primarily one-time costs of establishing a practice or compliance procedure. As discussed in the Cross-Border Proposing Release,[1306] the assessment costs associated with the substituted compliance would, in part, flow from the assessment of whether the counterparties to a security-based swap transaction satisfy the conditions of Rule 908(a). This assessment may be done by an in-house counsel reviewing

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time and 200 hours of outside counsel time. Such estimate takes into account the time required to prepare supporting documents necessary for the Commission to make a substituted compliance determination, including, without limitation, information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor compliance with these rules. Based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by the SEC staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead), the Commission estimates that the average national hourly rate for an in-house attorney is $380. The Commission estimates the costs for outside legal services to be $400 per hour. Accordingly, the Commission estimates the total cost to submit a request for a substituted compliance determination to be approximately $110,000 ($30,400 (based on 80 hours of in-house counsel time x $380) + $80,000 (based on 200 hours of outside counsel time x $400)).

1306 See Cross-Border Proposing Release, 78 FR at 31202.

readily ascertainable information. The Commission believes that the cost involved in making such assessment should not exceed one hour of in-house counsel's time or $380.[1307]

The Commission believes that market participants will likely incur costs arising from the need to identify and maintain records concerning the status of their counterparties and the location of any clearing agency used. The Commission anticipates that potential applicants for substituted compliance are likely to request representations from their transaction counterparties to determine the counterparties' status. The Commission believes that the assessment costs associated with determining the status of counterparties should be primarily one-time costs of establishing a practice or compliance procedure of requesting and collecting representations from trading counterparties and maintaining the representations collected as part of the recordkeeping procedures and limited ongoing costs associated with requesting and collecting representations.[1308] As discussed in the Cross-Border Proposing Release, the Commission believes that such one-time costs would be approximately $15,160.[1309] The Commission believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding security-based swap sales and trading practices and should not result in separate assessment costs.[1310] To the extent that market participants have incurred costs relating to similar or same assessments for other Title VII requirements, their assessment costs with respect to substituted compliance may be less.

6. Other Programmatic Effects of Regulation SBSR

1307 See id., note 1954.

1308 See id. at 31203.

1309 See id.

1310 See id., note 1957.

a. Operating Hours of Registered SDRs—Rule 904

Paragraphs (c) to (e) of Rule 904 specify requirements for receiving, handling, and disseminating reported data during a registered SDR's normal and special closing hours. The Commission believes that these provisions will provide benefits in that they clarify how security-based swaps executed while a registered SDR is in normal or special closing hours would be reported and disseminated. The Commission believes that the costs of requirements under these rules will be related to providing notice to participants of its normal and special closing hours and to provide notice to participants that the SDR is available to accept transaction data after its system is unavailable.

One commenter asserted that the proposed requirement for a registered SDR to receive and hold in the queue the data required to be reported during its closing hours "exceeds the capabilities of currently-existing reporting infrastructures."[1311] However, the Commission notes that this comment was submitted in January 2011; since the receipt of this comment, swap data repositories that are provisionally registered with the CFTC that are likely also to register as SDRs with the Commission appear to have developed the capability of receiving and holding data in queue during their closing hours.[1312] Thus, the Commission continues to believe that requiring registered SDRs to hold data in queue during their closing hours would not create a significant burden for registered SDRs.

Rule 904, as adopted, requires a registered SDR to have systems in place to receive and disseminate information regarding security-based swap data on a near-continuous basis, except during "normal closing hours" and "special closing hours." A registered SDR will be permitted

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1311 Markit I at 4.

1312 See supra note 668.

to establish "normal closing hours," which may occur only when, in the estimation of the registered SDR, the U.S. markets and other major markets are inactive. In addition, a registered SDR will be permitted to declare, on an ad hoc basis, special closing hours to perform routine system maintenance, subject to certain requirements. The re-proposal of Regulation SBSR in the Cross-Border Proposing Release only made minor technical changes to Rule 904.

The Commission continues to believe that a registered SDR will not incur significant costs in connection with Rule 904. The requirement for a registered SDR to provide reasonable advance notice to participants and to the public of its normal and special closing hours, and to provide notice to participants that the SDR is available to accept transaction data after its system was unavailable will likely entail only a modest annual cost. The Commission estimates that the ongoing aggregate annual cost would be $45,000, which corresponds to $4,500 per registered SDR.[1313]

The Commission does not believe there are significant one-time costs related to Rule 904. The Commission believes that, other than the costs related to the notice provisions cited above, any additional costs are subsumed in the costs associated with Rules 901 and 902. For example, the requirement for reporting sides to report information to the registered SDR upon receiving a notice that the registered SDR has resumed its normal operations would be part of the reporting sides' reporting obligations under Rule 901. The requirement to disseminate transaction reports held in queue should not present any costs in addition to those already contained in Rule 902. The Commission believes that the systems of the SDR would already have to account for system upgrades and maintenance, power outages, system overloads or other malfunctions or

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[1313] The Commission derived this number as follows: [(Operations Specialist (36 hours) at $125 per hour) x (10 registered SDRs)] = $45,000, which corresponds to $4,500 per registered SDR.

contingencies and as a result there would not be any additional quantifiable costs to also account for normal closing hours. Furthermore, to the extent that market participants have already expended resources in anticipation of the adoption of Regulation SBSR, the costs could be significantly lower. As a result, the Commission's estimates should be viewed as an upper bound of the potential costs of Regulation SBSR.

After reviewing comment letters received in response to the Regulation SBSR Proposing Release and the Cross-Border Proposing Release, the Commission continues to believe that these cost estimates pertaining to Rule 904, as adopted, remain valid. The Commission has received no comments to the contrary.

b. Error Reporting—Rule 905

Rule 905 requires any counterparty to a security-based swap that discovers an error in previously-reported information to take action to ensure that corrected information is provided to the registered SDR to which the initial transaction was reported. The rule also requires a registered SDR to verify any error reports that it receives and correct and, if necessary, publicly disseminate a corrected transaction report. This rule should enhance the overall reliability of security-based swap transaction data that must be maintained by registered SDRs. For registered SDRs, the ability to verify disputed information, process a transaction report cancellation, accept a new security-based swap transaction report, and update relevant records are all capabilities that the registered SDR must implement to comply with its obligations under Regulation SBSR. Likewise, to comply with Rule 905, a registered SDR must disseminate a corrected transaction report in instances where the initial report included erroneous primary trade information. This will allow market observers to receive updated transaction information from the same source that publicly disseminated the original transaction and allow them to integrate updated transaction information into their understanding of the security-based swap market.

Requiring participants to promptly correct erroneous transaction information should help ensure that the Commission and other relevant authorities have an accurate view of risks in the security-based swap market. Correcting inaccurate security-based swap transaction data held by a registered SDR also could benefit market participants by helping them to accurately value the security-based swaps they carry on their books.

The Commission believes that the costs of requirements under these rules will be related to developing and publicly providing the necessary protocols for carrying out error correction and reporting.

Rule 905(a), as adopted, establishes procedures for correcting errors in reported and disseminated security-based swap information, recognizing that that any system for transaction reporting must accommodate for the possibility that certain data elements may be incorrectly reported. Rule 905(b), as adopted, sets forth the duties of a registered SDR to verify disputed information and make necessary corrections. If the registered SDR either discovers an error in a transaction on its system or receives notice of an error from a counterparty, Rule 905(b)(1) requires the registered SDR to verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information contained in its system. Rule 905(b)(2) will further require that, if the erroneous transaction information contained any data that fall into the categories enumerated in Rule 901(c) as information required to be reported, the registered SDR would be required to 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.

The Commission continues to believe that promptly submitting an amended transaction report to the appropriate registered SDR after discovery of an error as required under Rule 905(a)(2) will impose costs on reporting sides. Likewise, the Commission continues to believes that promptly notifying the relevant reporting side after discovery of an error as required under Rule 905(a)(1) will impose costs on non-reporting-party participants.

With respect to reporting side, the Commission continues to believe that Rule 905(a) will impose an initial, one-time cost associated with designing and building the reporting entity's reporting system to be capable of submitting amended security-based swap transactions to a registered SDR. In addition, reporting sides will face ongoing costs associated with supporting and maintaining the error reporting function.[1314]

The Commission continues to believe that designing and building appropriate reporting system functionality to comply with Rule 905(a)(2) will be a component of, and represent an incremental "add-on" to, the cost to build a reporting system and develop a compliance function as required under Rule 901.

The Commission estimates this incremental burden to be equal to 5% of the one-time and annual costs associated with designing and building a reporting system that is in compliance with Rule 901,[1315] plus 10% of the corresponding one-time and annual costs associated with developing the reporting side's overall compliance program required under Rule 901.[1316] Thus,

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1314 The Commission continues to believe that the actual submission of amended transaction reports required under Rule 905(a)(2) would not result in material, independent costs because this would be done electronically though the reporting system that the reporting party must develop and maintain to comply with Rule 901. The costs associated with such a reporting system are addressed in the Commission's analysis of Rule 901. See supra Section XXII(C)(1)(b).

1315 See Regulation SBSR Proposing Release, 75 FR at 75271-72.

1316 See id.

for reporting sides, the Commission estimates that Rule 905(a) will impose an initial (first-year) aggregate cost of $3,547,500, which is approximately $11,825 per reporting side,[1317] and an ongoing aggregate annual cost of $1,192,500, which is approximately $4,000 per reporting side.[1318]

With regard to participants who are not assigned the duty to report a particular transaction, the Commission believes that Rule 905(a) will impose an initial and ongoing cost associated with promptly notifying the relevant reporting side after discovery of an error as required under Rule 905(a)(1). The Commission estimates that such annual cost will be approximately $64,000,000, which corresponds to approximately $13,000 per participant.[1319] This figure is based on the Commission's estimates of (1) 4,800 participants; and (2) 1.14 transactions per day per participant.[1320]

Rule 905 also imposes duties on security-based swap counterparties and registered SDRs to correct errors in reported and disseminated information.

1317 This figure is calculated as follows: [((($49,000 one-time reporting system development costs) x (0.05)) + (($2,500 annual maintenance of reporting system) x (0.05)) + (($54,000 one-time compliance program development) x (0.1)) + (($38,500 annual support of compliance program) x (0.1))) x (300 reporting sides)] = $3,547,500, or $11,825 per reporting side.

1318 This figure is calculated as follows: [((($2,500 annual maintenance of reporting system) x (0.05)) + ((38,500 annual support of compliance program) x (0.1))) x (300 reporting sides)] = $1,192,500, or approximately $4,000 per reporting side.

1319 This figure is based on the following: [(1.14 error notifications per non-reporting-side participant per day) x (365 days/year) x (Compliance Clerk (0.5 hours/report) at $64 per hour) x (4,800 participants)] = $63,912,960, or approximately $64,000,000, which corresponds to approximately $13,000 per participant.

1320 This figure is based on the following: [((2 million estimated annual security-based swap transactions) / (4,800 participants)) / (365 days/year)] = 1.14 transactions per day.

The costs associated with establishing these capabilities, including systems development, support, and maintenance, are largely addressed in the Commission's analysis of those rules.[1321] The Commission estimates that to develop and publicly provide the necessary protocols for carrying out these functions would impose on each registered SDR a cost of approximately $200,000.[1322] The Commission estimates that to review and update such protocols will impose an annual cost on each registered SDR of $400,000.[1323]

Accordingly, the Commission estimates that the initial aggregate annual cost on registered SDRs under Rule 905, as adopted, will be approximately $6,000,000, which corresponds to approximately $600,000 for each registered SDR.[1324] The Commission further estimates that the ongoing aggregate annual cost on registered SDRs under Rule 905, as adopted, will be approximately $4,000,000, which corresponds to approximately $400,000 for each registered SDR.

c. Other Participants' Duties—Rule 906

Rule 906(a) requires a registered SDR to send a notice to security-based swap counterparties that are participants of that SDR about any UIC information missing from

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1321 See SDR Adopting Release, Sections VIII and IX.

1322 This figure is based on the following: [(Sr. Programmer (80 hours) at $303 per hour) + (Compliance Manager (160 hours) at $283 per hour) + (Compliance Attorney (250 hours) at $334 per hour) + (Compliance Clerk (120 hours) at $64 per hour) + (Sr. Systems Analyst (80 hours) at $260 per hour) + (Director of Compliance (40 hours) at $446 per hour) = $199,340, or approximately $200,000 per registered SDR.

1323 This figure is based on the following: [(Sr. Programmer (160 hours) at $303 per hour) + (Compliance Manager (320 hours) at $283 per hour) + (Compliance Attorney (500 hours) at $334 per hour) + (Compliance Clerk (240 hours) at $64 per hour) + (Sr. Systems Analyst (160 hours) at $260 per hour) + (Director of Compliance (80 hours) at $446 per hour)] = $398,680, or approximately $400,000 per registered SDR.

1324 This figure is based on the following: [($199,340 to develop protocols) + ($398,680 for annual support)) x (10 registered SDRs)] = $5,980,200, or approximately $6,000,000, which corresponds to approximately $600,000 per registered SDR.

transaction reports. Rule 906(a) also obligates such participants to provide the missing UIC information to the registered SDR upon receipt of such notice. Rule 906(a) is designed to enable a registered SDR to obtain a complete record of the necessary information for each security-based swap transaction and thereby enable the Commission and other relevant authorities to obtain a comprehensive picture of security-based swap transactions, which will facilitate surveillance and supervision of the security-based swap markets. More complete security-based swap records may provide the Commission necessary information to investigate specific transactions and market participants.

Rule 906(b) is designed to enhance the Commission's ability to monitor and surveil the security-based swap markets by requiring each participant of a registered SDR to report the identity of its ultimate parent and any affiliates that also are participants of that registered SDR. Obtaining this ultimate parent and affiliate information will be helpful for understanding the risk exposures of not only individual participants, but also for related participants operating within a larger financial group. The Commission expects these costs of requiring participants to provide ultimate parent and affiliate information to registered SDRs will be modest and, in any event, believes that the costs of providing this information are justified. Having information on the ultimate parent and affiliate would enhance the ability of the Commission to monitor security-based swap exposures within ownership groups, allowing it to better assess the overall risk exposure of these groups. The Commission is also attempting to reduce these burdens by requiring participants to report the identity only of their ultimate parent(s) but not any intermediate parent(s). The Commission further notes that a participant is not required to provide any information about an affiliate, other than its counterparty ID.[1325] The participant is not required to provide any transaction or other information on the affiliate's behalf.

Rule 906(c) is designed to enhance the overall reliability security-based swap transaction data that is required to be reported to a registered SDR pursuant to Rule 901 by requiring registered security-based swap dealers and registered major security-based swap participants to establish, maintain, and enforce written policies and procedures addressing compliance with Regulation SBSR. Rule 901(a) should result in reliable reporting of security-based swap transaction data by requiring key participants to focus internal procedures on the reporting function. Reliable reporting would benefit counterparties, relevant authorities, and the market generally, by reducing the likelihood of errors in regulatory and publicly disseminated data. This could allow relevant authorities and the public to have confidence in the data and minimize the need to make corrections in the future.

The Commission believes that the costs of requirements under these rules will be related to developing the written policies and procedures necessary to satisfy Rule 901's reporting requirements. Once development is complete, SDRs will face ongoing costs associated with maintaining and enforcing these policies and procedures.

Rule 906(a) requires a registered SDR, once a day, to send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, any security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID. Rule 906(a) requires a participant that receives such a

1325 The Commission does not believe that the change in Rule 906(b) from "participant ID" to "counterparty ID" will result in any change in the cost to participants. The information to be provided is similar in scope and will, in the Commission's estimation, better accomplish the objective of ensuring that a registered SDR can identify each counterparty to a security-based swap.

report to provide the missing information to the registered SDR within 24 hours. Rule 906(b) requires participants to provide a registered SDR with information identifying the participant's affiliate(s) that are also participants of the registered SDR, as well as its ultimate parent(s). Additionally, under Rule 906(b), participants are required to promptly notify the registered SDR of any changes to the information previously provided. Rule 906(c) requires a participant that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR.

Rule 906(a) requires a participant that receives a daily report from a registered SDR to provide the missing UICs to the registered SDR within 24 hours. The Commission believes that Rule 906(a) will result in an initial and ongoing aggregate annual cost for all participants since even participants that are the reporting side for some transactions will be the non-reporting side for other transactions. The Commission estimates that Rule 906(a) will result in an initial and ongoing aggregate annual cost for participants of approximately $12,800,000, which corresponds to a cost of approximately $2,700 per participant.[1326] This figure was based on the Commission's preliminary estimates of (1) 4,800 participants and (2) 1.14 transactions per day per participant.[1327]

1326 This figure is based on the following: [(1.14 missing information reports per participant per day) x (365 days/year) x (Compliance Clerk (0.1 hours) at $64 per hour) x (4,800 participants)] = $12,782,592, or approximately $12,800,000, which corresponds to approximately $2,700 per participant.

1327 This figure is based on the following: [((2 million estimated annual security-based swap transactions) / (4,800 participants)) / (365 days/year)] = 1.14 transactions per day. See supra Section XXI.

Rule 906(b) requires every participant to provide a registered SDR an initial parent/affiliate report, using ultimate parent IDs and counterparty IDs, and updating that information, as necessary. The Commission continues to believe that the cost for each participant to submit an initial or update report will be $32.[1328] The Commission estimates that each participant will submit two reports each year.[1329] In addition, the Commission estimates that there may be 4,800 security-based swap participants and that each one may connect to two registered SDRs. Accordingly, the Commission estimates that the initial and ongoing aggregate annual cost associated with Rule 906(b) will be $614,400, which corresponds to $128 per participant.[1330]

Rule 906(c) requires each participant of a registered SDR that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR.[1331] Rule 906(c) also requires the review and updating of such policies and procedures at least annually. The Commission continues to estimate that developing and implementing written policies and procedures as required under the Rule 906 could result in a one-time initial cost to

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1328 This figure is based on the following: [(Compliance Clerk (0.5 hours) at $64 per hour) x (1 report)] = $32.

1329 During the first year, the Commission believes each participant would submit its initial report and one update report. In subsequent years, the Commission estimates that each participant would submit two update reports.

1330 This figure is based on the following: [($32/report) x (2 reports/year/registered SDR connection) x (2 registered SDR connections/participant) x (4,800 participants)] = $614,400, which corresponds to $128 per participant.

1331 As is explained in the Paperwork Reduction Act discussion, the Commission estimates that there will be approximately 50 registered security-based swap dealers and 5 registered major security-based swap participants for a total of 55 respondents. See supra Section XXII(C)(1)(b)(i).

each registered security-based swap dealer or registered major security-based swap participant of approximately $58,000.[1332] This figure includes the estimated cost to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing.[1333] In addition, the Commission estimates that the annual cost to maintain such policies and procedures, including a full review at least annually, as required under the adopted rule, will be approximately $34,000 for each registered security-based swap dealer or registered major security-based swap participant.[1334] This figure is based on an estimate of the cost to review existing policies and procedures, make any necessary updates, conduct ongoing training, maintain relevant systems and internal controls systems, and perform necessary testing.

Accordingly, the Commission estimates that the initial aggregate annual cost associated with Rule 906(c) would be approximately $5,060,000, which corresponds to $92,000 per covered participant.[1335] The Commission further estimates that the ongoing aggregate annual cost

1332 The Commission derived its estimate from the following: [(Sr. Programmer (40 hours) at $303 per hour) + (Compliance Manager (40 hours) at $283 per hour) + (Compliance Attorney (40 hours) at $334 per hour) + (Compliance Clerk (40 hours) at $64 per hour) + (Sr. Systems Analyst (32 hours) at $260 per hour) + (Director of Compliance (24 hours) at $446 per hour)] = $58,384, or approximately $58,000 per covered participant.

1333 See Cross-Border Proposing Release, 78 FR at 30994, note 256.

1334 The Commission derived its estimate from the following: [(Sr. Programmer (8 hours) at $303 per hour) + (Compliance Manager (24 hours) at $283 per hour) + (Compliance Attorney (24 hours) at $334 per hour) + (Compliance Clerk (24 hours) at $64 per hour) + (Sr. Systems Analyst (16 hours) at $260 per hour) + (Director of Compliance (24 hours) at $446 per hour)] = $33,632, or approximately $34,000 per covered participant.

1335 The Commission derived its estimate from the following: [($58,000 + $34,000) x (55 covered participants)] = $5,060,000, or approximately $92,000 per covered participant.

associated with Rule 906(c) will be approximately $1,870,000, which corresponds to $34,000 per covered participant.[1336]

Rule 906(a) requires a registered SDR, once a day, to send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, branch ID, execution agent ID, trading desk ID, and trader ID. Under Rule 906(a), a participant that receives such a report will be required to provide the missing ID information to the registered SDR within 24 hours.

The Commission believes that each registered SDR would face a one-time, initial cost of approximately $33,000 to create a report template and develop the necessary systems and processes to produce a daily report required by Rule 906(a).[1337] The Commission further believes that there will be an ongoing annual cost for a registered SDR to generate and issue the daily reports, and to enter into its systems the ID information supplied by participants in response to the daily reports, of approximately $30,000.[1338]

The Commission continues to estimate that the initial aggregate annual cost for registered SDRs associated with Rule 906(a) would be approximately $630,000, which corresponds to

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1336 The Commission derived its estimate from the following: [($34,000) x (55 covered participants)] = $1,870,000.

1337 The Commission derived its estimate from the following: [(Senior Systems Analyst (40 hours) at $260 per hour) + (Sr. Programmer (40 hours) at $303 per hour) + (Compliance Manager (16 hours) at $283 per hour) + (Director of Compliance (8 hours) at $446 per hour) + (Compliance Attorney (8 hours) at $334)] = $33,288, or approximately $33,000 per registered SDR.

1338 The Commission derived its estimate from the following: [(Senior Systems Analyst (24 hours) at $260 per hour) + (Sr. Programmer (24 hours) at $303 per hour) + (Compliance Clerk (260 hours) at $64 per hour)] = $30,152, or approximately $30,000 per registered SDR.

$63,000 per registered SDR.[1339] The Commission estimates that the ongoing aggregate annual cost for registered SDRs associated with Rule 906(a) will be approximately $300,000, which corresponds to $30,000 per for registered SDR.

d. Registered SDR Policies and Procedures—Rule 907

Rule 907(a) requires a registered SDR to establish and maintain written policies and procedures with respect to the receipt, reporting, and dissemination of security-based swap transaction data pursuant to Regulation SBSR. Under Rules 907(a)(1) and (2), a registered SDR's policies and procedures must specify the data elements of a security-based swap that must be reported and the reporting format that must be used for submitting information. Under Rule 907(a)(3), the registered SDR's policies and procedures must specify procedures for reporting life cycle events and corrections to previously submitted information. Rule 907(a)(4) requires policies and procedures for flagging transactions having special characteristics. Rules 907(a)(5) requires policies and procedures for assigning UICs in a manner consistent with Rule 903. Rule 907(a)(6) requires policies and procedures for periodically obtaining from each of its participants the ultimate parent and affiliate information required to be submitted to the SDR by Rule 906(b).

By requiring SDRs to establish and maintain policies and procedures pursuant to Rule 907(a)(1), SDRs likely will have to consult with their participants in devising flexible and efficient methods of obtaining high quality transaction data from market participants. This rule allows SDRs to adjust their policies and procedures as market conventions and technologies change. For example, registered SDRs will have the flexibility to incorporate new reporting methodologies more quickly. In addition, Rule 907(a)(1) should reduce the likelihood that

1339 The Commission derived its estimate from the following: [($33,288 + $30,152) x (10 registered SDRs)] = $634,400, or approximately $630,000, which corresponds to $63,440, or approximately $63,000 per registered SDR.

financial innovation that leads to a new security-based swap products will disrupt regulatory reporting and public dissemination of transaction information related to the new product.

At the same time, the Commission believes that there are benefits to enforcing minimum standards for reporting transaction information, standards that will be established as a result of the requirement that SDRs develop policies and procedures in accordance with Rule 907. As noted in Section XXII(B)(1)(a)(iii), the Commission anticipates that a small number of registered SDRs will serve the security-based swap market. These SDRs may enjoy market power relative to their participants, and we believe that imposing minimum standards on them is reasonable to mitigate the risk that imperfect competition leads to low quality data collection.

Further, the requirement in Rule 907(c) that a registered SDR make publicly available on its website the policies and procedures required by Regulation SBSR will allow the public to better understand and interpret the data publicly disseminated by SDRs. For example, under Rule 907(a)(4)(i), a registered SDR will have policies and procedures that identify the characteristics of a security-based swap that could, in the fair and reasonable estimation of the registered SDR, cause a person without knowledge of these characteristics to receive a distorted view of the market. Making publicly available a description of the flags that it requires will allow the public to interpret the flags they observe in publicly disseminated data. Rule 907(d) requires registered SDRs to review, and update as necessary, the policies and procedures required by Regulation SBSR at least annually, and indicate the date on which they were last reviewed.

Finally, Rule 907(e) requires a registered SDR to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to the registered SDR pursuant to Regulation SBSR and the registered SDR's policies and procedures established thereunder. Rule 907(e) will assist the Commission in examining for compliance with Regulation SBSR and in bringing enforcement or other administrative actions as necessary or appropriate. Required data submissions that are untimely, inaccurate, or incomplete could diminish the value of publicly disseminated reports that are designed to promote transparency and price discovery.

The Commission believes that the costs of requirements under Rule 907(a) are related to developing policies and procedures. Rules 907(c) and 907(d) require a registered SDR to update its policies and procedures as necessary and to post these policies and procedures on its website. Rule 907(e) requires a registered SDR to provide the Commission with information related to the timeliness, accuracy, and completeness of data reported to it pursuant to Regulation SBSR and the registered SDR's policies and procedures established thereunder.

Under Regulation SBSR, registered SDRs have the flexibility to determine the precise means through which they will accept reports of security-based swap transaction data. Rather than setting—by rule—a fixed schedule of data elements that must be reported as well as the specific reporting language or reporting protocols that must be used, Regulation SBSR instead requires registered SDRs to establish and maintain policies and procedures that detail these requirements. Persons seeking to register as SDRs may have ongoing discussions with their participants—both before and after registration—about the appropriate means of permitting reporting in a manner that captures all the elements required by Rule 901 while minimizing the administrative burden on reporting sides. Also, the data elements necessary to understand a trade could evolve over time as new contracts are developed, or that the most efficient means of reporting also could evolve as new technologies or reporting languages are devised. In light of these considerations, the Commission believes that registered SDRs and, to the extent that SDRs seek discussion with them, market participants will be in a better position to define the necessary reporting elements over time as the security-based swap market evolves.

As discussed above in Section IV, the Commission considered the alternative of requiring reporting parties to use a single reporting language or protocol in submitting data to registered SDRs, and three commenters encouraged the use of the FpML standard.[1340]

While specifying a single, acceptable standard would remove any ambiguity surrounding data formats that reporting parties could use for transaction reports, the Commission has chosen not to adopt such an approach, for three reasons. First, market participants may have preferences over the different open-source structured data formats available. By allowing registered SDRs to choose from among formats widely used by participants, the adopted approach allows SDRs to coordinate with their participants to select standards that allow reporting parties to efficiently carry out their obligations under Rule 901. Second, allowing SDRs flexibility in the formats they accept should help ensure that they can accommodate innovations in the security-based swap market that lead to changes in data elements that must be reported under Rule 901. Third, the Commission believes that, so long as registered SDRs can make security-based swap transaction data accessible to the Commission using a uniform format and taxonomy, it may not be necessary to require reporting sides to report transaction data to registered SDRs using a single format or taxonomy. This approach gives a registered SDR the opportunity to differentiate its services by offering reporting sides the ability to report using different formats and taxonomies, if the SDR can convert these transaction reports into the uniform format and taxonomy pursuant to which the Commission will require the SDR to make transaction data accessible to the Commission.

1340 See DTCC II at 16; ISDA I at 4; ISDA/SIFMA I at 8.

The Commission believes that ten registered SDRs will be subject to Rule 907, and that developing and implementing written policies and procedures as required under Rule 907, will result in an initial, one-time cost to each registered SDR of approximately $4,100,000.[1341] This figure includes the estimated cost to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, perform necessary testing, monitor participants, and compile data. In addition, the Commission believes that its estimate for maintaining such policies and procedures, including a full review at least annually; making its policies and procedures publicly available on its website; and providing the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to Regulation SBSR, and the registered SDR's policies and procedures is reasonable. As a result, the Commission believes its preliminary estimate of approximately $8,200,000 for each registered SDR is valid.[1342] This figure is based on an estimate of the cost to review existing policies and procedures, make necessary updates,

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1341 The Commission derived its estimate from the following: [(Sr. Programmer (1,667 hours) at $303 per hour) + (Compliance Manager (3,333 hours) at $283 per hour) + (Compliance Attorney (5,000 hours) at $334 per hour) + (Compliance Clerk (2,500 hours) at $64 per hour) + (Sr. Systems Analyst (1,667 hours) at $260 per hour) + (Director of Compliance (833 hours) at $446 per hour)] = $4,083,278, or approximately $4,100,000 per registered SDR. The Commission believes that potential SDRs that have similar policies and procedures in place may find that these costs would be lower, while potential SDRs that do not have similar policies and procedures in place may find that the potential costs would be higher.

1342 The Commission derived its estimate from the following: [(Sr. Programmer (3,333 hours) at $303 per hour) + (Compliance Manager (6,667 hours) at $283 per hour) + (Compliance Attorney (10,000 hours) at $334 per hour) + Compliance Clerk (5,000 hours) at $64 per hour) + (Sr. Systems Analyst (3,333 hours) at $260 per hour) + (Director of Compliance (1,667 hours) at $446 per hour)] = $8,166,722, or approximately $8,200,000 per registered SDR. The Commission believes that potential SDRs that have similar policies and procedures in place may find that these costs would be lower, while potential SDRs that do not have similar policies and procedures in place may find that the potential costs would be higher.

conduct ongoing training, maintain relevant systems and internal controls systems, perform necessary testing, monitor participants, and collect data.[1343] Accordingly, the Commission estimates that the initial annual cost associated with Rule 907 will be approximately $12,250,000 per registered SDR, which corresponds to an initial annual aggregate cost of approximately $122,500,000.[1344] The Commission estimates that the ongoing annual cost associated with Rule 907 will be approximately $8,200,000 per registered SDR, which corresponds to an ongoing annual aggregate cost of approximately $82,000,000.[1345] These figures are based, in part, on the Commission's experience with other rules that require entities to establish and maintain compliance with policies and procedures.[1346]

Finally, the Commission continues to believe that the Rule 907(e) requirement that a registered SDR must provide to the Commission, upon request, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission, registered SDRs will incur costs. The Commission notes, however, that any such costs are already covered by rules governing SDRs adopted in the SDR Adopting Release

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1343 In the Regulation SBSR Proposing Release, the Commission also included "calculate and publish block trade thresholds" as one of the items in the list of items that an SDR would need to undertake on an ongoing basis with respect to its policies and procedures under Rule 907. See Regulation SBSR Proposing Release, 75 FR at 75276-77. Although the Commission is not adopting Rule 907(b) at this time, the costs discussed herein pertain to all of the policies and procedures of a registered SDR. The Commission does not believe that not adopting Rule 907(b), which applies only to policies and procedures relating to block trades, would have had a measureable impact on the costs related to developing the policies and procedures of the registered SDR. As a result, the Commission believes that its cost estimate continues to be valid.

1344 The Commission derived its estimate from the following: [((4,083,278) + ($8,166,722)) x (10 registered SDRs)] = $122,500,000, or approximately $123,000,000.

1345 The Commission derived its estimate from the following: [($8,166,722) x (10 registered SDRs)] = $81,667,220, or approximately $82,000,000.

1346 See Cross-Border Proposing Release, 78 FR at 30994, note 256.

and, thus, do not need to be separately considered here. Specifically, Rule 13n-5(b) requires a registered SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate, and also to ensure that the transaction data and positions that it maintains are complete and accurate.[1347] The Commission further believes that these capabilities will enable a registered SDR to provide the Commission information or reports as may be requested pursuant to Rule 907(e). The Commission believes that Rule 907(e) will not impose any costs on a registered SDR beyond those imposed by Rule 13n-5(b). Furthermore, to the extent that market participants have already expended resources in anticipation of the adoption of Regulation SBSR, the costs could be significantly lower. As a result, the Commission's estimates should be viewed as an upper bound of the potential costs of Regulation SBSR.

After reviewing comment letters received in response to the Regulation SBSR Proposing Release and the Cross-Border Proposing Release, as well as evaluating the most recent data available to the Commission, the Commission continues to believe that these cost estimates related to Rule 907, as adopted, remain valid.

e. SIP Registration by Registered SDRs—Rule 909

Rule 909 requires a registered SDR to register with the Commission as a SIP. SIP registration of a registered SDR will help ensure fair access to important security-based swap transaction data reported to and publicly disseminated by the registered SDR. Specifically, requiring a registered SDR to register with the Commission as a SIP will subject it to Section 11A(b)(5) of the Exchange Act,[1348] which provides that a registered SIP must notify the

[1347] See SDR Adopting Release, Rules 13n-5(b)(1)(iii) and 13n-5(b)(3).

[1348] 15 U.S.C. 78k-1(b)(5).

Commission whenever it prohibits or limits any person's access to its services. If the Commission finds that the person has been discriminated against unfairly, the Commission can require the SIP to provide access to that person.[1349] Section 11A(b)(6) of the Exchange Act[1350] also provides the Commission authority to take certain regulatory action as may be necessary or appropriate against a registered SIP.[1351] Potential users of security-based swap market data will benefit from the Commission having the additional authority over a registered SDR/SIP provided by Sections 11A(b)(5) and 11A(b)(6) to help ensure that these persons offer their security-based swap market data on terms that are fair and reasonable and not unreasonably discriminatory.

Because the Commission is adopting a revised Form SDR that incorporates certain requests for information derived from Form SIP and will not require submission of a separate Form SIP, all programmatic costs of completing Form SDR are included in the Commission's SDR Adopting Release.[1352] As proposed and re-proposed, Regulation SBSR would have required the use of a separate form, existing Form SIP, for this purpose. In response to comments, however, the Commission is adopting a revised Form SDR that incorporates certain requests for information derived from Form SIP, and will not require submission of a separate Form SIP. All programmatic costs of completing Form SDR are scored in the SDR Adopting Release.[1353] Therefore, final Rule 909 itself imposes no programmatic costs on registered SDRs.

[1349] See 15 U.S.C. 78k-1(b)(5)(B).

[1350] 15 U.S.C. 78k-1(b)(6).

[1351] See supra note 994.

[1352] See SDR Adopting Release, Section VIII(D)(1).

[1353] See id.

7. Definitions—Rule 900

The Commission believes that Rule 900 will not entail any material costs to market participants. Rule 900 defines terms used in Regulation SBSR and does not, in itself, impose any obligations or duties. To the extent that the scope of a particular definition subjects a person to one or more provisions of Regulation SBSR, the costs and benefits of that rule are assessed (and, where feasible, calculated) in light of the scope of persons affected. With respect to the definition of "U.S. person," the Commission believes that the Commission's Title VII rules would benefit from having the same terms throughout and could, therefore, reduce assessment costs for market participants that might be subject to these rules.

D. Effects on Efficiency, Competition, and Capital Formation

1. Introduction

Section 3(f) of the Exchange Act[1354] requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, also to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation ("ECCF"). In addition, Section 23(a)(2) of the Exchange Act[1355] requires the Commission, when making rules under the Exchange Act, to consider the impact of such rules on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Regulation SBSR's effects on efficiency, competition, and capital formation are often closely related to one another, and it is difficult to distinguish between the effects of the final

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1354 15 U.S.C. 78c(f).

1355 15 U.S.C. 78w(a)(2).

rules on each of these elements. For example, elements of a security-based swap market structure that foster competition between liquidity suppliers may result in narrower spreads and higher trading volume, eventually resulting in greater price efficiency. Similarly, a security-based swap market that provides low-cost opportunities for firms to hedge commercial and financial risks as a result of low implicit transaction costs may encourage capital formation by allowing these firms to share risks with market participants that are better able to bear them, thereby reducing their need to engage in precautionary savings. However, as the last example indicates, the final rules' effects on capital formation often arise indirectly through their effects on efficiency and competition.

The following discussion of the effects of Regulation SBSR on efficiency, competition, and capital formation considers the regime that Regulation SBSR establishes for regulatory reporting and public dissemination as well as the particular means of implementation that the Commission has chosen, relative to alternative means of implementation considered. Because the various elements of these rules will affect the behavior of counterparties, infrastructure providers, and market participants in general, the Commission has considered the economic effects at each of these levels, including cases in which policy alternatives that may be privately efficient for individual actors, may nevertheless fail to be efficient for the overall market.

Regulation SBSR establishes a regime for regulatory reporting and public dissemination of security-based swap transaction data. Under the final rules, the Commission and other relevant authorities will have access to detailed information about security-based swap transaction activity and about the risk exposures of security-based swap counterparties to both reference entities and to each other. At the same time, the public will enjoy unprecedented access to pricing and volume data of security-based swap transactions. Post-trade transparency in the security-based swap market will reduce information asymmetries, thereby allowing even small counterparties to base their trading decisions on information about activity in the broader market, which they would not be able to observe without post-trade transparency. Moreover, public dissemination of security-based swap transactions could be used as an input to economic decisions in other markets (e.g., the corporate equity or bond markets).

2. Regulatory Reporting

As a result of the final rules, the Commission and other relevant authorities will have access, through registered SDRs, to comprehensive information about the security-based swap market. This information should improve relevant authorities' ability to oversee the security-based swap market both for systemic risk purposes and to detect, deter, and address market abuse.

Regulatory access to security-based swap data will facilitate monitoring of risk exposures with implications for financial stability that market participants do not internalize. For example, Regulation SBSR will provide relevant authorities with visibility into the security-based swap positions of a participant's ultimate parent. Regulation SBSR also will allow relevant authorities to detect unusual activity at a very granular level, by trading desk or even individual trader. Similarly, by filtering exposures to single-name CDS via the product ID, relevant authorities will be able to better understand any potential risk to financial stability that could arise if a corporate default triggers CDS payouts between counterparties. Information about the activity and exposures of security-based swap market participants could allow the Commission or other relevant authorities to take actions that reduce the likelihood of disruption to the smooth functioning of financial markets or to reduce the magnitude of such disruptions when they do occur.[1356] If such disruptions also impair capital formation by reducing the ability or willingness of financial intermediaries or other market participants to borrow or lend, then market oversight that reduces financial instability may also facilitate capital formation.

The opacity of the security-based swap market can contribute to uncertainty during periods of financial crisis. In the absence of information about the outstanding obligations between counterparties to security-based swaps, financial market participants may face uncertainty over the extent to which large financial institutions are exposed to each other's credit risk. This environment may create incentives for financial market participants to reduce risk exposures and seek safer assets (such as cash or Treasury securities), which could lead to a significant reduction in investment in capital goods.[1357] Under a robust regime of regulatory reporting, the Commission and other relevant authorities will have greater means to identify the extent of the relevant exposures and the interrelatedness of risks in the security-based swap market, which could be particularly important in times of financial stress. Providing relevant authorities access to information about outstanding obligations that result from security-based swap activity could allow these authorities to assist in the event of counterparty default. This knowledge could reduce market participants' uncertainty in times of stress, if, for example, it suggests to them a more orderly wind-down of risk exposures of the defaulting counterparty. To the extent that reduced uncertainty results in more efficient risk-sharing it may reduce market participants' demand for safe assets, as described above, and hence may improve the environment for capital formation.

1356 See supra Section XXII(B)(1)(d) (describing current state of efficiency in the security-based swap market).

1357 If financial market participants invest their money in cash or Treasury securities, rather than riskier assets such as stocks or corporate bonds, this may make it more difficult for companies to raise capital and invest in capital goods.

Regulatory reporting will also enable the Commission and other relevant authorities to improve their monitoring of market practices. This could have direct effects on competition in the security-based swap market. Absent regulation by the Commission and other relevant authorities, potential market participants may consider the potential costs of market abuse to be a barrier that discourages their entry into the security-based swap market. The knowledge that the Commission and other relevant authorities are able to conduct surveillance on the basis of regulatory reporting may lower their barriers to entry since surveillance and the resulting increased probability of detection may deter potential market abuse in the security-based swap market. This could result in broader participation and improved efficiency, competition, and capital formation due to the availability of more risk-sharing opportunities between market participants.

3. Public Dissemination

Regulation SBSR establishes a requirement for public dissemination of security-based swap transaction information. Currently, public access to security-based swap transaction information is limited to aggregate pricing and volume data made available by clearing agencies and DTCC-TIW, as well as infrequent reporting by large multilateral organizations. There is no comprehensive or widely available source of transaction-by-transaction pricing and volume information.

The Commission believes that public availability of pricing and volume data for individual security-based swaps, as required by Title VII, should promote efficiency and competition by enabling information produced by activity in the security-based swap markets to be used as an input to myriad economic decisions, when currently limited transaction information is generally available only to large dealers who observe customer order flow.[1358] Thus, smaller market participants, being able to view all security-based swap transactions disseminated by registered SDRs, can observe from recently executed prices whether there may be profitable opportunities to enter the market, thereby increasing competition. In addition, a firm may use information about the pricing of CDS written on its debt to decide on the appropriate opportunity cost of capital to apply to the cash flows of new investment projects, thereby promoting efficiency. Similarly, a lender may use information about credit risk embedded in the pricing of CDS written on a borrower's existing debt to inform the lender's decision of whether or not to extend additional financing, thereby also promoting efficiency.

As discussed in Section XXII(C)(2)(a), public dissemination of security-based swap transactions also may promote better valuation of underlying and related assets by allowing for the inclusion of last-sale information into valuation models. Models without the input of last-sale information could be imprecise or be based on assumptions subject to the evaluator's discretion without having last-sale information to help identify or correct flawed assumptions. As a result, otherwise identical market participants holding the same asset but using different valuation models might arrive at significantly different valuations. This could result in these market participants developing very different views of their risk exposures, resulting in inefficient economic decisions. The Commission anticipates that market observers will incorporate last-sale information that is publicly disseminated by registered SDRs into their valuation models for the same and related assets. Such last-sale information will assist them in developing and validating their pricing models and improve the accuracy of the valuations that

[1358] See supra Section XXII(B)(1)(d) (discussing sources of security-based swap information and efficiency in the current security-based swap market).

they use for a variety of purposes, such as making new investment decisions or managing the risk of existing positions. Efficient allocation of capital relies on accurate valuation of asset prices. Overvaluation of assets could result in a misallocation of capital, as investors seek to purchase or hold an asset that cannot deliver the anticipated risk-adjusted return. By the same token, undervalued assets represent investment opportunities that might go unpursued, because investors do not realize that a more attractive risk-adjusted return may be available. To the extent that post-trade transparency enables asset valuations to move closer to their fundamental values, capital should be more efficiently allocated.

Information revealed through public dissemination of security-based swap transaction details takes on two key characteristics. First, use of a piece of information by one economic agent does not necessarily preclude use of the same information by another. Second, once information is made public under Regulation SBSR, it is, by definition, non-excludable. Dissemination cannot be limited only to those that have direct access to the information (such as dealers who observe significant order flow) or to larger market participants who are willing to pay for the information. These characteristics make it difficult for parties who report transaction data to capture the value that market participants and market observers may gain from receipt of publicly disseminated security-based swap data. As a result, public dissemination of security-based swap transaction information is prone to inefficient supply—for example, parties have an incentive to make incomplete reports of their activity. By establishing minimum requirements for what is reported and publicly disseminated, the Commission believes that Regulation SBSR will limit the degree of this inefficient supply.

Public dissemination will also likely affect efficiency and competition within the security-based market. A primary economic effect of the final rules on public dissemination of transaction information is to reduce the degree of information asymmetry between market participants. Information asymmetries are currently endemic in the security-based swap market. Large dealers can observe a significant amount of order flow provided by their customers and know the prices at which their various customers have traded with them. Other market participants, including the customers of large dealers, generally do not know the prices that other market participants have paid or would be willing to pay for particular security-based swaps, what products are being transacted, or in what volumes. Large dealers collectively, who are able to observe their customers' orders and executions, may be able use this information to adjust the prices that they quote to extract profits at the expense of their customers.[1359] Customers, with very limited ability to obtain information about the prices or sizes of others' transactions, are in an inferior bargaining position to the dealers that they face. To the extent that dealer private information counters the incentives for market participants to efficiently share risks using security-based swaps, it represents a dead-weight loss and not a simple reallocation of gains from trade between dealers and their customers.[1360] Post-trade transparency increases the bargaining power of customers because knowledge of last-sale prices in the same or similar instruments allows them to establish a baseline for negotiations with any dealer.

Post-trade transparency in other financial markets has been shown to improve competition and efficiency by decreasing implicit transaction costs and improving the bargaining power of investors and other non-dealers. For example, a number of studies of the corporate

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1359 See, e.g., Bessembinder et al., supra note 1259.

1360 A dead-weight loss means that the economy in aggregate is worse off. If market participants do not share risks efficiently as a result of their inferior bargaining position relative to dealers, then risks are not transferred to those market participants who are in the best position to bear them. A dead-weight loss results when the benefits that accrue to dealers as a result of their private information are less than the costs of inefficient risk sharing, or when dealers do not benefit at the equal expense of other market participants.

bond market have found that post-trade transparency, resulting from the introduction of FINRA's TRACE system, reduced implicit transaction costs.[1361] Reduced implicit transaction costs could encourage market entry, particularly of smaller dealers and non-dealers, and potentially increase risk sharing and price competition, thereby promoting efficiency. To the extent that the current security-based swap market is similar to the corporate bond market prior to the introduction of TRACE, post-trade transparency could have similar effects in the security-based swap market.[1362]

Regulation SBSR will permit all market observers for the first time to see last-sale information of security-based swap transactions, thereby reducing the information asymmetry between dealers and non-dealers.[1363] Non-dealers may be able to use publicly disseminated information to negotiate more favorable prices from dealers or to decline to enter into security-based swaps offered at unfavorable prices, thereby improving the efficiency of risk sharing in the security-based swap market. Additionally, public dissemination could assist dealers in deriving better quotations, as knowledge of the prices and volumes at which other market participants have executed transactions could serve as a valuable input for quotations in the same or similar instruments.[1364] As a result, dealers will have a better sense of the market and may not need to build large margins into their quotations to compensate for uncertainty in providing quotations. Increased competition from new entrants and quotations that more accurately reflect fundamental

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1361 See Edwards, et al., supra note 1223.

1362 In the Regulation SBSR Proposing Release, the Commission requested comment on whether post-trade transparency would have a similar effect on the security-based swap market as it has in other securities markets—and if not, why not. See 75 FR at 75226. No commenters responded to the Commission's request.

1363 A similar information asymmetry, but to a lesser and varying degree, exists between larger and smaller dealers, and it would also be reduced.

1364 See supra Section XXII(B)(2)(a) (discussing the benefits of improved valuation).

value could lead to lower implicit transaction costs for security-based swaps, which will encourage efficient risk sharing and promote price efficiency.[1365]

The Commission recognizes, however, that the final rules will not eliminate entirely the informational advantage of large intermediaries. These market participants will still have the advantage of seeing order flows or inquiries that are not ultimately executed and disseminated. They also will be able to see their completed transactions against customers in real time, while market observers who consume the transaction data that is publicly disseminated by registered SDRs might not—during the interim phase of Regulation SBSR—learn of these transactions until up to 24 hours after they are executed. In addition, an executing intermediary may derive an informational advantage from knowing the identities of both its counterparties and other customers who submit orders or make inquiries about liquidity.

The Commission also acknowledges that implementing post-trade transparency in the security-based swap market could cause some market participants to execute fewer security-based swaps in the U.S. market or to exit the U.S. market completely and execute their transactions in foreign markets instead. To the extent that such events occur, these could be viewed as costs of the final rules that could have a detrimental impact on efficiency, competition, and capital formation. For example, certain market participants that are currently active in the market might not find it desirable for information about their security-based swaps to be publicly known. If market participants respond to the final rules by reducing their trading activity or exiting the market, or if the final rules raise barriers to entry, the result could be reduced competition between the remaining market participants. Besides reduced price competition, exit by certain participants from the market also could result in a less efficient allocation of credit

[1365] See Edwards, et al., supra note 1223.

risk. This could have implications for capital formation if market participants engage in precautionary savings and self-insurance rather than hedging their risks by using capital resources offered by third parties through security-based swaps.[1366]

Public dissemination of security-based swap transactions also may promote efficient valuation of various financial instruments. As a result of the final rules, all market participants and market observers will have the benefit of knowing how counterparties to a particular security-based swap valued the security-based swap at a specific moment in the recent past, and can incorporate this last-sale information into their own valuations for that security-based swap, as well as any related or underlying instrument.[1367] To the extent that last-sale information results in valuations that are more informationally efficient, they may help improve financial stability by making risk management by financial institutions more efficient. This in turn could enhance the ability of market participants to accurately measure financial exposures to each of their counterparties.

Public dissemination of security-based swap transaction information could improve the efficiency of the security-based swap market through more efficient deployment of assets used as collateral for security-based swap transactions. Appropriate collateral allocation is dependent on accurate valuation of security-based swaps. As the value of a security-based swap changes, the likelihood of one party having to make a payout to the other party also changes, which could impact the amount of collateral that one counterparty owes to the other. Hence, misvaluation of

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1366 The Commission notes there are also plausible cases in which Regulation SBSR might increase the efficiency of risk allocation while also reducing transaction volume. Market participants might determine, as a result of observing publicly disseminated price and volume data, that engaging in a security-based swap transaction is an inefficient means of managing financial or commercial risks.

1367 See supra Section XXII(C)(2).

a security-based swap contract could lead to inefficient allocation of collateral across counterparties. To the extent that public dissemination of security-based swap transactions will help enable better valuations, instances of overcollateralization or undercollateralization should decrease. Furthermore, the better investors can judge the performance of collective investment vehicles because of better valuations, the more efficiently they can allocate their investment capital among available funds.

Post-trade transparency of security-based swaps should promote more efficient valuation of securities on which security-based swaps are based. A clear example of this is the market for single-name CDS, where post-trade transparency may lead to better estimates of the creditworthiness of debt issuers. All other things being equal, CDS protection on a more creditworthy issuer costs less than CDS protection on a less creditworthy issuer. Furthermore, the cost of CDS protection on a single issuer may change over time, reflecting, in part, the financial position of the issuer. Mandatory post-trade transparency of CDS transactions will offer market participants and market observers the ability to dynamically assess the market's view of the creditworthiness of the reference entities that underlie CDS contracts, thus promoting efficiency in the market for cash bonds. For example, public dissemination of transactions in CDS on reference entities that issue TRACE-eligible debt securities will help reinforce the pricing signals derived from individual transactions in debt securities generated by TRACE. Market participants can arbitrage disparities in prices reflected in TRACE and as suggested in last-sale information of related CDS, helping create more overall efficiency in the market for credit. Similarly, public dissemination of transactions in single-name CDS should reinforce the pricing signals derived from public dissemination of index CDS transactions. Post-trade transparency of security-based swap CDS under Regulation SBSR could indirectly bring greater transparency into the market for debt instruments (such as sovereign debt securities) that are not subject to mandatory public dissemination through TRACE or any other means.

Finally, business owners and managers can use information gleaned from the publicly disseminated security-based swap transaction data to make more-informed investment decisions in physical assets and capital goods, as opposed to investment in financial assets, thereby promoting efficient resource allocation and capital formation in the real economy. Transparent security-based swap prices may also make it easier for firms to obtain new financing for business opportunities, by providing information and reducing uncertainty about the value and profitability of a firm's investments.[1368]

4. Implementation of Regulatory Reporting and Public Dissemination

a. Role of Registered SDRs

In adopting Regulation SBSR, the Commission has attempted to design the duties of registered SDRs to promote efficiency of the reporting and public dissemination requirements and thereby minimize any adverse impacts on competition and capital formation. At the same time, the Commission acknowledges that, to the extent that the final rules place regulatory obligations on registered SDRs, these obligations may constitute a barrier to entry that, at the margin, reduces competition between registered SDRs. Regulation SBSR requires a registered SDR to publicly disseminate specified information about reported security-based swap transactions immediately upon receipt. The Commission believes that this requirement will help promote an efficient allocation of public dissemination responsibilities for a number of reasons. First, registered SDRs—because of their role in the regulatory reporting function—already possess all of the information necessary to carry out public dissemination and would not have to

1368 See Bond, et al., note 1258, supra.

collect additional information from other parties. Second, placing the duty to publicly disseminate on registered SDRs eliminates the need for the development of other infrastructure and mechanisms for public dissemination of security-base swap transaction information in addition to the infrastructure that is required to support regulatory reporting.[1369] Third, users of publicly disseminated security-based swap data will be required to consolidate transaction data from only a small number of registered SDRs, rather than a potentially larger number of dissemination agents that might exist under an alternative regime. Under Rules 907(a)(1) and 907(a)(2), registered SDRs have the flexibility to determine the precise means through which they will accept reports of security-based swap transaction data. This degree of flexibility has implications for the efficiency of data collection. Registered SDRs could choose to innovate and adopt new reporting formats that could lower costs to market participants while maintaining the required level of information and data integrity. Moreover, in an effort to attract business, registered SDRs could decide to accept data from market participants in a wide variety of formats, taking on additional data management and systems burdens. Indeed, such an outcome could represent an efficient allocation of the costs of data management, in which a handful of registered SDRs invest in technologies to transform data rather than approximately 300 reporting sides making similar changes to their systems in an effort to provide identical reports to each SDR. The Commission acknowledges, however, that the same features that support a market structure that yields only a handful of registered SDRs could temper the incentives of these registered SDRs to compete on reporting efficiency. For example, registered SDRs could decide to accept data from customers in only one specific format. The Commission further anticipates efficiency gains if data elements necessary to understand a trade evolve over time as new

[1369] See supra Section XXII(C)(2)(c).

security-based swap contracts are developed. Additionally, this approach may support competition among security-based swap counterparties by maintaining low barriers to entry with respect to reporting obligations under Regulation SBSR.

Further, the final rules do not presume a market structure for registered SDRs. On one hand, this means that market participants, the Commission, and other relevant authorities cannot rely on efficiency gains from receiving security-based swap transaction data from a single, consolidated source, but must instead consolidate fragmented data from multiple SDRs. On the other hand, a monopoly in the market for SDR services could preclude innovations that may lead to higher quality outputs or lower costs for reporting parties, SDR participants more generally, the Commission, and other relevant authorities.

b. Interim Phase of Reporting Requirements and Block Rules

As discussed above in Section VII, the Commission is adopting rules for regulatory reporting and public dissemination of security-based swaps that are intended only as the interim phase of implementation of these Title VII requirements. At a later date, the Commission anticipates seeking additional comment on potential block thresholds and associated block rules (such as the time delay for disseminating block trades and the time period for the mandatory reporting and public dissemination of non-block trades).

Immediately implementing a complete regime that includes block trade thresholds and final reporting timeframes could improve efficiency, competition, and capital formation by increasing price transparency in the security-based swap market sooner. Several commenters, however, argued that requiring post-trade transparency for security-based swaps with incorrectly designed block trade thresholds could significantly damage the market,[1370] and the Commission is concerned that disruptions to the market that could result from establishing block trading rules without the benefit of comprehensive data analysis could cause certain market participants to limit their security-based swap activity or to withdraw from the market entirely. This in turn could lead to reduced competition, higher prices, and inefficient allocations of risk and capital.

Currently, there are no data that can be used to directly assess the impact of mandated post-trade transparency of security-based swap transactions on market behavior, because there is no widely available post-trade data to which the security-based swap market can react.[1371] The Commission anticipates that the initial phase of Regulation SBSR will yield at least some useful data about how much time market participants believe they need to hedge transactions and how other market participants react when they see transactions of different sizes with different delays after the time of execution. The phased approach is designed to introduce mandatory post-trade transparency in the security-based swap market while allowing the Commission sufficient time to gather and analyze data regarding potential block thresholds and dissemination delays.

The Commission acknowledges that allowing up to 24 hours for reporting a security-based swap means that market participants not involved in that particular transaction, and other market observers, will not have access to information about the transactions for up to 24 hours after the initial execution, depending upon the specific time when the transaction is reported. This delay could impact the development of more vigorous price competition in the security-based swap market because market participants who are involved in transactions would have

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1370 See supra note 486.

1371 The Commission's economic analysis of the effects of post-trade transparency on the security-based swap market has included indirect evidence from the swap market and from the security-based swap market. See Analysis of Post-Trade Transparency; Hedging Analysis.

access to potentially market-moving information up to 24 hours before those who are not. The Commission believes, however, that allowing up to 24 hours for transactions to be reported and publicly disseminated still represents a significant improvement over the status quo, where market participants report transactions to data repositories only on a voluntary basis and information about transaction is not publicly disseminated.

c. Use of UICs and Rule 903

Regulation SBSR requires the use of several UICs in the reporting of security-based swap transactions. Use of UICs improves efficiency of data intake by registered SDRs and data analysis by relevant authorities and other users of data, as the reported security-based swap transaction information can be readily aggregated by UIC along several dimensions (e.g., product ID, trading desk ID, or trader ID). The efficiency gain in aggregation applies primarily at the SDR level in cases where the SDR uses its own UICs that are not otherwise applied at other SDRs (assuming that no IRSS exists to provide such UICs). To the extent that multiple SDRs were to use the same UICs—because they use UICs provided by an IRSS, such as the GLEIS, or because SDRs agree to recognize UICs assigned by another SDR[1372]—the efficiency gain would extend to aggregation across SDRs, although this is not required under Regulation SBSR. The efficiency gains described in this section may be limited to regulatory reporting and only extend to public dissemination to the extent that the relevant information is being publicly disseminated. Additionally, minimizing the operational risks arising from inconsistent

1372 For example, assume that a person becomes a participant of a registered SDR and obtains UICs for its trading desks and individual traders from that SDR. Later, that person becomes a participant at a second registered SDR. The second SDR could issue its own set of UICs for this person's trading desks and individual traders, or it could recognize and permit use of the same UICs that had been assigned by the first registered SDR.

identification of persons, units of persons, products, or transactions by counterparties and market infrastructure providers would enhance efficiency.

Under Rule 903(b), as adopted, a registered SDR may permit information to be reported to it, and may publicly disseminate information, using codes in place of certain data elements only if the information necessary to interpret such codes is widely available to users of the information on a non-fee basis. If information to understand embedded codes is not widely available on a non-fee basis, information asymmetries would likely continue to exist between large market participants who pay for the codes and other market participants. Rents paid for the use of codes could decrease transparency and increase barriers to entry to the security-based swap market, because the cost of necessary licenses may reduce the incentives for smaller potential market participants to enter the market. Preventing this barrier to entry from forming should help promote competition by facilitating the entry of new market participants.

One commenter suggested that alternatives could be developed to the status quo of using fee-based codes in security-based swap market data.[1373] The Commission welcomes the development of such alternatives, and believes that Rule 903(b), as adopted, may encourage such development.

d. Rules Assigning the Duty to Report

Rule 901(a) assigns the reporting obligation for security-based swaps other than clearing transactions and platform-executed transactions that are submitted to clearing. The reporting hierarchy in Rule 901(a) is designed to increase efficiency for market participants, as well as the Commission and other relevant authorities, by locating the duty to report with counterparties

[1373] See Bloomberg Letter at 2 (stating that it would be possible to develop a public domain symbology for security-based swap reference entities that relied on products in the public domain to "provide an unchanging, unique, global and inexpensive identifier").

who are most likely to have the resources and who are best able to support the reporting function. Furthermore, Rule 901(a) seeks to increase efficiency by leveraging existing infrastructure to support security-based swap reporting, where practicable.

The Commission anticipates that the majority of security-based swaps covered by Rule 901(a), as adopted, will include a registered security-based swap dealer or registered major security-based swap participant on at least one side. Many of the entities that are likely to register as security-based swap dealers or major security-based swap participants already have committed time and resources building the infrastructure to support reporting security-based swaps and some reporting to DTCC-TIW is occurring on a voluntary basis.[1374] Moreover, many such entities currently report swaps pursuant to the CFTC's swap data reporting rules. Rule 901(a) is designed, as much as practicable, to allow these market participants to use these existing reporting capabilities and to minimize the chance that a market participant with limited involvement in the security-based swaps market might incur the duty to report. This approach could lead to lower barriers to entry into the market compared to the approach contemplated in the SBSR Proposing Release.[1375] Also, by reducing infrastructure costs imposed on smaller market participants, this approach also could promote competition by reducing the likelihood that these smaller entrants without existing reporting capabilities would be required to incur fixed costs necessary to develop reporting capabilities. Finally, to the extent that non-registered persons are not required to devote resources to support transaction reporting—because reporting is carried out instead by registered security-based swap dealers and registered major security-

1374 As discussed in Section XXII(B)(1), supra, the data in DTCC-TIW are self-reported and the vast majority of trades involves at least one dealer as a counterparty. Further, both transaction counterparties submit records for confirmation, covering all likely registrants.

1375 See Cross-Border Proposing Release, 78 FR at 31194.

based swap participants who, due to economies of scale and the presence of existing reporting capabilities, are likely to face relatively lower costs of reporting—such resources could be put to more efficient uses.[1376]

The Commission recognizes that this approach puts smaller market participants on the same rung of the hierarchy with entities that likely meet the definition of "security-based swap dealer" and will have to register with the Commission as such in the future. In theory, this could force these smaller market participants into a negotiation with the "likely dealers," because Rule 901(a)(2)(ii)(E)(1) requires both sides to select the reporting side. The Commission believes that this outcome will be unlikely in practice. The Commission understands that voluntary reporting practices in the security-based swap market are broadly consistent with the principle behind the reporting hierarchy in Rule 901(a)(2)(ii): that the more sophisticated market participant should report the transaction. Moreover, market participants who are active in the security-based swap market are likely also to be active in the swap market, where CFTC rules have established a reporting hierarchy that assigns the heaviest reporting duties to swap dealers and major swap participants.[1377] Because practices have already been established for larger market participants to assume reporting duties, it is likely that these practices will be applied in the security-based swap market even before the Commission adopts registration rules for security-based swap dealers and major security-based swap participants.

One of the general principles underlying Rule 901(a) is that, if a person has the duty to report information under Regulation SBSR, it should also have the ability to choose the registered SDR to which it reports. The Commission believes that this approach will promote

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1376 See supra Section XXII(C) (discussing the costs that reporting sides are likely to incur).

1377 See 17 CFR 45.8 (providing a hierarchy for regulatory reporting of swaps); 17 CFR 43.3(a).

efficiency and competition, because it enables each person with a duty to report a security-based swap to connect and report transactions to the registered SDR (or SDRs) that offer it the highest quality services and/or the lowest fees to the extent that there is more than one SDR. Two commenters believed that the Commission could promote competition by allowing a counterparty to a security-based swap—typically a security-based swap dealer—to choose the registered SDR that receives information reported under Regulation SBSR.[1378] The Commission agrees with the views of the commenters that allowing a counterparty to choose the registered SDR that received information reported under Regulation SBSR could promote competition. Rule 901(a), as adopted, reflects this approach by allowing the person with the duty to report to choose the registered SDR to which it reports.

Finally, the Commission believes that, if Rule 901(a) affects capital formation at all, it would be in only a limited and indirect way. The Commission does not see—and no commenter has presented any evidence to suggest—that the economic considerations of how, where, and by whom security-based swap transactions will be reported to registered SDRs will have any direct bearing on how, how often, and at what prices market participants might be willing to transact. As mentioned above, by placing the reporting duty on the person with the most direct access to required information, Rule 901(a) is designed to minimize reporting burdens, which could facilitate a more efficient allocation of capital by reducing expenditures on security-based swap reporting infrastructure.

e. Embargo Rule

Rule 902(d), the Embargo Rule, prohibits the release of security-based swap transaction information to persons (other than a counterparty or post-trade processor) until that information

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[1378] See DTCC VI at 8-9; DTCC VIII; MarkitSERV III at 4-5.

has been transmitted to a registered SDR. The Embargo Rule is designed to promote competition among market participants in the security-based swap market by prohibiting persons who obtain knowledge of a security-based swap transaction shortly after execution from providing information about that transaction to third parties before that information is provided to a registered SDR so that it can be publicly disseminated. In the absence of the Embargo Rule, selected third parties who are told about executions could obtain an informational advantage relative to other market participants, reducing the ability of these other market participants to compete in the market. The potential benefits of Regulation SBSR with respect to competition would suffer in the absence of the Embargo Rule, because market participants who gain earlier access to information could maintain a high degree of information asymmetry in the market.

Rule 902(d), as adopted, includes a carve-out for post-trade processors, such as entities involved in comparing or clearing transactions. This carve-out is designed to promote efficiency in the processing of security-based swap transactions by recognizing that the policy goals of the Embargo Rule are not served by impeding the ability of security-based swap counterparties to obtain post-trade processing services. Post-trade processors must obtain information about a transaction to carry out their functions, even if the transaction has not yet been reported to a registered SDR. In the absence of the carve-out, efficiency could be harmed if post-trade processors were barred from obtaining information about the transaction until it had been publicly disseminated by a registered SDR. Without this carve-out, Regulation SBSR could cause the services and functions provided by post-trade processors to be delayed. This could result in a disruption of current market practices, where post-trade processors provide a variety of services to security-based swap counterparties, and thus a reduction in security-based swap market efficiency.

5. Impact of Cross-Border Aspects of Regulation SBSR

a. General Considerations

The security-based swap market is global in nature, and dealers and other market participants are highly interconnected within this global market. This interconnectedness provides a myriad of paths for liquidity and risk to move throughout the financial system and makes it difficult, in many cases, to precisely identify the impact of a particular entity's activity on financial stability or liquidity. As a corollary to this, it is difficult to isolate risk and liquidity problems to one geographical segment of the market. Further, as we noted in Section XXII(B)(1), security-based swap market participants in one jurisdiction can conduct activity through branches or subsidiaries located in another. These features of the market form the basis of the Commission's analysis of the effects of rule 908 on competition, efficiency and capital formation.

b. Regulatory Reporting and Public Dissemination

Rule 908(a) generally applies regulatory reporting and public dissemination requirements depending on the characteristics of the counterparties involved in a transaction. The regulatory reporting requirement allows the Commission and other relevant authorities the ability to monitor risk and conduct market surveillance. Because the security-based swap market represents a conduit through which financial risks from foreign markets can manifest themselves in the United States, the Commission believes that it is appropriate to focus on those transactions that are likely to serve as routes for risk transmission to the United States, either because a direct or indirect counterparty is a U.S. person, is registered with the Commission as a security-based swap dealer or major security-based swap participant, or if the transaction is submitted to a clearing agency having its principal place of business within the United States. A regulatory reporting requirement that did not include within its scope such transactions would provide the Commission with such an incomplete view of transaction activity with potential to undermine the stability of U.S. financial markets that it would likely undermine the beneficial effects of a regulatory requirement on efficiency, competition and capital formation.

Under Regulation SBSR, as adopted, many of the provisions of Regulation SBSR will apply to a cross-border security-based swap if one of the direct counterparties, even if a non-U.S. person, is guaranteed by a U.S. person. For example, Rule 908(a)(1)(i) requires regulatory reporting of a security-based swap if there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction. Because guarantees extended by U.S. persons on transactions executed abroad can nevertheless import risk into the United States, regulatory reporting of security-based swaps should extend to any security-based swap transaction having an indirect counterparty (i.e., a guarantor) that is a U.S. person. This will improve the Commission's ability to monitor risks posed by activity guaranteed by U.S. persons and, as a result, reduce any adverse impacts on efficiency, competition, and capital formation that might arise without this ability or that might arise from attempts by certain market participants to shift activity into guaranteed foreign subsidiaries in order to evade Regulation SBSR.

Under the approach taken in this release, market participants could avoid regulatory reporting and public dissemination requirements by shifting activity into unguaranteed foreign subsidiaries, assuming there was no other basis for Regulation SBSR to apply, such as the direct counterparty being a U.S. person. Thus, the Commission's action in distinguishing between guaranteed and unguaranteed foreign subsidiaries of U.S. parent entities could affect how these parent entities allocate capital across the organization. For example, a U.S. parent could separately capitalize a foreign subsidiary to engage in transactions with non-U.S. persons. If the

U.S. parent takes such action solely as a response to Title VII regulation, it is unlikely that such a move would improve the efficiency with which the parent allocates its capital.

The primary economic effects of public dissemination of transaction information are related to improving market transparency. Rule 908(a) defines a scope of transactions subject to this requirement in the cross-border context that considers the benefits of public dissemination, including effects on efficiency, competition, and capital formation. The scope defined by Rule 908(a) also considers the potential costs that market participants could incur if counterparties restructure their operations so that their activity falls outside of the scope of Regulation SBSR and continues in a more opaque market. Such a response could result in lessened competition in the security-based swap market within the United States, less efficient risk-sharing and pricing, and impaired capital formation.

The public dissemination requirements under Regulation SBSR could affect the behavior of foreign market participants in ways that reduce market access for U.S. persons. For example, some non-U.S. persons might seek to minimize their contact with U.S. persons in an effort to avoid having their transactions publicly disseminated. Moreover, to the extent that the Commission's rules treat the foreign business of U.S. persons and non-U.S. persons differently from their respective U.S. business, market participants could perceive an incentive to restructure their business to separate their foreign and U.S. operations.

Programmatic benefits of this scope, beyond those already noted as benefits of regulatory reporting, are related to the ability of market observers to condition their beliefs about the security-based swap market on realized transaction prices.[1379] Post-trade transparency in the U.S. security-based swap market could have spillover benefits in foreign markets, even if those foreign markets impose no (or only limited) post-trade transparency requirements.[1380] Post-trade transparency provided by Regulation SBSR will make transaction data available to any market observer in the world. These data will also allow global market observers to use security-based swap prices as an input for valuation models and trading decisions for the same or related instruments, thereby improving the efficiency of these processes.[1381]

Relevant authorities in other jurisdictions are currently engaged in implementing their own regulatory reforms of the OTC derivatives markets that could apply to participants in those foreign markets. Regulatory differences among jurisdictions in the global security-based swap markets could create incentives for business restructuring. To the extent that such restructuring results from regulatory incentives rather than economic fundamentals, efficiency in the real economy could be reduced. Conflicting regulations or unnecessary duplication of regulation also might lead to fragmented markets.[1382]

1379 The effects of public dissemination are discussed more generally in Section XXII(C)(2); the economic effects of Rule 908 that relate to efficiency, competition, and capital formation are examined in Section XXII(D)(4)(i).

1380 See Edwards, et al., supra note 1223. (presenting a model implying, and finding empirical evidence in TRACE data for, what the authors term a "liquidity externality," i.e., improved market quality in certain securities that were not yet TRACE-eligible, when related securities had become subject to TRACE post-trade transparency).

1381 See supra Section XXII(C)(2)(a) (discussing the benefits of improved valuation).

1382 See, e.g., Arnoud W.A. Boot, Silva Dezelan, and Todd T. Milbourn, "Regulatory Distortions in a Competitive Financial Services Industry," Journal of Financial Services Research, Vol. 17, No. 1 (2000) (showing that, in a simple industrial organization model of bank lending, a change in the cost of capital resulting from regulation results in a greater loss of profits when regulated banks face competition from non-regulated banks than when regulations apply equally to all competitors); Victor Fleischer, "Regulatory Arbitrage," 89 Texas Law Review 227 (March 4, 2010) (discussing how, when certain

Even if the substance of statutory and regulatory efforts across jurisdictions is comparable, different jurisdictions may impose new regulatory requirements on different timelines. To the extent that these timelines or the underlying requirements differ, market participants might have the opportunity to take advantage of these differences by making strategic choices, at least in the short term, with respect to their transaction counterparties and business models. For example, at a larger scale, firms may choose whether to participate in or withdraw from the U.S. security-based swap market. As a result of exits, registered security-based swap dealers that are U.S. persons might have less access to foreign markets, unless they were to restructure their business to conduct foreign transactions through unguaranteed foreign subsidiaries whose transactions with non-U.S. persons would not be subject to the regulatory reporting and public dissemination under Regulation SBSR.

These potential restructurings could impact competition in the U.S. market. On one hand, the ability to restructure one's business rather than exit the U.S. market entirely to avoid application of Title VII to an entity's non-U.S. operations could reduce the number of entities that exit the market, thus mitigating the negative effects on competition described above. On the other hand, non-registered U.S. persons may find that the only non-U.S. person registered security-based swap dealers that are willing to deal with them are those whose security-based swap business is sufficiently large to afford the compliance costs associated with regulatory reporting and public dissemination requirements. To the extent that smaller dealers have an incentive to exit the market, the overall level of competition in the market could decline.

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firms are able to choose their regulatory structure, regulatory burdens are shifted onto those entities that cannot engage in regulatory arbitrage).

The Commission is mindful that, in the near term and until full implementation of comparable requirements for regulatory reporting and public dissemination of security-based swaps in other jurisdictions, the rules may generate incentives for market participants to restructure and reduce contact with U.S. market participants. As a result, for example, U.S. market participants seeking to hedge risk could face higher prices for hedging or fewer opportunities to hedge at all, which could impede capital formation. Another result could be inefficiency in risk allocation, because those market participants who are best placed to take on risks shared through security-based swap activity might be discouraged from doing so because of perceived necessity to avoid regulatory reporting and public dissemination requirements under Title VII. Furthermore, U.S. market participants that are able to restructure their business across national boundaries to avoid regulation are likely to be the largest financial institutions that can bear the greatest risks. The remaining firms will likely be smaller and have less capital with which to offer liquidity to the market.

Restructuring of business lines to take advantage of low-transparency regimes also would impede transparency, as fewer transactions would be subject to public dissemination under Regulation SBSR. Market participants who had relocated abroad would still be able to free-ride on price formation generated by the public dissemination of others' transactions in the same or similar instruments while not contributing any transactions of their own. The value of regulatory reporting and public dissemination in the U.S. market would be reduced to the extent that liquidity migrates to jurisdictions that are less-transparent.[1383]

1383 By the same token, regulatory reporting and public dissemination in the U.S. security-based swap market could have spillover benefits in foreign markets that trade the same or similar instruments as the U.S. market, even if those foreign markets impose no (or only limited) requirements. See supra note 1259.

c. Substituted Compliance

Rule 908(c) provides that the Title VII requirements relating to regulatory reporting and public dissemination of security-based swaps may be satisfied by compliance with the rules of a foreign jurisdiction if the Commission issues an order determining that the jurisdiction has requirements that comparable to those of Regulation SBSR. Rule 908(c) is designed to promote efficiency, competition, and capital formation in the security-based swap market, to the extent practical, given the state of regulatory reform of the OTC derivatives market being applied by specific foreign jurisdictions.

The Commission believes a regulatory regime that allows for substituted compliance under comparable foreign rules promotes efficiency by reducing the need for certain market participants to double report security-based swaps (i.e., once to a foreign trade repository or foreign regulatory authority and again to a registered SDR). Substituted compliance also has the potential to improve market and price efficiency by reducing or even eliminating instances of the same transaction being publicly disseminated under two separate systems. The Commission assumes that market observers will obtain and utilize last-sale information about security-based swaps from any available sources around the globe. Without substituted compliance, a security-based swap that met the jurisdictional requirements of Rule 908(a)(2) of Regulation SBSR as well as the public dissemination rules of a foreign jurisdiction would be publicly disseminated in both jurisdictions. It might be difficult or impossible for market observers to understand that the two trade reports represent the same transaction, which would thus distort their view of the market. If the Commission were to issue a substituted compliance order with respect to that jurisdiction, market observers would see only a single report (emanating from the foreign jurisdiction) of that transaction.

While the rules governing substituted compliance are not designed to promote efficiency at the regulatory level, they are designed at least to minimize detractions from regulatory efficiency. Under substituted compliance, certain cross-border transactions that otherwise would be reported to an SEC-registered SDR would instead be reported to a foreign trade repository or foreign regulatory authority. Final Rule 908(c) requires, among other things, direct electronic access to the foreign security-based swap data in order to make a substituted compliance determination. However, there could be some difficulties in normalizing and aggregating the data from SEC-registered SDRs with the data from the foreign trade repositories or foreign regulatory authorities.

Overall, the Commission believes that, on balance, there will be certain positive impacts on efficiency from allowing substituted compliance. The principle behind this approach is that the Commission would grant substituted compliance with respect to regulatory reporting and public dissemination of security-based swaps in another jurisdiction only if the requirements of that jurisdiction are comparable to otherwise applicable requirements in Regulation SBSR. If a foreign jurisdiction does not have a comparable regime for regulatory reporting and public dissemination of security-based swaps, allowing the possibility of substituted compliance could, on balance, erode any impacts of Regulation SBSR on efficiency, to the extent that the foreign jurisdiction's regulatory outcomes for regulatory reporting and public dissemination differ from those under Regulation SBSR. This result could be viewed as privately efficient by market participants who might otherwise restructure their activities to avoid public dissemination. However, the result also would be that many transactions with significant connections to the U.S. market would remain opaque, thus reducing opportunities for greater price competition and price discovery. Moreover, granting substituted compliance in such cases could provide incentives for foreign jurisdictions to impose lower regulatory standards for security-based swaps than those mandated by Title VII. Under the rules, as adopted, the Commission may not grant substituted compliance unless the foreign jurisdiction's rules are comparable to otherwise applicable requirements.

Under Rule 908(c), the Commission could make a determination of comparability for regulatory reporting and public dissemination either separately or together. A few commenters argued that the Commission should separate them, which would, for example, permit substituted compliance for regulatory reporting for a foreign jurisdiction, but not for public dissemination.[1384] The Commission agrees with the commenter's suggestions and has determined to take such an approach. Permitting substituted compliance for regulatory reporting but not for public dissemination might be privately efficient for firms, who would be obligated to report transactions to a foreign jurisdiction for regulatory purposes, but would be obligated to only report to a registered SDR only those data elements necessary for public dissemination under Regulation SBSR. The Commission could, for instance, permit transactions to be reported into a foreign jurisdiction with no or only limited public dissemination requirements.

One commenter correctly pointed out that there are a few classes of security-based swap for which Regulation SBSR requires regulatory reporting but not public dissemination and argued, therefore, that the Commission should permit itself to grant substituted compliance for regulatory reporting only (and not public dissemination) for these classes.[1385] The Commission agrees with the commenter and is adopting Rule 908(c) with certain revisions that will allow the Commission to issue a substituted compliance order with respect to regulatory reporting but not

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1384 See supra note 917.

1385 See IIB Letter at 25. See also Rule 902(c).

public dissemination in such cases.[1386] This revision should increase the scope of transactions that may enjoy the efficiency benefits of substituted compliance discussed above.

E. Aggregate Quantifiable Total Costs

Based on the foregoing, the Commission estimates that Regulation SBSR will impose an initial one-time cost of approximately $194,500,000 on all entities.[1387] The Commission estimates that Regulation SBSR will impose a total ongoing annual aggregate cost of approximately $275,500,000 for all entities.[1388] With regard to registered SDRs, the Commission estimates that Regulation SBSR will impose an initial aggregate one-time cost of

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1386 See supra Section XV(E)(6).

1387 The Commission derived its estimate from the following: [($360,000 (Rule 901 one-time costs on registered SDRs)) + ($20,000,000 (Rule 902 one-time costs on registered SDRs)) + ($2,000,000 (Rule 905 one-time costs on registered SDRs)) + ($330,000 (Rule 906 one-time costs on registered SDRs)) + ($41,000,000 (Rule 907 one-time costs on registered SDRs)) + ($3,190,000 (Rule 906 one-time costs on covered participants) + ($121,800,000 (Rule 901 one-time costs on reporting sides) + ($720,200 (Rule 903 one-time costs on SDR participants)) + ($3,547,500 (Rule 905 one-time costs on reporting sides) + ($1,540,000 (Rule 908(c) one-time costs on requesting entities)] = $194,487,700, or approximately $194,500,000.

1388 The Commission derived its estimate from the following: [($455,000 (Rule 901 ongoing annual costs on registered SDRs)) + ($12,000,000 (Rule 902 ongoing annual costs on registered SDRs)) + ($45,000 (Rule 904 ongoing annual costs on registered SDRs)) + ($4,000,000 (Rule 905 ongoing annual costs on registered SDRs)) + ($300,000 (Rule 906 ongoing annual costs on registered SDRs)) + ($82,000,000 (Rule 907 ongoing annual costs on registered SDRs)) + ($1,870,000 (Rule 906 ongoing annual costs on covered participants)) + ($95,700,000 (Rule 901 ongoing annual costs on reporting sides)) + ($2,352,000 (Rule 903 one-time costs on SDR participants)) + ($1,192,500 (Rule 905 ongoing annual costs on reporting sides)) + ($64,000,000 (Rule 905 ongoing annual costs on non-reporting sides)) + ($13,400,000 (Rule 906 ongoing annual costs on all participants)) + ($1,540,000 (Rule 908(c) costs of requests in the first year)] = $275,444,500 or approximately $275,500,000.

approximately $63,700,000,[1389] and an ongoing aggregate annual cost of approximately $98,800,000.[1390]

XXIII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA") requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[1391] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."[1392] Section 605(b) of the RFA[1393] states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.

In developing the final rules contained in Regulation SBSR, the Commission has considered their potential impact on small entities. For purposes of Commission rulemaking in

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1389 The Commission derived its estimate from the following: [($360,000 (Rule 901 one-time costs on registered SDRs)) + ($20,000,000 (Rule 902 one-time costs on registered SDRs)) + ($2,000,000 (Rule 905 one-time costs on registered SDRs)) + ($330,000 (Rule 906 one-time costs on registered SDRs)) + ($41,000,000 (Rule 907 one-time costs on registered SDRs))] = $63,690,000 or approximately $63,700,000.

1390 The Commission derived its estimate from the following: [($455,000 (Rule 901 ongoing annual costs on registered SDRs)) + ($1,000,000 (Rule 902 ongoing annual costs on registered SDRs)) + ($45,000 (Rule 904 ongoing annual costs on registered SDRs)) + ($4,000,000 (Rule 905 ongoing annual costs on registered SDRs)) + ($300,000 (Rule 906 ongoing annual costs on registered SDRs)) + ($82,000,000 (Rule 907 ongoing annual costs on registered SDRs))] = $98,800,000.

1391 5 U.S.C. 603(a).

1392 Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act, 17 CFR 240.0-10. See Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

1393 5 U.S.C. 605(b).

connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[1394] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[1395] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1396]

The Regulation SBSR Proposing Release stated that, based on input from security-based swap market participants and its own information, the Commission preliminarily believed that the majority of security-based swap transactions have at least one counterparty that is either a security-based swap dealer or major security-based swap participant, and that these entities, whether registered broker-dealers or not, would exceed the thresholds defining "small entities" set out above.[1397] Thus, the Commission noted that it preliminarily believed that neither of these types of entities would likely qualify as small entities for purposes of the RFA.[1398] Moreover, in the Regulation SBSR Proposing Release, the Commission noted that, even in cases where one of the counterparties to a security-based swap was outside of the categories of security-based swap

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1394 See 17 CFR 240.0-10(a).

1395 17 CFR 240.17a-5(d).

1396 See 17 CFR 240.0-10(c).

1397 See Regulation SBSR Proposing Release, 75 FR at 75282.

1398 See id.

dealer or major security-based swap participant, the Commission preliminarily did not believe any such entities would be "small entities" as defined in Commission Rule 0-10.[1399] In this regard, the Commission noted that feedback from industry participants and the Commission's own information about the security-based swap market (including a survey conducted by the Office of the Comptroller of the Currency) indicated that only persons or entities with assets significantly in excess of $5 million participate in the security-based swap market.[1400] As a result, the Commission stated its preliminarily belief that the vast majority of, if not all, security-based swap transactions are between large entities for purposes of the RFA.[1401]

Similarly, in the Regulation SBSR Proposing Release, the Commission stated its preliminarily belief that the entities likely to register as SDRs would not be small entities.[1402] Based on input from security-based swap market participants and its own information, the Commission stated its preliminarily belief that most if not all the registered SDRs would be part of large business entities, and that all registered SDRs would have assets exceeding $5 million and total capital exceeding $500,000.[1403] On this basis, the Commission preliminarily believed that the number of security-based swap transactions involving a small entity as that term is defined for purposes of the RFA would be de minimis and that no aspect of proposed Regulation SBSR would be likely to alter the type of counterparties presently engaging in security-based

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1399 See id. at 75283.

1400 See id.

1401 See id.

1402 See id.

1403 See id.

swap transactions.[1404] Therefore, the Commission preliminarily did not believe that proposed Regulation SBSR would impact any small entities.[1405]

As a result, in the Regulation SBSR Proposing Release, the Commission certified that Regulation SBSR would not have a significant economic impact on a substantial number of small entities for purposes of the RFA and requested written comments regarding this certification.[1406] Specifically, the Commission requested that commenters describe the nature of any impact on small entities, indicate whether they believe that participants and registered SDRs are unlikely to be small entities, and provide empirical data to support their responses.[1407] The Commission did not receive any comments contrary to its conclusion.

The Commission continues to believe that few if any security-based swap counterparties that would incur duties under Regulation SBSR, as adopted, are "small entities" as defined in Commission Rule 0-10. Feedback from industry participants and the Commission's own information about the security-based swap market indicate that only persons or entities with assets significantly in excess of $5 million participate in the security-based swap market.[1408] The Commission continues to believe that the vast majority of, if not all, security-based swap transactions are between large entities for purposes of the RFA.

Based on input from security-based swap market participants and its own information, the Commission continues to believe that registered SDRs would be part of large business entities, and that all registered SDRs would have assets exceeding $5 million and total capital

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1404 See id.

1405 See id.

1406 See id.

1407 See id.

1408 See id. See also Cross-Border Proposing Release, 78 FR at 31205.

exceeding $500,000. Therefore, the Commission continues to believe that none of the registered SDRs would be small entities.

The Commission believes that the number of security-based swap transactions involving a small entity as that term is defined for purposes of the RFA would be de minimis. Moreover, the Commission does not believe that any aspect of Regulation SBSR would be likely to alter the type of counterparties presently engaging in security-based swap transactions. Therefore, the Commission does not believe that Regulation SBSR would impact any small entities.

For the foregoing reasons, the Commission certifies that Regulation SBSR would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

XXIV. Statutory Basis and Text of Final Rules

Pursuant to the Exchange Act, 15 U.S.C. 78a et seq., and particularly Sections 3C(e), 11A(b), 13(m)(1), 13A(a), 23(a)(1), 30(c), and 36(a), 15 U.S.C. §§ 78c-3(e), 78k-1(b), 78m(m)(1), 78m-1(a), 78w(a)(1), 78dd(c), and 78mm(a) thereof, the Commission is adopting Rules 900, 901, 902, 903, 904, 905, 906, 907, 908, and 909 under the Exchange Act.

List of Subjects in 17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-l(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37, unless otherwise noted.

2. The part heading for part 242 is revised as set forth above.

3. Add §§ 242.900, 242.901, 242.902, 242.903, 242.904, 242.905, 242.906, 242.907, 242.908, and 242.909 to read as follows:

Regulation SBSR—Regulatory Reporting and Public Dissemination of Security-Based Swap Information

Sec.

§ 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

(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).

(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.

§ 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].

(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].

(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:

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

(II) [Reserved].

(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 (c)(1)(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), 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) 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), 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.

(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]

(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.

(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.

(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.

§ 240.901A Reports regarding the establishment of block thresholds and reporting delays for regulatory reporting of security-based swap transaction data. (Appendix A to 17 CFR § 240.901)

Appendix A to § 240.901 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 (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) 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), 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:

(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

(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).

(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 and guarantors.

(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.

(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.

§ 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 (i) is an error correction required to be disseminated by § 242.905(b)(2); or (ii) 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.

(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.

(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.

(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).

By the Commission.

Brent J. Fields
Secretary

Dated: February 11, 2015

Appendix A

Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Action [Release No. 34-69491; File No. S7-34-10]

http://www.sec.gov/comments/s7-34-10/s73410.shtml

- E-mail message from Larry E. Thompson, Managing Director and General Counsel, Depository Trust & Clearing Corporation ("DTCC"), to Stephen Luparello, SEC, dated December 10, 2014 ("DTCC X").

- Letter from Marisol Collazo, Chief Executive Officer, DTCC Data Repository US LLC, to Elizabeth M. Murphy, Secretary, SEC, dated November 14, 2014 ("DTCC IX").

- Letter from Angie Karna, Managing Director, Legal, Nomura Global Financial Products, Inc., to Brent J. Fields, Secretary, SEC, dated September 10, 2014 ("NGFP Letter")

- Letter from Carl Levin, Chairman, U.S. Senate Permanent Subcommittee on Investigations, to Kevin M. O'Neill, Deputy Secretary, SEC, dated July 3, 2014 ("Levin Letter").

- E-mail message from Christopher Young, Director, U.S. Public Policy, ISDA, to Thomas Eady, SEC, dated March 27, 2014 ("ISDA III").

- E-mail message from Marisol Collazo, Chief Executive Officer, DTCC Data Repository US LLC, to Thomas Eady and Michael J. Gaw, SEC, dated March 24, 2014 (with attached letters submitted to the CFTC regarding CME Rule 1001) ("DTCC VIII").

- E-mail message from Marisol Collazo, Chief Executive Officer, DTCC Data Repository US LLC, to Thomas Eady, SEC, dated March 21, 2014 (with attached message submitted to the CFTC ("DTCC VII").

- Letter from Kim Taylor, President, Clearing, CME Group, and Kara L. Dutta, General Counsel, ICE Trade Vault ("ICE"), LLC, to Elizabeth M. Murphy, Secretary, Commission, dated November 19, 2013 ("CME/ICE Letter").

- Letter from Kara L. Dutta, General Counsel, ICE Trade Vault, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated September 23, 2013 ("ICE Letter").

- Letter from Matti Leppälä, Secretary General/CEO, PensionsEurope, to Elizabeth M. Murphy, Secretary, Commission, dated September 3, 2013 ("PensionsEurope Letter").

- Letter from Americans for Financial Reform, to Elizabeth Murphy, Secretary, Commission, dated August 22, 2013 ("AFR Letter").

- Letter from Anne-Marie Leroy, Senior Vice President and Group General Counsel, World Bank, and Fady Zeidan, Acting Deputy/General Counsel, International Finance Corporation, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("World Bank Letter").

- Letter from Futures and Options Association, dated August 21, 2013 ("FOA Letter").

- Letter from Kenneth E. Bentsen, Jr., President, Securities Industry and Financial Markets Association ("SIFMA"); Walt Lukken, President & Chief Executive Officer, Futures Industry Association ("FIA"); and Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable ("Roundtable"), to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("SIFMA/FIA/Roundtable Letter").

- Letter from Per Sjöberg, Chief Executive Officer, and Christoffer Mohammar, General Counsel, TriOptima AB, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("TriOptima Letter").

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, SEC, dated August 21, 2013 ("DTCC VI").

- Letter from Jeff Gooch, Head of Processing, Markit, Chair and CEO, MarkitSERV, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("MarkitSERV IV").

- Letter from Coalition for Derivatives End-Users, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("CDEU Letter").

- Letter from Kathleen Cronin, Senior Managing Director, General Counsel, CME Group Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("CME II").

- Letter from Sarah A. Miller, Chief Executive Officer, Institute of International Bankers ("IIB"), to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("IIB Letter").

- Letter from Sullivan & Cromwell LLP, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("Sullivan Letter").

- Letter from Søren Elbech, Treasurer, and Jorge Alers, General Counsel, Inter-American Development Bank, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("IDB Letter").

- Letter from Karrie McMillan, General Counsel, Investment Company Institute ("ICI") and Dan Waters, Managing Director, ICI Global, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("ICI II").

- Letter from Dennis M. Kelleher, President and CEO, Stephen W. Hall, Securities Specialist, and Katelynn 0. Bradley, Attorney, Better Markets, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("Better Markets IV").

- Letter from Monique S. Botkin, Associate General Counsel, Investment Adviser Association, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("IAA Letter").

- Letter from Patrick Pearson, European Commission, dated August 21, 2013 ("Pearson Letter").

- Letter from Lutz-Christian Funke, Senior Vice President, and Frank Czichowski, Senior Vice President and Treasurer, KfW, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("KfW Letter").

- Letter from Koichi Ishikura, Executive Chief of Operations for International Headquarters, Japan Securities Dealers Association, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("JSDA Letter").

- Letter from Bruce E. Stern, Chairman, Association of Financial Guaranty Insurers, to Elizabeth M. Murphy, Secretary, Commission, dated August 20, 2013 ("AFGI Letter").

- Letter from Ernst-Albrecht Brockhaus, Member of the Management Board, and Nico Zachert, Authorized Signatory, Legal/Compliance, FMS Wertmanagement, to Elizabeth M. Murphy, Secretary, Commission, dated August 2013 ("FMS Letter").

- Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association ("MFA"), and Adam Jacobs, Director, Head of Markets Regulation, Alternative Investment Management Association, to Elizabeth M. Murphy, Secretary, Commission, dated August 19, 2013 ("MFA/AIMA Letter").

- Letter from Jonathan B. Kindred and Shigesuke Kashiwagi, Co-chairs, Japan Financial Markets Council, to Elizabeth M. Murphy, Secretary, Commission, dated August 15, 2013 ("JFMC Letter").

- Letter from Kevin Nixon, Managing Director, Institute of International Finance, to Elizabeth M. Murphy, Secretary, Commission, dated August 8, 2013 ("IIF Letter").

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, SEC, dated July 22, 2013 ("DTCC V").

- Letter from Dennis Kelleher, President & CEO, and Stephen W. Hall, Securities Specialist, Better Markets, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 22, 2013 ("Better Markets III").

- Letter from Chris Barnard, to Commission, dated July 15, 2013 ("Barnard II").
- Letter from Gregory Ugwi, Strategist, ThinkNum.com, dated June 15, 2013 ("ThinkNum Letter").
- Letter from FSR, FIA, IIB, International Swaps and Derivatives Association ("ISDA"), ICI, and SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated May 21, 2013 ("Six Associations Letter").

Comments on Proposed Rule: Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information
[Release No. 34-63346; File No. S7-34-10]

http://www.sec.gov/comments/s7-34-10/s73410.shtml

- Letter from Thomas G. McCabe, Chief Operating Officer, OneChicago, to Elizabeth M. Murphy, Secretary, Commission, dated March 1, 2013 ("OneChicago II").
- Letter from Elizabeth K. King, Head of Regulatory Affairs, GETCO, to Elizabeth M. Murphy, Secretary, Commission, dated March 21, 2012 ("GETCO Letter").
- Letter from Michael Hisler, Co-Founder, Swaps & Derivatives Market Association ("SDMA"), to Elizabeth M. Murphy, Secretary, Commission, dated October 19, 2011 ("SDMA II").
- Letter from the ABA Securities Association, American Council of Life Insurers, FSR, FIA, IIB, ISDA, and SIFMA to David A. Stawick, Secretary, CFTC; Jennifer J. Johnson, Secretary, Federal Reserve Board; Robert E. Feldman, Executive Secretary, FDIC; Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration; Elizabeth M. Murphy, Secretary, Commission; Office of the Comptroller of the Currency; and Alfred M. Pollard, General Counsel, Federal Housing Finance Agency, dated September 8, 2011 ("Multiple Associations Letter").
- Letter from Scott Pintoff, General Counsel, GFI Group, Inc. ("GFI"), to Elizabeth M. Murphy, Secretary, Commission, dated July 12, 2011 ("GFI Letter).
- Letter from Larry E. Thompson, General Counsel, the Depository Trust & Clearing Corporation ("DTCC"), to the Honorable Mary L. Schapiro, Chairman, Commission, and the Honorable Gary Gensler, Chairman, CFTC, dated June 3, 2011 ("DTCC IV").
- Letter from Stephen Merkel, Chairman, Wholesale Markets Brokers' Association Americas ("WMBAA"), to the Honorable Mary L. Schapiro, Chairman, Commission, and the Honorable Gary Gensler, Chairman, CFTC, dated June 3, 2011 ("WMBAA III"). [Note: This comment letter is in fact dated "June 3, 2010," but the Commission deems the true date to be June 3, 2011. The comment letter references proposed Regulation

SBSR, which the Commission issued in November 2010, and thus the comment could not have been submitted in June 2010.]

- Letter from John R. Gidman, Association of Institutional Investors, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated June 2, 2011 ("Institutional Investors Letter"). [Note: This comment letter is in fact dated "June 2, 2010," but the Commission deems the true date to be June 2, 2011. The comment letter references proposed Regulation SBSR, which the Commission issued in November 2010, and thus the comment could not have been submitted in June 2010.]

- Letter from Chris Koppenheffer, SDMA, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated June 1, 2011 ("SDMA I").

- Letter from Richard M. Whiting, Executive Director and General Counsel, FSR, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated May 12, 2011 ("Roundtable Letter").

- Letter from Davis Polk & Wardwell LLP on behalf of The Bank of Tokyo-Mitsubishi UFJ. Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corporation, to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, Commission, and Jennifer L. Johnson, Secretary, Federal Reserve Board, dated May 6, 2011 ("Japanese Banks Letter").

- Letter from Richard H. Baker, President and Chief Executive Officer, MFA, to the Honorable Mary L. Schapiro, Chairman, Commission, dated March 24, 2011 ("MFA II"), and attached "MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act" ("MFA Recommended Timeline").

- Letter from Davis Polk & Wardwell LLP on behalf of Barclays Bank PLC, PNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBS, Nomura Securities International, Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group, PLC, Société Générale, The Toronto-Dominion Bank, and UBS AG, to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, Commission, and Jennifer L. Johnson, Secretary, Federal Reserve Board, dated February 17, 2011 ("Davis Polk II").

- Letter from Robert Carpenter, President and Chief Executive Officer, GS1 U.S., Miguel A. Lopera, Chief Executive Officer, GS1 Global, and Allan D. Grody, President, Financial Inter Group, to Elizabeth Murphy, Secretary, Commission, dated February 14, 2011 ("GS1 Letter") and "GS1 & Financial InterGroup Response to Securities & Exchange Commission" ("GS1 Proposal").

- Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of Bank of America Merrill Lynch, BNP Paribas, Citi, Credit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, Morgan Stanley, Nomura Securities International, Inc., PNC Bank, Société General, UBS Securities LLC, and

Wells Fargo & Company, to Elizabeth M. Murphy, Secretary, Commission, and David A. Stawick, Secretary, CFTC, dated February 14, 2011 ("Cleary II").

- Letter from Charles Llewellyn, Regional Legal Counsel—Americas, Society for Worldwide Interbank Financial Telecommunication SCRL ("SWIFT"), to the Commission, dated February 14, 2011 ("SWIFT Letter").

- Letter from Patrick Durkin, Managing Director, Barclays Capital Inc. ("Barclays"), to Elizabeth M. Murphy, Secretary, Commission, dated February 11, 2010 ("Barclays Letter"). [Note: This comment letter is in fact dated "February 11, 2010," but the Commission deems the true date to be February 11, 2011. The comment letter references proposed Regulation SBSR, which the Commission issued in November 2010, and thus the comment could not have been submitted in February 2010.]

- Letter from Daniel G. Viola, Partner, Sadis & Goldberg LLP, to the CFTC and the Commission, dated February 7, 2011 ("Viola Letter").

- Letter from Andrew Downes, Managing Director, UBS Investment Bank, and James B. Fuqua, Managing Director, UBS Securities LLC, to Elizabeth M. Murphy, Secretary, Commission, dated February 7, 2011 ("UBS Letter").

- Letter from Cravath, Swaine & Moore, LLP, to Elizabeth M. Murphy, Secretary, Commission, dated February 6, 2011 ("Cravath Letter").

- Letter from Richard G. Ketchum, Chairman and Chief Executive Officer, Financial Industry Regulatory Authority ("FINRA"), to Elizabeth M. Murphy, Secretary, Commission, dated January 27, 2011 ("FINRA Letter").

- Letter from David G. Downey, Chief Executive Officer, OneChicago, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 26, 2011 ("OneChicago I").

- Letter from Dennis M. Kelleher, President and Chief Executive Officer, Stephen W. Hall, Securities Specialist, and Wallace C. Turbeville, Derivatives Specialist, Better Markets, Inc. ("Better Markets"), to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("Better Markets II").

- Letter from Kevin Gould, President, Markit North America, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("Markit I").

- Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("MarkitSERV I").

- Letter from Naphtali M. Hamlet, dated January 22, 2011 ("Hamlet Letter").

- Letter from Dennis M. Kelleher, President and Chief Executive Officer, Wallace C. Turbeville, Derivatives Specialist, and Stephen W. Hall, Better Markets, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Better Markets I").

- Letter from Craig S. Donohue, Chief Executive Officer, CME Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("CME I").

- Letter from Larry E. Thompson, General Counsel, DTCC, dated January 18, 2011 ("DTCC II").

- Letter from Beckwith B. Miller, Chief Executive Officer, Ethics Metrics LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Ethics Metrics Letter").

- Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("ICI I").

- Letter from Robert Pickel, Executive Vice Chairman, ISDA, and Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("ISDA/SIFMA I"), and accompanying study, "Block trade reporting for over-the-counter derivatives markets" ("ISDA/SIFMA Block Trade Study").

- Letter from Roger Liddell, Chief Executive, LCH.Clearnet Group Limited, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("LCH.Clearnet Letter").

- Letter from Stuart J. Kaswell, Executive Vice President, Managing Director, and General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("MFA I").

- Letter from Timothy W. Cameron, Managing Director, Asset Management Group, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("SIFMA I").

- Letter from Lee H. Olesky, Chief Executive Officer, and Douglas L. Friedman, General Counsel, Tradeweb Markets LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Tradeweb Letter").

- Letter from Gus Sauter, Managing Director and Chief Investment Officer, and John Hollyer, Principal and Head of Risk Management and Strategy Analysis, Vanguard, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Vanguard Letter").

- Letter from Julian Harding, Chairman, WMBAA, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("WMBAA II").

- Letter from R. Martin Chavez, Managing Director, Goldman, Sachs & Co., David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Goldman Sachs Letter").

- Letter from R. Glenn Hubbard, Co-Chair, John L. Thornton, Co-Chair, and Hal S. Scott, Director, Committee on Capital Markets Regulation, David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("CCMR I").

- Letter from Adam Litke, Bloomberg L.P., to Elizabeth M. Murphy, Secretary, Commission, dated January 14, 2011 ("Bloomberg Letter").

- Letter from Laurel Leitner, Senior Analyst, Council of Institutional Investors, to Elizabeth M. Murphy, Secretary, Commission, dated January 13, 2011 ("CII Letter").

- Letter from Jeremy Barnum, Managing Director, and Don Thompson, Managing Director and Associate General Counsel, J.P. Morgan, David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated January 12, 2011 ("J.P. Morgan Letter").

- Letter from Davis Polk & Wardwell LLP on behalf of Barclays Bank PLC, PNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group, PLC, Société Générale, UBS AG, to David A. Stawick, Secretary, CFTC, Elizabeth M. Murphy, Secretary, Commission, and Jennifer L. Johnson, Secretary, Federal Reserve Board, dated January 11, 2011 ("Davis Polk I").

- Letter from Suzanne H. Shatto, dated January 1, 2011 ("Shatto Letter").

- Letter from Spencer Bachus, Ranking Member, Committee on Financial Services, and Frank Lucas, Ranking Member, Committee on Agriculture, U.S. House of Representatives, to The Honorable Timothy Geithner, Secretary, Department of Treasury, the Honorable Gary Gensler, Chairman, CFTC, the Honorable Mary Schapiro, Chairman, Commission, and the Honorable Ben Bernanke, Chairman, Federal Reserve, dated December 16, 2010 ("Bachus/Lucas Letter").

- Letter from Chris Barnard, dated December 3, 2010 ("Barnard I").

- Letter from Laura J. Schisgall, Managing Director and Senior Counsel, Société Générale, to Ananda Radhakrishnan, Director, Division of Clearing and Intermediary Oversight, CFTC, John M. Ramsay, Deputy Director, Division of Trading and Markets, SEC, Mark E. Van Der Weide, Senior Associate Director, Federal Reserve Board, dated November 23, 2010 ("Société Générale Letter").

- Letter from Julian Harding, WMBAA, David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated November 19, 2010 ("WMBAA I").

Comments on Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Release No. 34-67177; File No. S7-05-12)

http://www.sec.gov/comments/s7-05-12/s70512.shtml

- Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated August 13, 2012 ("SIFMA II").

Comments on 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 (Release No. 34-69490; File No. S7-02-13)

http://www.sec.gov/comments/s7-02-13/s70213.shtml

- Letter from Karel Engelen, Senior Director, Head of Data, Reporting & FpML, ISDA, to Elizabeth M. Murphy, Secretary, Commission, dated November 14, 2014 ("ISDA IV").

- Letter from Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, American Bar Association, to Elizabeth M. Murphy, Secretary, Commission, dated October 2, 2013 ("ABA Letter").

- Letter from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("Citadel Letter").

- Letter from R. Glenn Hubbard, John L. Thornton, Co-Chairs, and Hal S. Scott, Director, Committee on Capital Markets Regulation, to Elizabeth M. Murphy, Secretary, Commission, and Gary Barnett, Director, CFTC, dated August 17, 2013 ("CCMR II").

- Letter from Robert Pickel, ISDA, to Elizabeth M. Murphy, Secretary, Commission, dated August 14, 2013 ("ISDA II").

- Letter from Masaaki Tanaka, Deputy President, Mitsubishi UFJ Financial Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 8, 2013 ("Mitsubishi Letter").

Comments on Acceptance of Public Submissions for a Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Release No. 34-64926; File No. 4-635]

http://www.sec.gov/comments/4-635/4-635.shtml

- Letter from Jiří Król, Director of Government and Regulatory Affairs, Alternative Investment Management Association Limited to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated September 26, 2011 ("AIMA Letter").

Comments on Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act
[Release No. 33-9204; File No. S7-16-11]

http://www.sec.gov/comments/s7-16-11/s71611.shtml

- Letter from Jacques Mirante-Péré, Chief Financial Officer, and Jan De Bel, General Counsel, Council of Europe Development Bank, dated July 22, 2011 ("CEB Letter").

- Letter from A. Querejeta, Secretary General and General Counsel, and B. de Mazières, Director General, European Investment Bank, to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated July 22, 2011 ("EIB Letter").

- Letter from Günter Pleines, Head of Banking Department, and Diego Devos, General Counsel, Bank for International Settlements, to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated July 20, 2011 ("BIS Letter").

Real-Time Reporting: Title VII Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act

http://www.sec.gov/comments/df-title-vii/real-time-reporting/real-time-reporting.shtml

- Letter from FIA, the Financial Services Forum ("FSF"), ISDA, and SIFMA to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated May 4, 2011 ("FIA/FSF/ISDA/SIFMA Letter").

- Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP on behalf of Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Credit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., PNC Bank, National Association, UBS Securities LLC, and Wells Fargo & Company, to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated October 25, 2010 ("Cleary I").

- Letter from James W. Toffey, Chief Executive Officer, Benchmark Solutions, to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated October 1, 2010 ("Benchmark Letter").

Comments on Reporting of Security-Based Swap Transaction Data
[Release No. 34-63094; File No. s7-28-10]

http://www.sec.gov/comments/s7-28-10/s72810.shtml

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, Commission, dated December 20, 2010 ("DTCC I").

- Letter from Robert Pickel, Executive Vice Chairman, ISDA, to Elizabeth Murphy, Secretary, Commission, dated December 10, 2010 ("ISDA I").

- Letter from Ernest C. Goodrich, Jr., Managing Director—Legal Department, Deutsche Bank AG, and Marcel Riffaud, Managing Director, Legal Department, Deutsche Bank AG, to David A. Stawick, Secretary, CFTC, and to Elizabeth M. Murphy, Secretary, Commission, dated November 5, 2010 ("Deutsche Bank Letter").

Comments on Proposed Rule: Registration and Regulation of Security-Based Swap Execution Facilities
[Release No. 34-63825; File No. S7-06-11]

http://www.sec.gov/comments/s7-06-11/s70611.shtml

- Letter from the American Benefits Council to Elizabeth M. Murphy, Secretary, Commission, dated April 8, 2011 ("ABC Letter").

- Letter from Joanne Medero, Richard Prager, and Supurna VedBrat, BlackRock, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated April 4, 2011 ("BlackRock Letter").

- Letter from Kevin Gould, President, Markit North America, Inc., to Elizabeth Murphy, Secretary, Commission, dated April 4, 2011 ("Markit II").

- Letter from Robert Pickel, Executive Vice Chairman, ISDA, and Kenneth E. Bentsen, Jr. Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated April 4, 2011 ("ISDA/SIFMA II").

- Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV, to Elizabeth Murphy, Secretary, Commission, dated April 4, 2011 ("MarkitSERV II").

- Letter from Nancy C. Gardner, Executive Vice President and General Counsel, Markets Division, Thomson Reuters, to Elizabeth M. Murphy, Secretary, Commission, dated April 4, 2011 ("Thomson Reuters Letter").

- Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, General Counsel, MFA, to Elizabeth M. Murphy, Secretary, Commission, dated April 4, 2011 ("MFA III").

- Letter from Nicholas J. Stephan, Chief Executive Officer, Phoenix Partners Group LP to Elizabeth M. Murphy, Secretary, Commission, dated April 4, 2011 ("Phoenix Letter").

Comments on Proposed Rule: Security-Based Swap Data Repository Registration, Duties, and Core Principles
[Release No. 34-63347; File No. S7-35-10]

http://www.sec.gov/comments/s7-35-10/s73510.shtml

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("DTCC III").

Comments on Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act
[Release No. 34-64939; File No. 4-636]

http://www.sec.gov/comments/4-636/4-636.shtml

- Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, UBS Securities LLC, to David A. Stawick, Secretary, CFTC; Elizabeth M. Murphy, Secretary, SEC; Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve Board ("Federal Reserve Board"); Office of the Comptroller of the Currency; Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation ("FDIC"); Alfred M. Pollard, General Counsel, Federal Housing Finance Agency; and Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, dated September 20, 2011 ("Cleary III").

- Letter from Kevin Gould, President, Markit North America, Inc., to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated September 19, 2011 ("Markit III").

- Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated September 19, 2011 ("MarkitSERV III").

Commissioner Gallagher
Commissioner Piwowar
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

Release No. 34-74245; File No. S7-03-15

RIN 3235-AL71

Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules, rule amendments, and guidance.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is proposing certain new rules and rule amendments to Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information ("Regulation SBSR"). Specifically, proposed Rule 901(a)(1) of Regulation SBSR would require a platform (i.e., a national securities exchange or security-based swap execution facility ("SB SEF") that is registered with the Commission or exempt from registration) to report to a registered security-based swap data repository ("registered SDR") a security-based swap executed on such platform that will be submitted to clearing. Proposed Rule 901(a)(2)(i) of Regulation SBSR would require a registered clearing agency to report to a registered SDR any security-based swap to which it is a counterparty. The Commission also is proposing certain conforming changes to other provisions of Regulation SBSR in light the proposed amendments to Rule 901(a), and a new rule that would prohibit registered SDRs from charging fees for or imposing usage restrictions on the users of the security-based swap transaction data that they are required to publicly disseminate. In addition, the Commission is explaining the application of Regulation SBSR to prime brokerage transactions and proposing guidance for the reporting and public dissemination of allocations of cleared security-based swaps. Finally, the Commission is proposing a new compliance schedule

for the portions of Regulation SBSR for which the Commission has not specified a compliance date.

DATES: Comments should be received on or before [insert date 45 days after publication in Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-03-15 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-03-15. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Michael Gaw, Assistant Director, at (202) 551-5602; Yvonne Fraticelli, Special Counsel, at (202) 551-5654; George Gilbert, Special Counsel, at (202) 551-5677; David Michehl, Special Counsel, at (202) 551-5627; Geoffrey Pemble, Special Counsel, at (202) 551-5628; all of the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

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I. Introduction

Section 13A(a)(1) of the Exchange Act[1] provides that each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be subject to regulatory reporting. Section 13(m)(1)(G) of the Exchange Act[2] provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR, and Section 13(m)(1)(C) of the Exchange Act[3] generally provides that transaction, volume, and pricing data of security-based swaps shall be publically disseminated in real time, except in the case of block trades.[4]

In a separate release, the Commission is adopting Regulation SBSR,[5] which contains several rules relating to regulatory reporting and public dissemination of security-based swap transactions. The Commission initially proposed Regulation SBSR in November 2010.[6] In May 2013, the Commission re-proposed the entirety of Regulation SBSR as part of the Cross-Border Proposing Release, which proposed rules and interpretations regarding the application of Title

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1 15 U.S.C. 78m-1(a)(1). All references in this release to the Exchange Act refer to the Securities Exchange Act of 1934.

2 15 U.S.C. 78m(m)(1)(G).

3 15 U.S.C. 78m(m)(1)(C).

4 Section 13(m)(1)(E) of the Exchange Act, 15 U.S.C. 78m(m)(1)(E), provides that, with respect to cleared security-based swaps, the rule promulgated by the Commission related to public dissemination shall contain provisions, among others, that "specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts" and "specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public."

5 Securities Exchange Act Release No. 74244 (February 11, 2015) (no Federal Register publication yet) ("Regulation SBSR Adopting Release").

6 See Securities Exchange Act Release No. 63346 (November 19, 2010), 75 FR 75207 (December 2, 2010) ("Regulation SBSR Proposing Release").

VII of the Dodd-Frank Act to cross-border security-based swap activities.[7] In this release, the Commission is proposing certain new rules of Regulation SBSR as well as amendments to, and guidance regarding Regulation SBSR, as adopted. The Commission also is proposing a compliance schedule for Regulation SBSR. The Commission seeks comment on all of the rules, rule amendments, and guidance proposed in this release.[8]

II. Reporting by Registered Clearing Agencies and Platforms—Proposed Amendments to Rule 901(a) and Conforming Changes

Section 13(m)(1)(F) of the Exchange Act[9] provides that parties to a security-based swap (including agents of parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission. Section 13(m)(1)(G) of the Exchange Act[10] provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered SDR.

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7 See Securities Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30967 (May 23, 2013) ("Cross-Border Proposing Release").

8 With these proposed rules, rule amendments, and guidance, the Commission is not re-opening comment on the rules adopted in Regulation SBSR Adopting Release. The Commission received 86 comments that were specifically directed to the comment file (File No. S7-34-10) for the Regulation SBSR Proposing Release, of which 38 were comments submitted in response to the re-opening of the comment period. Of the comments directed to the comment file (File No. S7-02-13) for the Cross-Border Proposing Release, six referenced Regulation SBSR specifically, while many others addressed cross-border issues generally, without specifically referring to Regulation SBSR. As discussed in the Regulation SBSR Adopting Release, the Commission also has considered other comments that are relevant to regulatory reporting and/or public dissemination of security-based swaps that were submitted in other contexts. The comments discussed in this release are listed in Appendix A. For ease of reference, this release identifies commenters using the same naming convention as the Regulation SBSR Adopting Release, although it does not discuss all of the comment letters included in the Regulation SBSR Adopting Release. For example, this release refers to a letter identified as "ISDA IV," but does not discuss ISDA I, ISDA II, or ISDA III because those letters are not relevant to the current release.

9 15 U.S.C. 78m(m)(1)(F).

10 15 U.S.C. 78m(m)(1)(G).

Section 13A(a)(3) of the Exchange Act[11] specifies the party obligated to report a security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization. Consistent with these statutory provisions, Rule 901(a) of Regulation SBSR, as adopted, assigns the duty to report "covered transactions," which include all security-based swaps except: (1) clearing transactions;[12] (2) security-based swaps that are executed on a platform and that will be submitted to clearing; (3) transactions where there is no U.S. person, registered security-based swap dealer, or registered major security-based swap participant on either side; and (4) transactions where there is no registered security-based swap dealer or registered major security-based swap participant on either side and there is a U.S. person on only one side. This release proposes to assign the duty to report security-based swaps in categories (1) and (2) above. The Commission anticipates seeking additional public comment in the future on the reporting obligations for security-based swaps in categories (3) and (4) above.

Rule 901(a), as proposed and re-proposed, would have used a hierarchy to assign reporting obligations for all security-based swaps—including those in the four non-covered categories noted above—without regard to whether a particular security-based swap was cleared or uncleared. In the Regulation SBSR Proposing Release, the Commission expressed a preliminary view that cleared and uncleared security-based swaps should be subject to the same

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11 15 U.S.C. 78m-1(a)(3).

12 Rule 900(g), as adopted, defines "clearing transaction" as "a security-based swap that has a registered clearing agency as a direct counterparty." This definition describes security-based swaps that arise when a registered clearing agency accepts a security-based swap for clearing as well as security-based swaps that arise as part of a clearing agency's internal processes, such as security-based swaps used to establish prices for cleared products and security-based swaps that result from netting other clearing transactions of the same product in the same account into an open position. See Regulation SBSR Adopting Release, Section V(B)(2).

reporting hierarchy.[13] In addition, Rule 901(a), as proposed and as re-proposed, did not differentiate between security-based swaps that are executed on a platform and other security-based swaps. The Commission preliminarily believed that security-based swap dealers and major security-based swap participants generally should be responsible for reporting security-based swap transactions of all types, because they would be more likely than other persons to have appropriate systems in place to facilitate reporting.[14]

The Commission requested comment on a range of issues related to Rule 901(a), as proposed and as re-proposed. In particular, the Commission sought comment on whether platforms or clearing agencies should be required to report security-based swaps.[15] The Commission also asked whether counterparties to a security-based swap executed anonymously on a platform and subsequently cleared would have the information necessary to know which counterparty would incur the reporting obligation under Rule 901(a).[16] The comments that the Commission received in response are discussed below.

In light of comments received and upon additional consideration of the issues, the Commission is proposing two amendments to Rule 901(a) of Regulation SBSR. First, the Commission is proposing a new subparagraph (1) of Rule 901(a), which would provide that, 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 have the duty to report the transaction to a registered SDR. Second, the Commission is proposing a new subparagraph (2)(i) of Rule 901(a), which would assign the reporting duty for a clearing transaction to the registered clearing agency that is

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13 See 75 FR at 75211.

14 See id.

15 See id. at 75212.

16 See id.

a counterparty to the security-based swap. In connection with these proposed rules, the Commission also is proposing several conforming rule amendments to Regulation SBSR. The Commission describes each of these proposed rules and rule amendments in more detail below, following a description of the process for central clearing of security-based swap transactions.

A. Clearing Process for Security-Based Swaps

As discussed in Section V of the Regulation SBSR Adopting Release, two models of clearing—an agency model and a principal model—are currently used in the swap markets. In the agency model, which predominates in the U.S. swap market, a swap that is accepted for clearing—often referred to in the industry as an "alpha"—is terminated and replaced with two new swaps, known as "beta" and "gamma." The Commission understands that, under the agency model, one of the direct counterparties to the alpha becomes a direct counterparty to the beta, and the other direct counterparty to the alpha becomes a direct counterparty to the gamma. The clearing agency would be a direct counterparty to each of the beta and the gamma.[17] This release uses the terms "alpha," "beta," and "gamma" in the same way that they are used in the agency

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17 If both direct counterparties to the alpha are clearing members, the direct counterparties would submit the transaction to the clearing agency directly and the resulting beta would be between the clearing agency and one clearing member, and the gamma would be between the clearing agency and the other clearing member. The Commission understands, however, that, if the direct counterparties to the alpha are a clearing member and a non-clearing member (a "customer"), the customer's side of the trade would be submitted for clearing by a clearing member acting on behalf of the customer. When the clearing agency accepts the alpha for clearing, one of the resulting swaps—in this case, assume the beta—would be between the clearing agency and the customer, with the customer's clearing member acting as guarantor for the customer's trade. The other resulting swap—the gamma—would be between the clearing agency and the clearing member that was a direct counterparty to the alpha. See, e.g., Byungkwon Lim and Aaron J. Levy, "Contractual Framework for Cleared Derivatives: The Master Netting Agreement Between a Clearing Customer Bank and a Central Counterparty," 10 Pratt's J. of Bankr. Law 509, 515-517 (LexisNexis A.S. Pratt) (describing the clearing model for swaps in the United States).

model of clearing in the U.S. swap market.[18] The Commission notes that, under Regulation SBSR, an alpha is not a "clearing transaction," even though it is submitted for clearing, because it does not have a registered clearing agency as a direct counterparty.[19]

B. Summary of the Proposed Amendments to Rule 901(a) and Conforming Changes

In a separate release, the Commission is adopting Regulation SBSR under the Exchange Act. In light of comments received in response to both the Regulation SBSR Proposing Release and the Cross-Border Proposing Release (which re-proposed Regulation SBSR in its entirety), the Commission in this release is proposing to amend Rule 901(a) of Regulation SBSR to assign reporting duties for: (1) platform-executed security-based swaps that will be submitted to clearing; and (2) clearing transactions.

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18 In the principal model of clearing, which the Commission understands is used in certain foreign swap markets, a customer is not a direct counterparty of the clearing agency. Under this model, a clearing member would clear a swap for a customer by entering into a back-to-back swap with the clearing agency: the clearing member would become a direct counterparty to a swap with the customer, and then would become a counterparty to an offsetting swap with the clearing agency. In this circumstance, unlike in the agency model of clearing, the swap between the direct counterparties might not terminate upon acceptance for clearing. The Commission notes that one commenter recommended that Regulation SBSR should clarify the applicable reporting requirements under each of the agency and principal clearing models. See ISDA IV at 6. Although this release focuses on the agency model of clearing, which predominates in the United States, the Commission is requesting comment regarding the application of the principal model.

19 This release does not address the application of Section 5 of the Securities Act of 1933, 15 U.S.C. 77a et seq. ("Securities Act"), to security-based swap transactions that are intended to be submitted to clearing (e.g., alphas, in the agency model of clearing). Rule 239 under the Securities Act, 17 CFR 230.239, provides an exemption for certain security-based swap transactions involving an eligible clearing agency from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions. This exemption does not apply to security-based swap transactions not involving an eligible clearing agency, including a transaction that is intended to be submitted to clearing, regardless of whether the security-based swaps subsequently are cleared by an eligible clearing agency. See Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Securities Act Release No. 33-9308 (March 30, 2012), 77 FR 20536 (April 5, 2012).

1. Proposed Rule 901(a)(1)—Reporting by Platforms

The Commission is proposing a new subparagraph (1) of Rule 901(a), which would require a platform to report to a registered SDR any security-based swap that is executed on that platform and that will be submitted to clearing (i.e., any alpha executed on the platform).[20] As the person with the duty to report the transaction, the platform would be able to select the registered SDR to which it reports.[21]

2. Proposed Reporting Obligations of Registered Clearing Agencies

The Commission is proposing a new subparagraph (2)(i) of Rule 901(a), which would designate a registered clearing agency as the reporting side for all clearing transactions to which it is a counterparty. In its capacity as the reporting side, the registered clearing agency would be permitted to select the registered SDR to which it reports a clearing transaction.

The Commission also is proposing certain rules to address reporting requirements for life cycle events arising from the clearing process. Subparagraph (i) of Rule 901(e)(1), as adopted, provides that the reporting side for a security-based swap must generally report a life cycle event of that swap, "except that the reporting side shall not report whether or not a security-based swap has been accepted for clearing." The Commission is proposing a new subparagraph (ii) of Rule

20 If the execution occurs otherwise than on a platform, or if the security-based swap is executed on a platform but will not be submitted to clearing, the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, will apply to the transaction.

21 This is consistent with the Commission's guidance in Section V(B) of the Regulation SBSR Adopting Release that, for transactions subject to Rule 901(a)(2)(ii), the reporting side may choose the registered SDR to which it makes the report required by Rule 901: "The reporting side may select the registered SDR to which it makes the required report. However, with respect to any particular transaction, all information required to be reported by Rule 901(a)(2)(ii), as adopted, must be reported to the same registered SDR."

901(e)(1), which would require a registered clearing agency to report whether or not it has accepted an alpha security-based swap for clearing.[22]

Rule 901(e)(2), as adopted, requires a life cycle event to be reported "to the entity to which the original security-based swap transaction will be or has been reported." Thus, proposed Rule 901(e)(1)(ii) would require a registered clearing agency to report to the registered SDR that received or will receive the transaction report of the alpha (the "alpha SDR") whether or not it has accepted the alpha for clearing. As discussed in Section II(C)(3), infra, the Commission is proposing that this obligation to report whether or not it has accepted the alpha for clearing would cause the registered clearing agency to become a participant of the alpha SDR.

If the registered clearing agency does not know the identity of the alpha SDR, the registered clearing agency would be unable to report to the alpha SDR whether or not it accepted the alpha transaction for clearing, as would be required by proposed Rule 901(e)(1)(ii). Therefore, the Commission is proposing a new subparagraph (3) of Rule 901(a), which would require a platform or reporting side for a security-based swap that has been submitted to clearing to promptly provide the relevant registered clearing agency with the identity of the alpha SDR and the transaction ID of the alpha transaction that has been submitted to clearing.

C. Discussion of Comments and Further Explanation of the Proposal

The Commission requested and received comment on a wide range of issues related to Rules 901(a) and 901(e), as initially proposed in the Regulation SBSR Proposing Release and as re-proposed in the Cross-Border Proposing Release. For example, in the Regulation SBSR

22 If the alpha security-based swap is not required to be reported to a registered SDR—which could occur if Rule 901(a) does not assign a reporting obligation for the transaction or if the person assigned under Rule 901(a) is not enumerated in Rule 908(b)—the registered clearing agency would have no duty to report whether or not it has accepted the alpha for clearing.

Proposing Release, the Commission asked commenters about the types of entities that should have the duty to report security-based swaps and the practicability of the proposed reporting hierarchy in certain cases where the counterparties might not know each other's identities.[23]

1. Reporting Clearing Transactions

Six commenters addressed the Commission's proposal to treat cleared security-based swaps the same as uncleared security-based swaps for purposes of assigning reporting obligations under Rule 901(a). Two commenters generally supported the Commission's proposal, noting that it would allow security-based swap counterparties, rather than clearing agencies, to choose the registered SDR that receives data about their security-based swaps.[24] However, three other commenters objected to the proposal on statutory or operational grounds.[25] One commenter argued that Title VII's security-based swap reporting provisions and Regulation SBSR should not extend to clearing transactions.[26] Two commenters stated that the reporting hierarchy in Regulation SBSR is appropriate for OTC bilateral markets, but that it should not be applied to cleared transactions because the clearing model substantially differs from OTC bilateral markets.[27] These commenters argued that, in the alternative, if the Commission requires clearing transactions to be reported to a registered SDR, the clearing agency that clears the alpha should have the duty to report the associated clearing transactions to a registered SDR of its

23 See 75 FR at 75212.

24 See DTCC VI at 8-9; MarkitSERV III at 3-5.

25 See CME/ICE Letter at 2-4; ICE Letter at 2-5; CME II at 4; ISDA IV at 5-6.

26 See CME II at 5 (stating that "a choice by the Commission to require that data on cleared SBS be reported to a third-party SDR would impose substantial costs on market participants which greatly outweigh the benefits (if any). . . . The Commission already has access to this data via the clearing agency.")

27 See ICE Letter at 2; CME/ICE Letter at 2.

choice.[28] Another commenter expressed the view that a clearing agency is best-positioned to report cleared security-based swaps.[29]

a. Requirements for Reporting of Clearing Transactions to a Registered SDR

Two commenters argued that the Exchange Act does not require data on clearing transactions to be reported to a registered SDR for regulatory reporting purposes.[30] They noted that Section 13A(a)(1) of the Exchange Act[31] provides that "[e]ach security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported" to a registered SDR or the Commission. In the view of these commenters, Section 13A(a)(1) is intended to ensure that the Commission has access to data for uncleared security-based swaps. Section 13A(a)(1) does not, according to these commenters, apply to clearing transactions, because complete data for these security-based swaps already would be collected, maintained, and made available to the Commission by the relevant clearing agency.[32] Accordingly, these commenters contend that "any system that would require a Clearing Agency to make duplicative reports to an outside third party regarding [security-based swaps] it clears would be costly and unnecessary."[33]

The Commission does not agree with the commenters' reading of the Exchange Act.

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28 See CME II at 4-5; CME/ICE Letter at 2-4; ICE Letter at 2-3.

29 ISDA IV at 5 (stating further that ..."[I]f the Commission assigns responsibility to clearing agencies for the reporting of cleared [security-based swaps], the clearing agency should be the sole party responsible for reporting all the trade data for cleared swaps.") See also ICE Letter at 2-3 (stating that "The Clearing Agency is best positioned to have the sole responsibility to report . . . required swap data, including valuation data").

30 See CME/ICE Letter at 4; CME II at 4.

31 15 U.S.C. 78m-1(a)(1).

32 See CME/ICE Letter at 2, 4; CME II at 4.

33 CME/ICE Letter at 4.

While Section 13A(a) of the Exchange Act requires all uncleared security-based swaps to be reported to a registered SDR and specifies who must report an uncleared security-based swap, it does not address whether cleared security-based swaps must be reported to a registered SDR. However, Section 13(m)(1)(G) of the Exchange Act[34] provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository." This section explicitly requires reporting of each security-based swap to a registered SDR, including a security-based swap that is a clearing transaction, because all security-based swaps necessarily are either cleared or uncleared.

Furthermore, the Commission preliminarily believes that having data for all security-based swaps reported to registered SDRs will provide the Commission and other relevant authorities with the most efficient access to security-based swap information.[35] If data for clearing transactions were not reported to registered SDRs, the Commission would have to obtain transaction information from multiple types of registered entities—i.e., registered clearing agencies as well as registered SDRs—to obtain a complete picture of the security-based swap market. Obtaining transaction data separately from additional types of registrants would exacerbate concerns about fragmentation of the data that could be reduced by requiring all security-based swap transactions to be reported to registered SDRs. For example, registered clearing agencies might store, maintain, and furnish data to the Commission in a format different from the data provided by registered SDRs, which would force the Commission to expend

34 15 U.S.C. 78m(m)(1)(G).

35 Section 13(n)(5)(G) of the Exchange Act, 15 U.S.C. 78m(n)(5)(G), provides specified authorities other than the Commission with access to security-based swap data held by SDRs, but does not grant similar access to security-based swap data held by registered clearing agencies. If the Commission relied exclusively on registered clearing agencies to store data for clearing transactions, the ability of other relevant authorities to access the information could be impaired.

greater resources harmonizing the data sets.

b. Determining the Reporting Side for Clearing Transactions

Two commenters supported the Commission's original proposal to assign reporting obligations for all security-based swaps, including clearing transactions, through the reporting hierarchy in all circumstances.[36] One of these commenters expressed the view that counterparty choice would "ensure that a party to the transaction (instead of a platform or clearinghouse) can chose [sic] the most efficient manner of performing its reporting across all of the regions and asset classes that it is active in."[37] This commenter further stated that permitting a platform or clearing agency to report security-based swaps would impose costs on market participants by obligating them to establish connectivity to multiple trade repositories.[38]

Three other commenters objected to this aspect of Regulation SBSR, as proposed and re-proposed. Two of these commenters argued that, if clearing transactions are subject to Regulation SBSR, they should be reported by the clearing agency that clears the alpha: "in contrast to uncleared [security-based swaps], the Clearing Agency is the sole party who holds the complete and accurate record of transactions and positions for cleared [security-based swaps] and in fact is the only entity capable of providing accurate and useful positional information on cleared [security-based swaps] for systemic risk monitoring purposes."[39] The other commenter stated that the clearing agency is best positioned to report cleared security-based swaps timely and accurately as an extension of the clearing process, and that the clearing agency should be the

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36 See DTCC VI at 8-9; DTCC VIII (recommending that the Commission should not assign reporting obligations to clearing agencies because Regulation SBSR, as proposed and re-proposed, would not have required reporting by clearing agencies); MarkitSERV III at 4.

37 MarkitSERV III at 4.

38 See id.

39 CME/ICE Letter at 3-4.

sole party responsible for reporting all the trade data for cleared swaps, including valuation data.[40]

After careful consideration of the comments, the Commission now preliminarily believes that a registered clearing agency should have the duty to report any clearing transaction to which it is a counterparty. The Commission believes that, because the registered clearing agency creates the clearing transactions to which it is a counterparty, the registered clearing agency is in the best position to provide complete and accurate information for the clearing transactions resulting from the security-based swaps that it clears.[41]

The Commission understands that certain registered clearing agencies that offer central clearing in swaps currently report their clearing transactions to swap data repositories that are

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40 ISDA IV at 5. The Commission notes that Regulation SBSR as adopted does not require the reporting of the market value of a security-based swap. See Regulation SBSR Adopting Release, Section II(B)(3)(e) and Section II(B)(3)(k).

41 One commenter urged the Commission to be clear which party is responsible for reporting a clearing transaction in the event that reporting commences before security-based swap clearing agencies are required to register with the Commission or in the event that a security-based swap is cleared through a clearing agency that is not required to register, exempted from registration, or granted relief. See ISDA IV at 6. This commenter further recommended that the reporting requirement for a clearing agency should apply equally to clearing agencies required to register and those that may be exempted from the requirement but which clear security-based swaps subject to reporting. See id. The Commission believes that the proposed rules are clear as to which side would have the responsibility for reporting a clearing transaction. The Commission notes that proposed Rule 901(a)(2)(i) would impose the duty to report clearing transactions on registered clearing agencies. It is possible that a non-U.S. person could register with the Commission as a clearing agency under Section 17A of the Exchange Act, 15 U.S.C. 78q-1. The Commission generally believes that, if a person registers with the Commission as a clearing agency, it should assume the same obligations as all other persons that register as clearing agencies. Proposed Rule 901(a)(2)(i) would not apply to unregistered clearing agencies (i.e., persons that act as clearing agencies outside the United States that are not required to, and choose not to, register with the Commission). If in the future the Commission contemplates a process for exempting clearing agencies from registration or considers an application for relief from clearing agency registration requirements, the Commission could at that time consider the issue of whether to extend the duty to report clearing transactions to an exempt clearing agency.

provisionally registered with the CFTC. These registered clearing agencies have adopted rules stating that they will comply with the CFTC's swap data reporting rules by reporting beta and gamma swaps to a swap data repository that is an affiliate or business unit of the registered clearing agency. These current swap market practices evidence the ability of registered clearing agencies to report clearing transactions. The Commission's proposal to assign to registered clearing agencies the duty to report clearing transactions is intended, in part, to promote efficiency in the reporting process under Regulation SBSR by leveraging these existing workflows.

The Commission has considered the following alternatives to proposed Rule 901(a)(2)(i):

(1) Utilize the reporting hierarchy in Regulation SBSR, as re-proposed. Under this approach, a registered clearing agency would occupy the lowest spot in the hierarchy, along with other persons who are neither registered security-based swap dealers nor registered major security-based swap participants. Thus, in the case of a beta or gamma transaction between a registered security-based swap dealer or registered major security-based swap participant and a registered clearing agency, the registered security-based swap dealer or registered major security-based swap participant would be the reporting side. In the case of a beta or gamma transaction between a non-registered person and a registered clearing agency, the outcome would depend on whether the non-clearing agency direct counterparty is guaranteed by a registered security-based swap dealer or registered major security-based swap participant. If the non-clearing agency direct counterparty is guaranteed by a registered security-based swap dealer or registered major security-based swap participant, that side would be the reporting side. If the non-clearing agency direct counterparty has no guarantor or is guaranteed by a person who is not a registered security-based swap dealer or registered major security-based swap participant, there

would be a tie and the sides would be required to select the reporting side.

(2) Modify the re-proposed hierarchy to place registered clearing agencies above other non-registered persons but below registered security-based swap dealers and registered major security-based swap participants. Thus, in a transaction between a registered clearing agency and a registered security-based swap dealer (or a transaction between a registered clearing agency and a non-registered person who is guaranteed by a registered security-based swap dealer), the outcome would be the same as in Alternative 1: the side with the registered security-based swap dealer would have the duty to report. However, the outcome would be different from Alternative 1 in the case of a beta or gamma transaction between a registered clearing agency and a non-registered person who is not guaranteed by a registered security-based swap dealer or registered major security-based swap participant: instead of the sides choosing, the registered clearing agency would have the duty to report.

(3) Require the reporting side of the alpha to report both the beta and gamma transaction. Under this approach, the reporting side of the alpha transaction also would be the reporting side for the beta and gamma transactions. Under this approach, the beta and gamma could be viewed as life cycle events of the alpha, and thus should be treated like other life cycle events of the alpha, which the reporting side of the alpha has the duty to report.

The Commission preliminarily believes that each of these three alternatives for assigning the reporting duty for clearing transactions would be less efficient and could result in less reliable reporting than assigning to registered clearing agencies the duty to report all clearing transactions. Two commenters have asserted that a clearing agency is the only party that has complete information about clearing transactions immediately upon their creation.[42] Each of the three alternatives could require a person who does not have information about the clearing transaction at the time of its creation to report that transaction. The only way such a person could discharge its reporting duty would be to obtain the information from the registered clearing agency or from the counterparty to the registered clearing agency. This extra and unnecessary step could introduce more opportunities for data discrepancies, errors, or delays in reporting. The Commission preliminarily believes instead that a more efficient way to obtain a regulatory report of each clearing transaction would be to require the registered clearing agency to report each clearing transaction to a registered SDR directly.

Under Alternative 1, applying the reporting hierarchy to a transaction between a registered clearing agency and a registered security-based swap dealer or registered major security-based swap participant would result in the side opposite the clearing agency being the reporting side for the security-based swap. This approach would comport with the suggestion of commenters who opposed placing reporting obligations on registered clearing agencies.[43] As discussed above, however, the Commission believes that it would be more efficient to require the registered clearing agency to report the transaction. Furthermore, applying the reporting hierarchy to a transaction between a registered clearing agency and another non-registered person (assuming it is not guaranteed by a registered security-based swap dealer or major security-based swap participant) would require the sides to select the reporting side. While it is likely that the counterparties in this case would select the registered clearing agency as the

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42 See CME/ICE Letter at 3-4. Even the commenters who opposed reporting by clearing agencies did not suggest that a clearing agency lacks adequate information to report the beta and the gamma.

43 See DTCC VI at 8-9; DTCC VIII (noting that Regulation SBSR, as proposed and re-proposed, would not have required reporting by clearing agencies); MarkitSERV III at 4.

reporting side, the Commission preliminarily believes that it would be more efficient to obviate the need for registered clearing agencies and non-registered persons to negotiate reporting duties. As discussed in the Regulation SBSR Adopting Release, the Commission designed Rule 901(a), in part, to minimize the possibility of reporting obligations being imposed on non-registered counterparties.[44]

Alternative 2 would assign the reporting obligation to a registered security-based swap dealer or registered major security-based swap participant when it is a counterparty to a registered clearing agency, while avoiding the need for non-registered persons to negotiate reporting obligations with registered clearing agencies. The Commission preliminarily believes, however, that this alternative—like Alternatives 1 and 3—would be less efficient than requiring the registered clearing agency to report the transaction information directly to a registered SDR, because the registered clearing agency is the only person who has complete information about a clearing transaction immediately upon its creation.

Under Alternative 3, the reporting side for the alpha also would be the reporting side for the beta and gamma. Alternative 3 would require the reporting side for the alpha also to report information about a security-based swap—the clearing transaction between the registered clearing agency and the non-reporting side of the alpha—to which it is not a counterparty. The Commission could require the non-reporting side of the alpha to transmit information about its clearing transaction to the reporting side of the alpha. In theory, this would allow the reporting side of the alpha to report both the beta and the gamma. The Commission believes, however,

44 See Regulation SBSR Adopting Release, Section V. See also Vanguard Letter at 6 (noting that clearing agencies, platforms, security-based swap dealers, and major security-based swap participants would be better situated to report security-based swaps than other types of market participants, such as buy-side firms).

that this result could be difficult to achieve operationally and, in any event, could create confidentiality concerns, as an alpha counterparty may not wish to reveal information about its clearing transactions except to the registered clearing agency (and, if applicable, its clearing member). Moreover, all other things being equal, having more steps in the reporting process—e.g., more data transfers between execution and reporting—introduces greater opportunity for data discrepancies and delays than having fewer steps. Also, because the reporting side of the alpha would have the duty to report the beta and gamma, Alternative 3 is premised on the view that the beta and gamma are life cycle events of the alpha. The Commission, however, considered and rejected this approach in the Regulation SBSR Adopting Release.[45]

In sum, having considered these alternatives, the Commission preliminarily believes that the most direct and efficient way of reporting clearing transactions to a registered SDR is to assign to a registered clearing agency the duty to report all clearing transactions to which it is a counterparty. Therefore, the Commission is proposing new subparagraph (i) of Rule 901(a)(2) to achieve this result. A registered clearing agency has complete information about all clearing transactions to which it is a counterparty, including betas and gammas that arise from clearing alpha security-based swaps. The alternative reporting regimes discussed above could result in less efficiencies in reporting, and thus greater costs, because persons that are less likely to have established infrastructure for reporting or that do not possess the same degree of direct and complete access to the relevant data as the registered clearing agency could have the duty to

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45 See Regulation SBSR Adopting Release, Section V(B)(2) at note 267 ("Under Rule 900(g), a security-based swap that results from clearing is an independent security-based swap and not a life cycle event of a security-based swap that is submitted to clearing. Thus, Rule 901(e), which addresses the reporting of life cycle events, does not address what person has the duty to report the clearing transactions that arise when a security-based swap is accepted for clearing").

report. Furthermore, these non-clearing agency counterparties would first have to obtain information about executed clearing transactions from the registered clearing agency before they, in turn, could provide the transaction information to a registered SDR. This extra step in reporting could result in delays, or create opportunities for errors that could lead to a loss of data integrity. The Commission preliminarily believes that data discrepancies, errors, and delays are less likely to occur if the duty to report information about clearing transactions were assigned to registered clearing agencies directly.

c. Choice of Registered SDR for Clearing Transactions

The Commission has carefully considered how registered clearing agencies would fulfill their reporting obligations under proposed Rule 901(a)(2)(i), including whether registered clearing agencies could choose the registered SDR to which they report or whether they should be required to report clearing transactions to the registered SDR that received the report of the associated alpha transaction. Regulation SBSR allows the reporting side to choose the registered SDR to which it reports, subject to the requirement that reports of life cycle events must be made to the same registered SDR that received the initial report of the security-based swap.[46]

As noted in the Regulation SBSR Adopting Release, a clearing transaction is an independent security-based swap and not a life cycle event of an alpha security-based swap that is submitted to clearing.[47] As discussed in the Regulation SBSR Adopting Release, the Commission believes that, in general, the person with the duty to report a security-based swap

46 See Regulation SBSR Adopting Release, Section V(B)(2) ("The reporting side may select the registered SDR to which it makes the required report").

47 See Regulation SBSR Adopting Release, Section V(B). However, the determination by a registered clearing agency of whether or not to accept the alpha for clearing is a life cycle event of the alpha. Proposed Rule 901(e)(1)(ii) would require registered clearing agencies to report these life cycle events to the alpha SDR.

under Rule 901(a) should be permitted to discharge this duty by reporting to a registered SDR of its choice.[48] This approach is designed to promote efficiency by allowing the person with the reporting duty to select the registered SDR that offers it the greatest ease of use or the lowest fees. Under proposed Rule 901(a)(2)(i), a registered clearing agency would be the reporting side for all clearing transactions to which it is a counterparty; because the registered clearing agency would have the duty to report, it also would have the ability to choose the registered SDR. The Commission considered proposing that reports of betas and gammas go to the same registered SDR that received the report of the associated alpha, but has declined to do so, for the reasons discussed below.

If Regulation SBSR were to require registered clearing agencies to report betas and gammas to the registered SDR that received the report of the associated alpha, the registered clearing agency would be required to report to a registered SDR that might not offer it the greatest ease of use or the lowest fees. As such, this result could be less efficient for the registered clearing agency than the alternative approach of permitting the registered clearing agency to choose the registered SDR to which it reports the beta and gamma. Moreover, the Commission preliminarily believes that it would have sufficient tools to be able to track related transactions across SDRs,[49] and thus that it would be appropriate to allow a registered clearing agency to choose where to report the beta and gamma, even if it chooses to report to a registered SDR other than the alpha SDR.

One commenter asserted that allowing a registered clearing agency to report betas and

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48 See Regulation SBSR Adopting Release, Section V(B).

49 See Regulation SBSR Adopting Release, Section II(B)(3)(j) (explaining that Rule 901(d)(10), as adopted, will facilitate the Commission's ability to link transactions using the transaction ID); Regulation SBSR Adopting Release, Section VIII (further describing the ability of the Commission to link related transactions using the transaction ID).

gammas to a registered SDR of the clearing agency's choice, rather than to the alpha SDR, would impose substantial costs on security-based swap counterparties because the non-clearing agency counterparties would have to establish connectivity to multiple SDRs.[50] This comment appears premised on the idea that non-clearing agency counterparties would have ongoing obligations to report subsequent information—such as life cycle events or a daily mark of the security-based swap—to registered SDRs not of their choosing, which could force them to establish connections to multiple registered SDRs. However, proposed Rule 901(a)(2)(ii) would assign the reporting duty for a clearing transaction to the registered clearing agency, and Regulation SBSR, as adopted, does not impose any duty on a non-reporting side to report life cycle events or a daily mark.[51] Therefore, the Commission does not believe that any duty under Regulation SBSR, as adopted, or the amendments to Regulation SBSR proposed herein, would cause non-clearing agency counterparties to incur significant costs resulting from the ability of a registered clearing agency to select the registered SDR to which it reports clearing transactions.[52]

d. Reporting Whether an Alpha Transaction is Accepted for Clearing

One commenter expressed the view that a clearing agency would be well-positioned to issue a termination report for the alpha and subsequently report the beta, gamma, and, if

50 See MarkitSERV III at 4, n. 11.

51 Nor does Regulation SBSR require a non-reporting side to alert a registered SDR if it becomes aware that any security-based swap information has been reported erroneously. Under the proposed amendments to Rule 905(a) discussed below, if an error is discovered by a person other than the person having the duty to report a security-based swap, the person who discovered the error would report such error to the person who had the duty to report the transaction, rather than to the registered SDR directly.

52 Non-clearing agency counterparties to clearing transactions might incur modest costs associated with reporting certain unique identification code ("UIC") information required by Rule 906(a), e.g., their branch ID, broker ID, trader ID, and trading desk ID, as applicable. See Regulation SBSR Adopting Release, Section XXII(C)(6)(c) (discussing the costs of complying with Rule 906(a), as adopted).

necessary, open positions to a registered SDR.[53] The Commission agrees with this commenter and is therefore proposing a new subparagraph (ii) of Rule 901(e)(1), which would require a registered clearing agency to report to the alpha SDR whether or not it has accepted the alpha for clearing. Rule 901(e)(1)(i), as adopted, requires the reporting side of a security-based swap to report—to the same entity to which it reported the original transaction—any life cycle event (or adjustment due to a life cycle event) except for whether or not the security-based swap has been accepted for clearing. Proposed Rule 901(e)(1)(ii) would address the reporting of whether or not the security-based swap has been accepted for clearing, and would assign that duty to the registered clearing agency to which the transaction is submitted for clearing, rather than to the reporting side of the original transaction. Proposed Rule 901(e)(1)(ii) would ensure that all potential life cycle events (and adjustments due to life cycle events) would be subject to regulatory reporting, and that Regulation SBSR would specify the person who has the duty to report each kind of life cycle event (or adjustment).

When an alpha is submitted for clearing, the registered clearing agency will review the trade and decide whether or not to accept it. Acceptance for clearing can result in the termination of the alpha and the creation of the beta and gamma. Furthermore, rejection from clearing is an important event in the life of the alpha—because rejection could result in the voiding of the transaction or the activation of credit support provisions that would alter the character of the transaction—and thus is the kind of event that Rule 901(e) is designed to capture for regulatory purposes. Accordingly, proposed Rule 901(e)(1)(ii) would require a registered clearing agency to report whether or not it has accepted a security-based swap for clearing.

53 See ICE Letter at 2-5.

The Commission preliminarily believes that requiring a registered clearing agency, rather than the reporting side of the alpha, to report whether or not the registered clearing agency has accepted an alpha for clearing is consistent with the Commission's approach of assigning reporting obligations to the person with the most complete and efficient access to the required information. The registered clearing agency would have the most complete and efficient access to information about whether a particular alpha has been accepted for clearing because the registered clearing agency determines whether to accept a submitted alpha and knows the precise moment when the transaction is cleared. Although it would be possible for the reporting side for the alpha transaction to report whether a registered clearing agency has accepted the alpha for clearing, the reporting side would need to learn this information from the clearing agency. The Commission preliminarily believes it is more efficient to require the registered clearing agency to report to the alpha SDR whether or not the registered clearing agency has accepted the alpha for clearing.

Rule 901(e)(2), as adopted, requires whoever has the duty to report a life cycle event to include in the report of the life cycle event the transaction ID of the original transaction. If the Commission ultimately adopts proposed Rule 901(e)(1)(ii), a registered clearing agency that accepts or rejects an alpha transaction from clearing would incur this duty under existing Rule 901(e)(2). The transaction ID of the alpha transaction is information that the registered clearing agency might not have, because the registered clearing agency is not involved in the execution or reporting to a registered SDR of the alpha transaction. Therefore, the Commission also is proposing a new subparagraph (3) of Rule 901(a), which would provide that "a person who, under [Rule 901(a)(1) or 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." Proposed Rule 901(a)(3) would ensure that the registered clearing agency knows the identity of the alpha SDR and the transaction ID of the alpha, so that the registered clearing agency knows where to report whether or not it accepts the alpha for clearing—as required under existing Rule 901(e)(2)—and so that this report can be linked to the alpha report.

The Commission recognizes the potential for proposed Rules 901(e)(1)(ii) and 901(a)(3) to result in the registered clearing agency reporting whether or not it accepted the alpha for clearing to the alpha SDR before the alpha transaction itself has been reported to the alpha SDR. This could occur during the interim phase for regulatory reporting and public dissemination, which the Commission discussed in Section VII of the Regulation SBSR Adopting Release. Rule 901(j), as adopted, generally permits the person with the duty to report a security-based swap up to 24 hours after the time of execution to report to a registered SDR the transaction information required by Rules 901(c) and 901(d). Accordingly, an alpha could be submitted for clearing immediately after execution, but not reported to a registered SDR for up to 24 hours (or, if 24 hours after the time of execution would fall on a day that is not a business day, by the same time on the next day that is a business day). If the registered clearing agency accepts the alpha for clearing, the registered clearing agency might, pursuant to proposed Rule 901(e)(1)(ii), submit a report of this life cycle event to the alpha SDR before the alpha SDR has received the transaction report of the alpha transaction itself.[54]

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[54] To submit the report contemplated by proposed Rule 901(e)(1)(ii), the registered clearing agency would need to know the transaction ID of the alpha. The person with the duty to report the alpha might know the transaction ID of the alpha before it reports the transaction to a registered SDR. Under Rules 903(a) and 907(a)(5), as adopted, there is

To account for this possibility, the Commission is proposing a minor amendment to Rule 901(e)(2). Rule 901(e)(2), as adopted, states in relevant part that a life cycle event must be reported "to the entity to which the original security-based swap transaction was reported" (emphasis added). Under the proposed amendment to Rule 901(e)(2), a life cycle event would have to be reported "to the entity to which the original security-based swap transaction will be reported or has been reported." This amendment mirrors the language in proposed Rule 901(a)(3), which would require a person who reports an alpha to provide the registered clearing agency to which the alpha is submitted the transaction ID of the alpha and the identity of the registered SDR to which the alpha "will be reported or has been reported."

A registered SDR should consider—in formulating its policies and procedures under Rule 907(a), as adopted—whether those policies and procedures should address the situation where it receives a report from a registered clearing agency stating whether or not it has accepted an alpha (with a particular transaction ID) for clearing before the registered SDR has received a transaction report of the alpha. For example, the policies and procedures could provide that the registered SDR would hold a report from a registered clearing agency that it accepted the alpha for clearing in a pending state until it receives the transaction report of the alpha, and then

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no requirement that a registered SDR itself assign a transaction ID. Under those rules, a registered SDR may allow third parties—such as reporting sides or platforms—to assign a transaction ID using a methodology endorsed by the registered SDR. If the registered SDR allows third parties to assign the transaction ID, the reporting side or platform could tell the registered clearing agency the transaction ID, which in turn could allow the registered clearing agency to report to the alpha SDR whether or not the alpha has been accepted for clearing before the alpha has been reported to the registered SDR. If, however, the person with the duty to report the alpha does not obtain the transaction ID until it reports the alpha to a registered SDR, the person could not provide the transaction ID of the alpha to the registered clearing agency, and the registered clearing agency could not report whether or not it accepts the alpha for clearing until after it received alpha's transaction ID.

disseminate the security-based swap transaction information and the fact that the alpha has been terminated as a single report.

2. Reporting by a Platform

Some commenters, responding to Rule 901(a) as initially proposed, suggested that the Commission require a platform to report security-based swaps executed on or through its facilities.[55] One of these commenters stated that a platform would have the technology to report a security-based swap executed on its facilities and would be in the best position to ensure that the transaction was reported accurately and on a real-time basis.[56] This commenter also stated that the counterparties to a transaction executed on a platform should be relieved of any reporting obligations because they would not be in a position to control or confirm the accuracy of the information reported or to control the timing of the platform's reporting.[57] Another commenter expressed the view that having platforms report security-based swaps would facilitate economies in the marketplace because fewer entities, including end users, would be required to build the systems necessary to support security-based swap reporting.[58] Four commenters, however, raised concerns about imposing reporting requirements on platforms.[59]

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55 See ICI I at 5; Tradeweb Letter at 3-4; Vanguard Letter at 2, 7.

56 See Tradeweb Letter at 3.

57 See id. at 3-4. The commenter also noted that the CFTC's proposed swap data reporting rules would require a SEF or designated contract market to report a swap executed on its facilities. See id. at 4. The CFTC has subsequently adopted a final rule that requires SEFs and designated contract markets to report swaps executed on their facilities. See 17 CFR 45.3.

58 See Vanguard Letter at 7; ICI I at 5 (arguing that because investment funds would need to spend significant time and resources to build security-based swap reporting systems, platforms and security-based swap dealers should be obligated to report security-based swap data).

59 See ISDA/SIFMA I at 18; ISDA IV at 7; MarkitSERV III at 4; WMBAA II at 6.

After carefully considering these comments, the Commission is proposing to require a platform to report any security-based swap that is executed on the platform, but only if the security-based swap will be submitted to clearing. Proposed Rule 901(a)(1) provides that, 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 SDR the information required by Rules 901(c) (the primary trade information), 901(d)(1) (the participant ID or execution agent ID for each counterparty, as applicable), and 901(d)(9) (the platform ID). If the security-based swap will not be submitted to clearing, the platform would have no reporting obligations under Regulation SBSR. Instead, the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, will determine which side is the reporting side for such a platform-executed transaction.[60] As discussed below, proposed subparagraph (1) of Rule 901(a) is intended to maximize the accuracy and completeness of data reported to registered SDRs, while continuing to align the reporting duty with persons that are best able to carry it out.

The Commission understands that each counterparty to a platform-executed transaction that will be submitted to clearing intends to assume the credit risk of the clearing agency rather than any of the other platform participants, so there is no need to have credit and other documentation in place between itself and its counterparty. Thus, such a transaction could be executed anonymously, as there might be no mechanism by which one counterparty would learn the identity of the other.[61] The direct counterparties to such an alpha might not know which side

60 See Regulation SBSR Adopting Release, Section V.

61 The Commission notes that the offer and sale of security-based swaps, even if affected anonymously on a platform, must either be registered under the Securities Act or be made pursuant to an exemption from registration. The registration exemption in Section 4(a)(2) of the Securities Act, 15 U.S.C. 77d(a)(2), generally is available for transactions by an issuer not involving any public offering. One factor in determining the availability

would be the reporting side (if the hierarchy in Rule 901(a)(2), as adopted, applied) and there might be no mechanism for them to learn this information because they would not be assuming each other's credit risk.[62] Even if the direct counterparties could agree that one side—for example, the side selling protection in a single-name credit default swap—would report the trade, the reporting side might not learn the identity of its counterparty even though Rule 901(d)(1), as adopted, requires the reporting side to report all counterparty IDs.[63]

Although some platform-executed transactions that will be submitted to clearing might not be executed anonymously, the Commission preliminarily believes that it would be more efficient to require the platform to report all security-based swaps executed on that platform that will be submitted to clearing, regardless of whether the counterparties are, in fact, anonymous to each other. The Commission preliminarily believes that assigning the duty to report to the platform minimizes the number of reporting steps and thus minimizes the possibility of data

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of the Section 4(a)(2) exemption is that the purchasers of the securities in the transaction must be sophisticated investors. As previously noted by the Commission, Congress determined that eligible contract participants are sophisticated investors for purposes of security-based swap transactions. See Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Securities Act Release No. 9308 (March 30, 2012), 77 FR 20536 (April 5, 2012); Exemptions for Security-Based Swaps, Securities Act Release No. 9231 (July 1, 2011), 76 FR 40605 (July 11, 2011). The Commission believes that Congressional determination of eligible contract participants as sophisticated investors for purposes of security-based swap transactions applies as well for purposes of Section 4(a)(2) of the Securities Act. In addition, the exemption in Rule 240 under the Securities Act, 17 CFR 230.240, also may be available for security-based swap transactions involving eligible contract participants, to the extent applicable.

62 Cf. Cross-Border Adopting Release, 79 FR at 47325 (creating an exception, from having to be counted against the de minimis thresholds, for certain security-based swap transactions that a non-U.S. person enters into anonymously on a platform and that are cleared through a clearing agency, because each counterparty would not be in a position to know whether the other is a U.S. person).

63 Rule 901(d)(1) requires the reporting side to provide the counterparty ID or execution agent ID for each counterparty, as applicable. If the execution occurs anonymously, neither side would know the counterparty ID or execution agent ID of the other side.

corruption and delays in reporting the transaction to a registered SDR. Thus, the Commission preliminarily believes that all platform-executed transactions that will be submitted to clearing should be reported by the platform. This approach would be more efficient than if the platform had to assess on a transaction-by-transaction basis whether or not the counterparties are in fact unknown to each other.

As noted above,[64] four commenters generally opposed assigning to platforms the duty to report security-based swap transactions. One commenter stated generally that "the reporting party should be able to choose which SDR to report to, while being allowed to delegate the actual reporting to qualified third parties where it sees fit."[65] The commenter appeared to suggest that a platform could be a qualified third party acting as an agent for a reporting side.[66] The Commission agrees with the commenter that the platform is well-placed to carry out the act of reporting, but, unlike the commenter, the Commission preliminarily believes that the platform itself should have the legal duty to report for the reasons discussed above.

Three other commenters argued generally that platforms should not be assigned the duty to report because they lack certain information that would have to be reported. One of these commenters stated, for example, that "the SB SEF or national securities exchange may not itself have access to all of the information required, such as whether the trade has been accepted for clearing."[67] The other commenter argued that "[t]he SB SEF would likely not be privy to all of

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64 See supra note 59.

65 MarkitSERV III at 4.

66 See id. (stating that counterparties should be able to choose the registered SDR "regardless of whether the transaction is executed on a SEF").

67 ISDA/SIFMA I at 18. See also ISDA IV at 7 (stating that the clearing agency should be responsible for reporting the alpha trade once it is has been accepted for clearing, and that one of the counterparties should be responsible per the reporting hierarchy for reporting a

the terms required to be reported in accordance with proposed Regulation SBSR, such as, but not limited to: (i) contingencies of the payment streams of each counterparty to the other; (ii) the title of any master agreement or other agreement governing the transaction; (iii) data elements necessary to calculate the market value of the transaction; and (iv) other details not typically provided to the SB SEF by the customer, such as the actual desk on whose behalf the transaction is entered. Moreover, and quite critical, an SB SEF would not be in a position or necessarily have the capabilities to report life cycle event information. Indeed, even if an SB SEF were required to report the transaction details as the proposed regulation requires, something we do not think advisable, it would likely take at least 30 minutes to gather and confirm the accuracy of that information."[68]

The Commission shares the commenters' concern that it would not be appropriate to require platforms to report information that they do not have or that would be impractical to obtain. However, a close examination of the data elements that must be reported under Rules 901(c) and 901(d), as adopted, suggests that a platform would not be put in this position:

- Rule 901(c)(1) requires reporting of the product ID, if available, or else other information that identifies the security-based swap. Proposed Rule 901(a)(1) would apply only to platform-executed security-based swaps submitted to clearing, which suggests that these

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bilateral transaction that is not intended for clearing). The last commenter also stated that certain aspects of the CFTC regime for reporting bilateral swaps executed on a facility have been challenging due to the difficulty for SEFs to know and report certain trade data that is not essential to trade execution, and because of the shared responsibility for reporting since the SEF/DCM is responsible for the initial creation data reporting and the SD/MSP is responsible for continuation data reporting. See id. The Commission notes that Regulation SBSR, as adopted, applies the reporting hierarchy in Rule 901(a) to a security-based swap executed on a platform that is not intended to be cleared. See Regulation SBSR Adopting Release, Section V(C)(4).

68 WMBAA II at 6.

are products that would have a product ID. Even if these security-based swaps did not have a product ID, the platform would have sufficient information to identify a security-based swap traded on its facilities to allow its subscribers to trade it; this same information would be sufficient for the platform to report the information required by Rule 901(c)(1) to a registered SDR.

- Rules 901(c)(2), 901(c)(3), and 901(c)(4) require reporting of the date and time of execution, the price, and the notional amount, respectively, of the security-based swap. The platform will know these data elements because they were determined on the platform's facilities.
- Rule 901(c)(5) requires reporting of whether both sides of the transaction include a registered security-based swap dealer. The Commission anticipates that this information will be publicly available, or the platform could easily obtain it from a platform participant.
- Rule 901(c)(6) requires reporting of whether the direct counterparties intend that the security-based swap will be submitted to clearing. Rule 901(d)(6) requires reporting of the name of the clearing agency to which the security-based swap will be submitted to clearing. The fact that the transaction is intended to be cleared may be implicit in the product ID (e.g., if the security-based swap traded has a product ID of a "made available to trade" product). Alternatively, the counterparties may inform the platform that the security-based swap will be submitted to clearing; in some cases, the platform may provide the mechanism for reporting the transaction to a clearing agency. The Commission presumes that, if the platform knows that the security-based swap will be submitted to clearing, the platform will also know the name of the clearing agency. If the

platform has no knowledge that the transaction will be submitted to clearing, the platform would have no duty to report it under proposed Rule 901(a)(1).

- Rule 901(c)(7) requires reporting, if applicable, of any flags pertaining to the transaction that are specified in the policies and procedures of the registered SDR to which the transaction will be reported. The Commission preliminarily believes that, because the transaction occurs on the platform's facilities, the platform would have knowledge of any circumstances that would require application of a flag.
- Rule 901(d)(1) requires reporting of the counterparty ID or the execution agent ID of each counterparty, as applicable. A platform will know the identity of each direct counterparty or the execution agent for each direct counterparty because those market participants will be using the platform's facilities to execute the alpha transaction. To the extent that such alphas have an indirect counterparty, the Commission presumes that the platform will be able to obtain this information from the participant that is a direct counterparty to the alpha.
- Rule 901(d)(2) requires <u>the reporting side</u> to report the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID "of the direct counterparty on the reporting side." Regardless of whether a platform has these UICs for the counterparties to a security-based swap executed on its facilities, the platform would not be the reporting side for such a transaction because it is not a counterparty to the security-based swap.[69] Thus, when a platform has the duty to report a transaction, there is no reporting side, and the registered SDR to which the platform reports the security-based swap would be

69 Under Rule 900(hh), as adopted, the sides are counterparties to the security-based swap. Thus, the platform would not be one of the sides (except possibly in unusual circumstances) and thus could not be the reporting side.

required to obtain the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID, as applicable, from each direct counterparty using the process in Rule 906(a), as adopted.[70]

- Rules 901(d)(3) and 901(d)(5) require reporting of the terms of any fixed or floating rate payments and any other elements included in the agreement necessary to calculate the value of the contract, respectively, but only "[t]o the extent not provided pursuant to [Rule 901(c)]." The Commission believes that all of the identifying information would be contained in the product ID or otherwise available to the platform and reported by the platform pursuant to Rule 901(c).[71] Therefore, the Commission preliminarily believes that the information required under Rules 901(d)(3) and 901(d)(5) would be a null set for a transaction executed on a platform that is submitted to clearing.

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70 See Regulation SBSR Adopting Release, Section XIII (describing Rule 906(a), as adopted). The Commission preliminarily believes that relying on the Rule 906(a) process to obtain UIC information from both sides to a platform-executed security-based swap that will be submitted to clearing would not cause counterparties to such transactions to incur significant additional costs. See Regulation SBSR Adopting Release, Section XXII(C)(6)(c) (estimating the costs of complying with Rule 906(a), as adopted, for reporting sides). As noted above, assigning the reporting duty to the platform should minimize the number of reporting steps and thus the possibility of data corruption and delays in reporting the transaction to a registered SDR because a platform will have superior access to the economic terms of security-based swaps that are executed on its facilities and will be submitted to clearing. The Commission further notes that the platform could report the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID, as applicable, as agent for a direct counterparty, if the direct counterparty provided this information to the platform. See Regulation SBSR Adopting Release, Section V(C)(2) (discussing use of agents to carry out reporting duties).

71 For a platform to make a security-based swap eligible for trading on its facilities, it must display a product in specific enough detail for the platform participants to reach a meeting of the minds about what they are trading. In other words, the platform must provide information that identifies the security-based swap, the effective date, the scheduled termination date, and the terms of any standardized fixed or floating rate payments and the frequency of such payments. The platform would be required to report these elements, or a product ID that incorporates these elements, to a registered SDR pursuant to Rule 901(c).

- Rule 901(d)(4) requires reporting of the titles and dates of agreements that are "incorporated by reference into the security-based swap contract." The terms of the alpha security-based swap will be established according to the rules of the platform and, potentially, the rules of the registered clearing agency to which the security-based swap will be submitted, and likely will not be written. Therefore, the Commission presumes that there will be no agreements incorporated by reference to such contracts, and the information required under Rule 901(d)(4) would be a null set for a transaction executed on a platform that will be submitted to clearing.
- Rule 901(d)(7) would apply only if the direct counterparties do not intend to submit the security-based swap to clearing. Rule 901(d)(8) would apply only if the transaction is not submitted to clearing. Because a platform would be required to report a security-based swap executed on its facilities only if the transaction will be submitted to clearing, Rules 901(d)(7) and 901(d)(8) would not be applicable.
- Rule 901(d)(9) requires reporting of the platform ID. The platform can provide this information.
- Rule 901(d)(10) would apply only if the security-based swap arises from the allocation, termination, novation, or assignment of one or more existing security-based swaps. To the extent that platforms facilitate allocations, terminations, novations, or assignments of existing security-based swaps, the platform participants engaging in such exercises could provide the platform with the transaction IDs of those existing security-based swaps,[72] which the platform would need to report pursuant to Rule 901(d)(10).

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72 For a platform to facilitate allocations, terminations, novations, or assignments of existing security-based swaps, the platform participants necessarily must provide a significant

Two commenters who raised general issues about platforms having the duty to report questioned, in particular, a platform's ability to report subsequent events affecting the initial alpha transaction. One commenter stated that "an SB SEF would not be in a position or necessarily have the capabilities to report life cycle event information."[73] The second commenter noted that "the SB SEF or national securities exchange may not itself have access to . . . whether the trade has been accepted for clearing."[74] This commenter further noted that "the relevant clearing agency . . . could report the missing data in parallel."[75] The Commission broadly agrees with that suggestion and therefore is proposing a new subparagraph (ii) of Rule 901(e)(1), which would require a registered clearing agency to report whether or not it has accepted a security-based swap for clearing. Proposed Rule 901(e)(1)(ii) reflects the Commission's preliminary view that the registered clearing agency—and not a platform or any other person—has the most direct access to that information and, therefore, should have the duty to report it to the alpha SDR.[76] Similarly, the Commission generally agrees with the first commenter that a platform is not in a good position to know about life cycle events of security-based swaps executed on their facilities. However, the Commission preliminarily believes that the only life cycle event of a platform-executed security-based swap that will be submitted to clearing will be whether the security-based swap is accepted for clearing. Proposed Rule

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amount of information to the platform regarding those existing security-based swaps. Given that the platform participants must provide a significant amount of information about the existing transactions to the platform, the Commission preliminarily believes that the platform participants also could provide the platform with the transaction IDs of those existing security-based swaps.

73 WMBAA II at 6.

74 ISDA/SIFMA I at 18.

75 Id.

76 See supra Section II(C)(2)(d).

901(e)(1)(ii) would require the registered clearing agency to report that information, not the platform.

The Commission notes that proposed Rule 901(a)(1) would require a platform to report a security-based swap only if the security-based swap will be submitted to clearing. If the platform-executed transaction will not be submitted to clearing, Rule 901(a)(2)(ii), as adopted, already requires the counterparties to apply the reporting hierarchy to determine which side will have the duty to report the transaction, as well as any life cycle event of that transaction. This result is consistent with Section 13A(a)(3) of the Exchange Act,[77] which sets out a reporting hierarchy under which one of the counterparties, but not a platform, will have the duty to report a security-based swap that is not accepted by any clearing agency.

3. Additional Amendments to Account for Platforms and Registered Clearing Agencies Incurring Duties to Report

Under Rule 901(h), as adopted, "a reporting side" must electronically transmit the information required by Rule 901 in a format required by the registered SDR.[78] The Commission is now proposing to replace the term "reporting side" in Rule 901(h) with the phrase "person having a duty to report" because, under the proposed amendments to Rule 901(a), platforms and registered clearing agencies would have duties to report certain transaction information, in addition to reporting sides. The Commission believes that all persons who have a duty to report under Regulation SBSR—i.e., platforms, registered clearing agencies, and reporting sides—should electronically transmit the information required by Rule 901 in a format required by the registered SDR.

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77 15 U.S.C. 78mA(a)(3).

78 Rule 907, as adopted, requires a registered SDR to establish and maintain written policies and procedures to govern various aspects of the registered SDR's operations, including the manner and format in which the registered SDR will accept data from its participants.

Under Rule 900(u), as adopted, platforms and registered clearing agencies would not be participants of registered SDRs solely as a result of reporting security-based swap transaction information pursuant to proposed Rule 901(a)(1) or 901(e)(1)(ii), respectively.[79] However, consistent with the proposed amendment to Rule 901(h) described immediately above, the Commission believes that platforms and registered clearing agencies should be participants of any registered SDR to which they report security-based swap transaction information. Imposing participant status on platforms and registered clearing agencies would explicitly require those entities to report security-based swap transaction information to a registered SDR in a format required by that registered SDR. If platforms and registered clearing agencies were not participants of the registered SDR and were permitted to report data in a format of their own choosing, it could be difficult or impossible for the registered SDR to understand individual transaction reports or aggregate them with other reports in a meaningful way. This could adversely affect the ability of the Commission and other relevant authorities to carry out their oversight responsibilities and could interfere with the ability of a registered SDR to publicly disseminate security-based swap transaction information as required by Rule 902, as adopted. Therefore, the Commission is proposing to amend the definition of "participant" in Rule 900(u) to mean: (1) a person that is a counterparty to a security-based swap, provided that the security-based swap is subject to regulatory reporting under Regulation SBSR and is reported to a registered SDR pursuant to Regulation SBSR; (2) a platform that is required to report a security-

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79 Rule 900(u), as adopted, provides that a "[p]articipant, with respect to a registered security-based swap data repository, means a counterparty, that meets the criteria of [Rule 908(b)], of a security-based swap that is reported to that registered security-based swap data repository to satisfy an obligation under [Rule 901(a)]."

based swap pursuant to Rule 901(a)(1); or (3) a registered clearing agency that is required to report a life cycle event pursuant to Rule 901(e).[80]

4. Examples

The following examples illustrate the proposed reporting process for alpha, beta, and gamma security-based swaps, assuming an agency model of clearing under which a non-clearing member counterparty becomes a direct counterparty to a clearing transaction:[81]

- Example 1. A registered security-based swap dealer enters into a security-based swap with a private fund. The transaction is not executed on a platform. The counterparties intend to clear the transaction (i.e., the transaction is an alpha). Neither side has a guarantor with respect to the alpha, and both direct counterparties are U.S. persons.
    - The registered security-based swap dealer is the reporting side under Rule 901(a)(2)(ii), as adopted, and must report this alpha transaction to a registered SDR (and may choose the registered SDR).
    - Proposed Rule 901(a)(3) would require the registered security-based swap dealer, as the reporting side of the alpha transaction, to promptly provide to the registered clearing agency the transaction ID of the alpha and the identity of the alpha SDR.

80 A registered clearing agency that is required to report a clearing transaction pursuant to proposed Rule 901(a)(2)(i) would be a counterparty to a security-based swap and covered by the first prong of the proposed definition of "participant."

81 As noted in Section II(A), supra, because clearing of security-based swaps in the United States is still evolving, other models of clearing might emerge where customers would not become direct counterparties of a registered clearing agency.

- If the registered clearing agency accepts the alpha for clearing and terminates the alpha, two clearing transactions—a beta (between the registered security-based swap dealer and the registered clearing agency) and a gamma (between the registered clearing agency and the private fund)—take its place.
- Proposed Rule 901(e)(1)(ii) would require the registered clearing agency to report to the alpha SDR that it accepted the transaction for clearing.
- Under proposed Rule 901(a)(2)(i), the registered clearing agency would be the reporting side for each of the beta and the gamma. Therefore, the registered clearing agency would be required to report the beta and gamma to a registered SDR and could choose the registered SDR to which it reports the beta and gamma. The report for each of the beta and the gamma must include the transaction ID of the alpha, as required by Rule 901(d)(10), as adopted.

- Example 2. Same facts as Example 1, except that the private fund and the registered security-based swap dealer transact on a SB SEF.
  - Proposed Rule 901(a)(1) would require the SB SEF to report the alpha transaction (and allow the SB SEF to choose the registered SDR).
  - Upon submission of the alpha for clearing, proposed Rule 901(a)(3) would require the SB SEF to promptly report to the registered clearing agency the transaction ID of the alpha and the identity of the alpha SDR.
  - Once the alpha is submitted to clearing, the reporting workflows are the same as in Example 1.

D. Request for Comment

The Commission requests comment on all aspects of the proposed new Rules 901(a)(1), 901(a)(2)(i), and 901(a)(3), as well as the proposed amendment to Rule 901(e).

1. Is the Commission's discussion of how Regulation SBSR—under the amendments proposed in this release—would apply to different steps or actions in the clearing process under the agency model sufficiently clear and complete? If not, please provide detail about the operation of the agency model of clearing (e.g., particular steps or actions in the clearing process) that you believe the Commission has not adequately addressed and how you believe they should be treated under Regulation SBSR.

2. Do you believe that the principal model of clearing is or is likely to become sufficiently prevalent in the U.S. market that the Commission should address how Regulation SBSR would apply to different steps in the clearing process under the principal model? If so, do you think that further guidance is necessary to apply Regulation SBSR effectively to the principal model? What aspects of the principal model should the Commission focus on for purposes of providing further guidance?

3. At the time that a security-based swap is accepted for clearing, will any person other than the registered clearing agency have complete information about the beta and the gamma that result from clearing?

4. Do you agree with the Commission's preliminary assessment of the data elements under Rules 901(c) and 901(d) that will be available to a platform and required to be reported for a platform-executed security-based swap that will be submitted to

clearing? If not, what information would the platform find difficult to obtain? For example, could a platform be reasonably be expected to know of guarantors of direct counterparties transacting on its facilities (if the guarantors are clearing members who guarantee platform participants who are not themselves direct members of the clearing agency)?

5. If the Commission were to adopt the basic requirement that a platform must report transactions executed on its facilities that are submitted to clearing but, as discussed above, would not require the platform to report certain data elements in Rule 901(c) or 901(d), what data elements should be excepted? Can you suggest an alternate mechanism—besides requiring the platform to report—for such data elements to be reported to the registered SDR?

6. Would a platform have knowledge of any special circumstances of a transaction executed on its facilities that might have to be flagged pursuant to the policies and procedures of the registered SDR to which the platform reports the transaction? Are there any special circumstances that it would be difficult or impossible for a platform to know? If so, please discuss and suggest how the transaction could be appropriately flagged if the platform does not do so.

7. Are there any potential life cycle events of a platform-executed security-based swap that will be submitted to clearing, other than acceptance or rejection from clearing? If so, what are they and who do you think should have the duty of reporting such life cycle events to a registered SDR? Why?

8. What costs might platforms incur to report security-based swap transactions pursuant to proposed Rule 901(a)(1)? Could other market participants report

these transactions more efficiently or cost effectively?

9. Would a registered clearing agency have the information necessary to report a platform-executed alpha that will be submitted to clearing? If so, should the registered clearing agency, rather than the platform, be required to report the transaction? Why or why not? How long does it typically take between the execution of a security-based swap on a platform and submission to clearing? How long does it typically take between submission to clearing and when the registered clearing agency determines whether to accept or reject the transaction?

10. Rule 901(d)(2), as adopted, requires the reporting side to report—"as applicable"— the branch ID, broker ID, execution agent ID, trader ID, and trading desk ID with respect to the direct counterparty on the reporting side. As described above, the Commission is proposing that the registered clearing agency would be the reporting side for all clearing transactions to which it is a counterparty. Would the branch ID, broker ID, execution agent ID, trader ID, or trading desk ID ever be applicable to a registered clearing agency? Why or why not?

11. Rule 906(a), as adopted, provides a mechanism for a registered SDR to obtain the branch ID, broker ID, execution agent ID, trading ID, and trading desk ID—"as applicable"—for the non-reporting side of a security-based swap. Thus, mechanisms exist under Regulation SBSR, as adopted, for the Commission to learn the UICs, as applicable, for both sides of the alpha transaction. Would these UICs be applicable to the non-clearing agency side of a clearing transaction? Why or why not? If not, do you believe that the Commission should provide

guidance that there is no requirement under Rule 906(a) to report the UICs for the non-clearing agency counterparty of a clearing transaction?

12. Will registered clearing agencies be able to leverage existing reporting processes to report data to registered SDRs? What additional reporting processes might registered clearing agencies need to develop to ensure accurate reporting in accordance with the proposed amendments to Rule 901? What costs might registered clearing agencies incur to adopt these processes?

13. Would other market participants be able to report clearing transactions or terminations of transactions submitted to clearing more efficiently or cost effectively than the registered clearing agency? What costs might counterparties incur if one of the sides of the alpha were assigned the duty to report a clearing transaction rather than the registered clearing agency?

14. Should the proposed reporting requirements for registered clearing agencies apply only to registered clearing agencies having their principal place of business in the United States rather than to all registered clearing agencies (which could include registered clearing agencies having their principal place of business outside the United States)? Why or why not? Would U.S. persons, registered security-based swap dealers, and registered major security-based swap participants be in a better position to report transactions with non-U.S. person registered clearing agencies? Why or why not?

15. Under proposed Rule 901(e)(1)(ii), a registered clearing agency would be required to report whether or not it has accepted a security-based swap for clearing. Should this information be required to be reported to the same

registered SDR that receives the transaction report of the alpha? If not, how would the Commission and other relevant authorities be able to ascertain whether or not the alpha had been cleared? If so, what costs would be imposed on registered clearing agencies for having to report this transaction information to a registered SDR not of their choosing?

16. Is it appropriate to require a registered clearing agency to become a participant of the alpha SDR solely as a result of reporting whether or not it has accepted an alpha for clearing? What costs would be imposed on registered clearing agencies as a result of this requirement? If a registered clearing agency did not become a participant of the alpha SDR solely by virtue of reporting the disposition of an alpha, in what other way should the registered clearing agency be required to report the disposition of an alpha such that the systems of the alpha SDR can accept and understand that report?

17. What costs might platforms and reporting sides incur to comply with proposed Rule 901(a)(3), which would require the person with the duty to report a security-based swap that has been submitted to clearing at a registered clearing agency to promptly provide that registered clearing agency with the transaction ID of the submitted security-based swap and the identity of the alpha SDR? Is there a more efficient way of ensuring that registered clearing agencies know the transaction ID of the alpha and the identity of the alpha SDR? If so, please discuss.

18. Should platforms and registered clearing agencies be participants of the registered SDRs to which they report? If not, how would a registered SDR ensure that these persons provide data in a format required by the registered SDR?

19. How might the policies and procedures of a registered SDR address the circumstance where the registered SDR receives a termination report of an alpha pursuant to proposed Rule 901(e)(1)(ii) before it receives the initial report of the alpha? What costs would registered SDRs incur to implement policies and procedures addressing this scenario?

20. Can anonymous trading occur on any other type of trading venue besides a platform? If so, please describe where and how such activity occurs and provide your view as to how Regulation SBSR should, if necessary, be amended to require reporting of such transactions.

III. Reporting and Public Dissemination of Security-Based Swaps Involving Allocation

The Regulation SBSR Adopting Release provides guidance for the reporting of certain security-based swaps executed by an asset manager on behalf of multiple clients—transactions involving what are sometimes referred to as "bunched orders."[82] Specifically, the Regulation SBSR Adopting Release explains how Regulation SBSR applies to executed bunched orders that are reported pursuant to the reporting hierarchy in Rule 901(a)(2)(ii), as adopted, including bunched order alphas. That release also explains how Regulation SBSR applies to the security-based swaps that result from allocation of that executed bunched order, if the resulting security-

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82 See Regulation SBSR Adopting Release, Section VIII. The Commission recognizes that market participants may use a variety of other terms to refer to such transactions, including "blocks," "parent/child" transactions, and "splits." The Commission has determined to use a single term, "bunched orders," for purposes of this release, as this appears to be a widely accepted term. See, e.g., "Bunched orders challenge SEFs," MarketsMedia (March 25, 2014), available at http://marketsmedia.com/bunched-orders-challenge-sefs/, (last visited September 22, 2014); "Cleared bunched trades could become mandatory rule," Futures and Options World (October 31, 2013), available at http://www.fow.com/3273356/Cleared-bunched-trades-could-become-mandatory-rule.html, (last visited September 22, 2014).

based swaps are uncleared. This section explains how the Commission preliminarily believes Regulation SBSR, as adopted and as proposed to be amended by this release, would apply to a platform-executed bunched order that will be submitted to clearing, and the security-based swaps that result from the allocation of any bunched order execution, if the resulting security-based swaps are cleared.

As described in the Regulation SBSR Adopting Release, to execute a bunched order, an asset manager negotiates and executes a security-based swap with a counterparty, typically a security-based swap dealer, on behalf of multiple clients. The bunched order could be executed on- or off-platform. After execution of the bunched order, the asset manager would allocate a fractional amount of the aggregate notional amount of the transaction to each of several clients, thereby creating several new security-based swaps and terminating the bunched order execution.[83] By executing a bunched order, the asset manager avoids having to negotiate the client-level transactions individually, and obtains exposure for each client on the same terms (except, perhaps, for size).

In the Regulation SBSR Adopting Release, the Commission explained that a bunched order execution and the security-based swaps resulting from the allocation of the bunched order execution, if they are not cleared, must be reported like other security-based swaps. Regulation SBSR provides that the registered SDR to which the initial bunched order execution is reported must disseminate a report of the bunched order execution, including the full notional amount of the transaction. The Commission observed that publicly disseminating bunched order executions in this manner would allow the public to "know the full size of the bunched order execution and

[83] In aggregate, the notional amount of the security-based swaps that result from the allocation is the same as the notional amount of the executed bunched order.

that this size was negotiated at a single price."[84] Rule 902(c)(7), as adopted, provides that the registered SDR shall not publicly disseminate any information regarding the allocation of a bunched order execution, which would include the smaller security-based swaps resulting from the allocation of the initial transaction as well as the fact that the initial transaction is terminated following this allocation.

A. Examples

The following examples illustrate how Regulation SBSR would apply to platform-executed bunched order alphas, and security-based swaps that result from allocation of bunched order alphas, if the resulting security-based swaps are cleared. The examples specify which actions are addressed by Regulation SBSR, as adopted, and which actions would be addressed by the new provisions of Regulation SBSR that are being proposed in this release. The Commission notes that the proposed amendments to Rule 901(a) and the conforming changes discussed in Section II, supra, would not affect the examples describing the reporting of bunched orders and the security-based swaps that result from their allocation that the Commission provided in the Regulation SBSR Adopting Release. Furthermore, the examples assume that the bunched order alpha would be cleared using the agency model of clearing.[85] In the case of a bunched order alpha, the final placement of risk will take the form of clearing transactions between: (1) the client accounts of the asset manager and the registered clearing agency that clears the bunched order alpha; and (2) the registered security-based swap dealer and the registered clearing agency.

The Commission understands that market participants may use a variety of workflows for allocating a bunched order alpha. Regulation SBSR, as adopted, provides that, regardless of the

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[84] Regulation SBSR Adopting Release, Section VIII.

[85] As noted in Section II(A), supra, the agency model of clearing predominates in the United States.

workflow employed, a bunched order alpha that is executed off-platform shall be reported and publicly disseminated as a single transaction, showing the full notional amount.[86] The proposed interpretation discussed below would take the same approach to bunched order alphas that are executed on a platform. Regulation SBSR, as adopted, further provides that the security-based swaps that result from allocation of a bunched order execution are subject to regulatory reporting but not public dissemination, if these resulting security-based swaps are uncleared. The proposed interpretation discussed below would take the same approach to cleared security-based swaps that result from the allocation of a bunched order alpha.[87]

1. Example 1: Off-Platform Cleared Transaction

Assume that an asset manager, acting on behalf of several advised accounts, executes a bunched order alpha with a registered security-based swap dealer. The execution does not occur on a platform, and there are no indirect counterparties on either side of the bunched order alpha. The transaction is submitted to a registered clearing agency.

a. Reporting the Bunched Order Alpha

The reporting hierarchy of Rule 901(a)(2)(ii), as adopted, applies to the bunched order alpha because the execution does not occur on a platform and the bunched order alpha is not a clearing transaction. Under Rule 901(a)(2)(ii)(B), as adopted, the registered security-based swap dealer is the reporting side for the bunched order alpha because its side includes the only registered security-based swap dealer. As the reporting side, the registered security-based swap dealer must report the primary and secondary trade information for the bunched order alpha to a registered SDR (the "alpha SDR") of its choice within 24 hours after the time of execution. Rule

86 See Regulation SBSR Adopting Release, Section VIII(A).

87 See ISDA IV at 10 (recommending that bunched order executions be subject to public dissemination instead of the transactions resulting from the allocation).

902(a), as adopted, requires the alpha SDR to publicly disseminate a transaction report of the bunched order alpha immediately upon receiving the report from the registered security-based swap dealer.[88]

When the registered security-based swap dealer submits the bunched order alpha to a registered clearing agency for clearing, proposed Rule 901(a)(3) would require the registered security-based swap dealer promptly to provide the registered clearing agency with the transaction ID of the bunched order alpha and the identity of the alpha SDR. This requirement would facilitate the registered clearing agency's ability to report whether or not it accepts the bunched order alpha for clearing pursuant to proposed Rule 901(e)(1)(ii).

b. Reporting the Security-Based Swaps Resulting From Allocation

Proposed Rule 901(a)(2)(i) would require the registered clearing agency to report all clearing transactions that arise as a result of clearing the bunched order alpha, regardless of the workflows used to clear the bunched order alpha.[89]

If the asset manager provides allocation instructions prior to or contemporaneous with the clearing of the bunched order alpha, clearing could result in the creation of a beta (i.e., the clearing transaction between the registered clearing agency and the security-based swap dealer) and a "gamma series" (i.e., the gammas between the registered clearing agency and each of the client funds selected by the asset manager to receive a portion of the initial notional amount).

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88 Pursuant to Rule 906(a), as adopted, the registered SDR also would be required to obtain any missing UICs from the counterparties.

89 Like other clearing transactions that arise from the acceptance of a security-based swap for clearing, these security-based swaps would not be subject to public dissemination. See Rule 902(c)(6). See also Rule 902(c)(7) (exempting from public dissemination any "information regarding the allocation of a security-based swap"); Regulation SBSR Adopting Release, Section VI(D)(1) (describing final Rule 902(c)(7)).

The beta and each security-based swap that comprises the gamma series would not be treated differently under Regulation SBSR than any other clearing transactions.[90]

If the asset manager does not provide allocation instructions until after the bunched order alpha is cleared, clearing could result in the creation of a beta (i.e., the clearing transaction between the registered clearing agency and the security-based swap dealer) and an "intermediate gamma" (i.e., the clearing transaction between the clearing agency and the side representing the clients of the asset manager). The beta would be the same—and would be treated the same—as any other clearing transaction, while the intermediate gamma would continue to exist until the registered clearing agency receives the allocation information, which could come from the asset manager or its clearing member and would allow for the creation of the gamma series. As the registered clearing agency receives the allocation information, it would terminate the intermediate gamma and create new security-based swaps as part of the gamma series. The partial terminations of the intermediate gamma would be life cycle events of the intermediate gamma that the registered clearing agency must report under Rule 901(e)(1)(i), as adopted. Rule 901(e)(2), as adopted, would require the registered clearing agency to report these life cycle events to the same registered SDR to which it reported the intermediate gamma. Under proposed Rule 901(a)(2)(i), the registered clearing agency also would be required to report to a registered SDR each new security-based swap comprising part of the gamma series. Because these security-based swaps arise from the termination (or partial termination) of an existing security-based swap (i.e., the gamma series), Rule 901(d)(10), as adopted, requires the registered clearing agency to link each new transaction in the gamma series to the intermediate gamma by including

90 See supra Section II(C)(1) (explaining the reporting process for clearing transactions).

the transaction ID of the intermediate gamma as part of the report of each new security-based swap in the gamma series.

2. Example 2: Cleared Platform Transaction

Assume the same facts as Example 1, except that the registered security-based swap dealer and asset manager execute the bunched order alpha on a SB SEF.

a. Reporting the Bunched Order Alpha

Because the initial transaction is executed on a platform and will be submitted to clearing, the platform would have the duty, under proposed Rule 901(a)(1), to report the bunched order alpha to a registered SDR. To satisfy this reporting obligation, the platform would be required to provide all of the applicable information required by proposed Rule 901(a)(1). Commission staff understands from discussions with market participants that, even if the platform does not know and thus cannot report the counterparty IDs of each account that will receive an allocation, the platform would know the identity of the execution agent who executed the bunched order alpha on behalf of its advised accounts. The platform, therefore, could report the execution agent ID of the execution agent, even though it might not know the intended counterparties of the security-based swaps that will result from the allocation.[91] Rule 902(a), as adopted, requires the registered SDR that receives the report of the bunched order alpha from the platform to publicly disseminate a report of the bunched order alpha. Then, pursuant to Rule

91 See Rule 901(d)(1) (requiring reporting of the counterparty ID "or the execution agent ID of each counterparty, if applicable"). If the counterparties—i.e., the specific accounts who will receive allocations—are not yet known, the requirement to report the execution agent ID instead of the counterparty ID would apply. Similarly, if the asset manager uses an execution agent to access the platform, the platform would report the identity of the asset manager's execution agent.

906(a), as adopted, the registered SDR would be required to obtain any missing UICs from its participants.

b. Reporting the Security-Based Swaps Resulting From Allocation

If the asset manager provides allocation instructions prior to or contemporaneous with the clearing of the bunched order alpha, clearing would (under the agency model of clearing) result in the creation of a beta (i.e., the clearing transaction between the registered clearing agency and the registered security-based swap dealer) and a "gamma series" (i.e., the gammas between the clearing agency and each of the asset manager's clients). The beta and each security-based swap that comprises the gamma series would be no different—and would not be treated differently under Regulation SBSR—from other clearing transactions.[92]

If the asset manager does not provide allocation instructions until after the bunched order alpha is cleared, clearing (under the agency model) would result in the creation of a beta (between the registered clearing agency and the security-based swap dealer) and an intermediate gamma (between the registered clearing agency and the side representing the clients of the asset manager). The registered clearing agency would then be required to report the termination of the bunched order alpha and the creation of the beta and intermediate gamma, pursuant to proposed Rules 901(e)(1)(ii) and 901(a)(2)(i), respectively. From this point on, the beta would be treated the same as any other clearing transaction, while the intermediate gamma would be decremented and replaced by the gamma series, as described in Example 1.

B. Request for Comment

The Commission requests comment on all aspects of its preliminary views regarding how the proposed amendments to Regulation SBSR would apply to various allocation scenarios

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92 See supra Section II(C)(1) (explaining the reporting process for clearing transactions).

involving cleared security-based swaps.

21. Is the Commission's discussion of how Regulation SBSR—under the amendments proposed in this release—would apply to different steps in the process for reporting the betas and gammas that result from clearing a bunched order alpha sufficiently clear and complete? If not, please provide detail about particular steps that you believe the Commission has not adequately addressed and how you believe they should be treated under Regulation SBSR.

22. Are there additional processes or workflows related to the clearing of bunched order alphas for which market participants need guidance? If so, please describe these situations and your recommendation for how Regulation SBSR should address them.

23. Do asset managers identify the clients that will receive allocations from a bunched order alpha before the bunched order alpha is submitted to clearing? If so, when is allocation of the bunched order alpha complete? If the bunched order alpha is allocated prior to clearing, would the information provided to the registered clearing agency allow the registered clearing agency to recognize that it is clearing a bunched order alpha? If a registered clearing agency is unable to recognize that it is clearing a bunched order alpha, would the registered clearing agency be able to fulfill its reporting duties under the proposed amendments to Regulation SBSR?

IV. Reporting and Public Dissemination of Prime Brokerage Transactions

Commission staff understands from discussions with market participants that, under a prime brokerage arrangement, a customer of a prime broker will negotiate and agree to the economic terms of a security-based swap with a registered security-based swap dealer (the "executing dealer") but both the customer and the executing dealer ultimately will face the prime broker, rather than each other.[93] Before negotiating with one or more executing dealers, the customer will first enter into a prime brokerage arrangement with a prime broker.[94] The terms of this arrangement typically will, among other things, set out the types of transactions eligible for prime brokerage treatment, enumerate the executing dealers with whom the customer may negotiate, and establish terms for the credit support and other transaction-related services provided by the prime broker to the customer. A prime brokerage arrangement allows a customer to negotiate transactions with a range of executing dealers without having to negotiate credit documentation with each dealer individually. This is because both the customer and the executing dealer know that the transaction between them will be replaced by separate transactions between each of them and the prime broker, thus obviating the need for credit documentation between the two original counterparties.[95]

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93 See The Financial Markets Lawyers Group, CFTC No-Action Letter No. 12-53 at 2-3 (December 17, 2012) ("CFTC NAL No. 12-53"); Division of Swap Dealer and Intermediary Oversight, CFTC No-Action Letter at 3-4 (April 30, 2013) ("CFTC NAL No. 13-11"). These no-action letters describe the CFTC's understanding of prime brokerage arrangements in the swap market. It is the Commission's understanding that prime brokerage arrangements in the security-based swap market are similar to those in the swap market.

94 For purposes of this release, the Commission assumes that both the prime broker and the executing dealer would be registered security-based swap dealers.

95 The agreement between the customer and the executing dealer would constitute a contract for the sale of a security for purposes of the federal securities laws. See Securities Offering Reform, Securities Act Release No. 33-8591 (July 19, 2005), 70 FR 44722, 44767 (August 3, 2005) (discussing the determination of the time of sale with respect to a contract of sale for securities and noting that "a contract of sale under the federal securities laws can occur before there is an unconditional bilateral contract under state law").

Through the prime brokerage arrangement, the prime broker permits the customer to negotiate and agree to the terms of security-based swaps with approved executing dealers, subject to specified limits and parameters.[96] If the terms of the transaction agreed to by the customer and the executing dealer are within those parameters, the prime broker would replace the initial transaction between the customer and the executing dealer with two separate transactions—one between the prime broker and the customer and the second between the prime broker and the executing dealer—having substantially the same terms as the original transaction between the customer and the executing dealer. Thus, a prime brokerage arrangement in the security-based swap market typically results in the following three transactions:

- Transaction 1. The customer and the executing dealer negotiate and agree to the terms of a security-based swap transaction (the "customer/executing dealer transaction") and notify the prime broker of these terms.
- Transaction 2. The prime broker will accept the transaction and face the executing dealer in a security-based swap with the same economic terms agreed to by the executing dealer and the customer, if the terms are within the parameters established by the prime brokerage arrangement (the "prime broker/executing dealer transaction").
- Transaction 3. Upon executing the security-based swap with the executing dealer, the prime broker will enter into an offsetting security-based swap with the customer (the "prime broker/customer transaction").[97]

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96 See ISDA, 2005 Master Give-Up Agreement (providing standard terms that market participants can use to document prime brokerage arrangements). See also CFTC NAL No. 12-53, supra note 93, at 2-3 (describing a typical prime brokerage arrangement in the swap market).

97 See CFTC NAL No. 12-53, supra note 93, at 2-3; CFTC NAL No. 13-11, supra note 93, at 3-4 (describing typical prime brokerage arrangements in the swap market).

A. Application of Regulation SBSR as Adopted to Prime Brokerage Transactions

The Commission understands that prime brokerage arrangements involve credit intermediation offered by the prime broker, rather than a registered clearing agency. Thus, prime brokerage transactions are not cleared. Therefore, Rule 901(a)(2)(ii), as adopted, assigns the reporting duty for Transaction 1, because Transaction 1 is not a clearing transaction.

If the prime broker determines that Transaction 1 meets the terms of the prime brokerage arrangement, the prime broker would initiate Transactions 2 and 3, which would have the effect of terminating Transaction 1. The termination would be a life cycle event of Transaction 1, and the reporting side for Transaction 1 (likely the executing dealer) would be required by Rule 901(e)(i), as adopted, to report the life cycle event to the same SDR to which it reported the transaction initially.[98] If the reporting side for Transaction1 did not report whether Transaction 1 was terminated, the Commission and market observers might incorrectly conclude that the counterparties to Transaction 1 (the customer and executing dealer) continue to have exposure to each other.

Transactions 2 and 3 (i.e., the prime broker/executing dealer transaction and the prime broker/customer transaction, respectively) also are security-based swaps that must be reported

98 If the prime broker determines that Transaction 1 does not meet the terms of the prime brokerage arrangement, the executing dealer also would be required to report this fact to the registered SDR to which it reported the transaction initially pursuant to Rule 901(e)(2), as adopted. Rule 901(e)(2) requires, in relevant part, reporting a life cycle event to the entity to which the original security-based swap was reported. Pursuant to commonly used industry documentation for prime brokerage trades, the rejection by the prime broker could cause the initial transaction to be void or, in some cases, the customer and executing dealer could agree to revise their initial agreement and preserve their contract without the involvement of the prime broker. See ISDA, 2005 ISDA Compensation Agreement, at Section 2. In either case, a life cycle event of Transaction 1 would result, because the terms of Transaction 1 would change.

pursuant to Rule 901(a)(2)(ii), as adopted. Because both sides of Transaction 2 likely include a registered security-based swap dealer, the sides are required to select the reporting side. In the case of Transaction 3, however, the prime broker is likely to be the only registered security-based swap dealer involved in the transaction, in which case the prime broker would be the reporting side.[99] Furthermore, because each of these transactions is a security-based swap that arises from the termination of another security-based swap (i.e., the Transaction 1), Rule 901(d)(10), as adopted, requires the reporting of Transaction 1's transaction ID as part of the secondary trade information for both Transaction 2 and Transaction 3. As the Commission stated in the Regulation SBSR Adopting Release, Rule 901(d)(10) is designed to ensure that the Commission and other relevant authorities have an accurate picture of counterparty exposures. In the case of prime brokerage transactions, Rule 901(d)(10) should enable the Commission and other relevant authorities to link the three prime brokerage transactions together for surveillance purposes and to identify the parties that ultimately assume the risks of these transactions.

Rule 902(a), as adopted, requires public dissemination of each security-based swap, unless it falls within a category enumerated in Rule 902(c). Each prime brokerage transaction (i.e., the customer/executing dealer transaction, the prime broker/executing dealer transaction,

99 If, however, both sides of Transaction 3 include a registered security-based swap dealer, the sides would be required to select the reporting side. One commenter recommended that, in accordance with current industry practice under the CFTC rules, Regulation SBSR assign the reporting duty for the prime broker/executing broker transaction (Transaction 2) to the executing broker, and responsibility for reporting the prime broker/client transaction (Transaction 3) to the prime broker. See ISDA IV at 5. Under the application of the rules as adopted, as just discussed, if both sides of the prime broker/executing broker transaction include a registered security-based swap dealer, the sides are required to choose who has the reporting duty and can choose the executing broker. Likewise, with respect to the prime broker/client transaction, it is likely that the prime broker is the only registered security-based swap dealer involved in the transaction, and thus application of the reporting hierarchy would result in the side with the prime broker being the reporting side.

and the prime broker/customer transaction) is subject to Rule 902(a). The statutory provisions relating to the reporting of security-based swap transactions state that "each" security-based swap shall be reported; these statutory provisions do not by their terms limit the reporting requirement to transactions having particular characteristics,[100] and Rule 902(c), as adopted, does not contain an exclusion from public dissemination for prime brokerage transactions.

One commenter requested that the Commission exempt the prime broker/customer leg of a prime broker transaction from public dissemination, stating its belief that dissemination of this transaction would not increase price transparency, and a concern that dissemination of this transaction may confuse the market and undermine the value of the data made public.[101] The Commission believes that publicly disseminating reports of prime brokerage transactions could provide market observers with useful information about the cost of the prime broker's credit intermediation services, because prime brokers may charge for these services by pricing Transaction 2 or 3 differently than Transaction 1. This differentiates Transactions 2 and 3 from clearing transactions that are excepted from public dissemination under Rule 902(c)(6), because a registered clearing agency is compensated for its credit intermediation services through clearing fees that are publicly disclosed. With prime brokerage transactions, however, the only mechanism for ascertaining the charge for the credit intermediation service offered by the prime broker would be to compare the prices of Transaction 1 with the prices of the two subsequent transactions. Thus, market observers could discern useful information by comparing reports of the related prime brokerage transactions, and the Commission does not believe at this time that an exception from public dissemination is warranted for any prime brokerage transactions. If a

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100 See Section 13(m)(1)(G) of the Exchange Act, 15 U.S.C. 78m(m)(1)(G).

101 See ISDA IV at 13.

report of each prime brokerage transaction is publicly disseminated, price discovery would be enhanced. The published transaction reports would be required to consist of all the information reported pursuant to Rule 901(c), as adopted, plus any condition flags required by the registered SDR's policies and procedures, such as a flag indicating that the three transactions are related.

Rule 907(a)(4), as adopted, requires each registered SDR to establish and maintain written policies and procedures for, among other things, establishing flags to denote special characteristics of a security-based swap, or special circumstances associated with the execution or reporting of a security-based swap. Rules 907(a)(4)(i) and (ii) require the registered SDR to identify those characteristics or circumstances that could, in the fair and reasonable estimation of the registered SDR, cause a person without knowledge of those characteristic(s) or circumstance(s), to receive a distorted view of the market and establish flags to denote such characteristic(s) or circumstance(s). In the Regulation SBSR Adopting Release, the Commission noted several conditions that registered SDRs generally should consider including in their list of condition flags.[102] The fact that all three transactions in a prime brokerage arrangement are related, the Commission generally believes, is a special circumstance of the type that registered SDRs should consider in developing the condition flags required by Rule 907(a)(4). Absent such flags, market observers might interpret the three transaction reports as three separate pricing events and incorrectly infer the existence of more market activity than actually exists, which could distort their view of the market.

B. Example of Application of the Adopted Rules

The following example explains how Regulation SBSR, as adopted, would apply to the steps in a prime brokerage transaction described above. For purposes of this example, assume

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[102] See Regulation SBSR Adopting Release, Section VII(G).

that the customer is a private fund and both the executing dealer and the prime broker are registered security-based swap dealers.[103]

Transaction 1: The Customer/Executing Dealer Transaction

- The executing dealer would be the reporting side under Rule 901(a)(2)(ii) and would be required to report the customer/executing dealer transaction (Transaction 1) to a registered SDR.[104]
- The executing dealer would have up to 24 hours after the time of execution to report to the registered SDR the applicable primary and secondary trade information of Transaction 1.
- Immediately upon receiving the report of Transaction 1, the registered SDR would be required to publicly disseminate a transaction report with all the information required by Rule 902(a).
- When the customer and the executing dealer agree to the terms of Transaction 1, each party would typically report the terms to the prime broker. The Commission understands that, if the terms of Transaction 1 fall within the prime brokerage arrangement, the prime broker would be obligated to face the executing dealer

103 One commenter requested that Regulation SBSR specify that the time of execution for the prime broker/executing dealer transaction is the time of commitment to economic terms with the prime broker's client, and that for the prime broker/customer transaction, the prime broker may use the time of acceptance as the time of execution for reporting purposes. See ISDA IV at 9. The Commission notes that the time of execution for all security-based swaps is defined in Rule 900(ii), as adopted, as the point at which the counterparties to a security-based swap become irrevocably bound under applicable law. See Regulation SBSR Adopting Release, Section II(A)(2)(c). The Commission sees no reason at this time to have a different standard for prime brokerage transactions.

104 See Rule 901(a)(2)(ii)(B) ("If only one side of the security-based swap includes a registered security-based swap dealer, that side shall be the reporting side").

with substantially the same terms agreed upon by the customer and the executing dealer in Transaction 1.

- If the prime broker determines that Transaction 1 meets the terms of the prime brokerage arrangement and accepts the transaction, Transaction 1 would terminate. The executing dealer, as the reporting side for Transaction 1, would be required to report this life cycle event pursuant to Rule 901(e), as adopted, to the same registered SDR that received the initial report of Transaction 1. Immediately upon receiving this report, the registered SDR would be required to publicly disseminate the termination information.
- If the prime broker does not accept the terms agreed to by the customer and executing dealer, the executing dealer, in its capacity as reporting side for Transaction 1, would notify the registered SDR that the prime broker had rejected the transaction pursuant to Rule 901(e)(1)(i), as adopted.

<u>Transaction 2: The Prime Broker/Executing Dealer Transaction</u>

- The executing dealer and prime broker would enter into a prime broker/executing dealer transaction (Transaction 2).
- The prime broker and executing dealer would be required by Rule 901(a)(2)(ii)(A), as adopted, to select the side that would be the reporting side for Transaction 2.
- The reporting side of Transaction 2 would have up to 24 hours after the time of execution to report to the registered SDR the applicable primary and secondary trade information of the transaction. Because Transaction 2 arises from the termination, novation, or assignment of Transaction 1, the reporting side of

Transaction 2 would need to report the transaction ID of Transaction 1 pursuant to Rule 901(d)(10), as adopted.[105]

- Immediately upon receiving the report of Transaction 2, the registered SDR would be required to publicly disseminate a transaction report with all the information required by Rule 902(a) and with any flags required by the registered SDR's policies and procedures under Rule 907.

Transaction 3: The Prime Broker/Customer Transaction

- The prime broker would execute the prime broker/customer transaction (Transaction 3) to "step into" the position that the executing dealer established against the customer in Transaction 1.
- The prime broker would be the reporting side for Transaction 3 under Rule 901(a)(2)(ii), as adopted.[106]
- The prime broker would have up to 24 hours after the time of execution to report to the registered SDR the applicable primary and secondary trade information of Transaction 3. Because Transaction 3 arises from the termination, novation, or assignment of Transaction 1, the prime broker would need to report the

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105 If the executing dealer is the reporting side for both Transaction 1 and Transaction 2, the executing dealer will know the transaction ID of Transaction 1 and can include it in the report of Transaction 2. However, if the prime broker is the reporting side for Transaction 2, the Commission anticipates that the prime broker will obtain from the executing dealer the transaction ID of Transaction 1, along with all of the other information regarding Transaction 1 that will permit the prime broker to determine whether to accept Transaction 1.

106 See Rule 901(a)(2)(ii)(B) ("If only one side of the security-based swap includes a registered security-based swap dealer, that side shall be the reporting side").

transaction ID of Transaction 1 as part of the report of Transaction 3, pursuant to Rule 901(d)(10), as adopted.[107]

- Immediately upon receiving the report of Transaction 3, the registered SDR would be required to publicly disseminate a transaction report with all the information required by Rule 902(a) and with any flags required by the registered SDR's policies and procedures under Rule 907.

C. Request for Comment

The Commission requests comment on its discussion above of the application of Regulation SBSR to security-based swaps that are part of a prime brokerage arrangement. In particular:

24. Does the description of prime brokerage arrangements above adequately describe prime brokerage arrangements in the security-based swap market? Do market participants employ other types of prime brokerage arrangements? If so, how do these prime brokerage arrangements differ from the arrangements discussed above?

25. Should the prime broker/customer and/or prime broker/executing dealer transactions be exempted from public dissemination? Why or why not?

26. Would market observers benefit from being able to observe any difference in price between the customer/executing dealer transaction and the prime broker/customer and prime broker/executing dealer transactions?

27. Should public reports of related prime brokerage transactions include condition

107 The Commission anticipates that the prime broker (the reporting side for Transaction 3) will obtain the transaction ID of Transaction 1 from the executing dealer. See supra note 104 and associated text.

flags to indicate a relationship between the transactions? Would a market participant receive a distorted view of the market if condition flags are not used? Why or why not?

28. Rule 901(e), as adopted, requires the executing dealer to report the termination of the customer/executing dealer transaction, because the executing dealer was the reporting side of that transaction. Should the duty to report the termination of the customer/executing dealer transaction be shifted to the prime broker? Why or why not? As between the executing dealer and the prime broker, which person do you believe is better placed to report the termination? Why?

29. Should the time of execution for any leg of a prime brokerage transaction be defined differently than as provided for in Rule 900(ii)? If so, why?

V. Additional Proposed Amendments

A. Amendments to Rule 905(a)

Rule 905(a), as adopted, establishes a mechanism for reporting corrections of previously submitted security-based swap transaction information. Rule 905(a) applies to any counterparty to a security-based swap that discovers an error in the information reported with respect to that security-based swap. Under Rule 905(a)(1), as adopted, if the non-reporting side discovers the error, the non-reporting side must promptly notify the reporting side of the error. Under Rule 905(a)(2), as adopted, once the reporting side receives notification of the error from the non-reporting side, or if the reporting side discovers the error on its own, the reporting side must promptly submit an amended report—containing the corrected information—to the registered SDR that received the erroneous transaction report. The reporting side must submit the report required by Rule 905(a) in a manner consistent with the policies and procedures of the registered SDR.

As discussed in Section II, supra, the Commission is proposing to amend Rule 901(a) to require a platform to report a security-based swap that is executed on the platform and that will be submitted to clearing. Accordingly, to preserve the principle in adopted Rule 905(a) that the person responsible for reporting a security-based swap also should be responsible for submitting a correction if it discovers an error, the Commission is proposing a conforming amendment to Rule 905(a) to account for the possibility that a person who is not a counterparty and is thus not on either side[108] of the transaction (i.e., a platform) could have the original duty to report the transaction. Thus, under the proposed amendment to Rule 905(a)(1), a non-reporting side that discovers an error in the information reported with respect to a security-based swap would be required to promptly notify "the person having the duty to report" that security-based swap of the error. The Commission is proposing a similar change to Rule 905(a)(2). Under the proposed amendment to Rule 905(a)(2), the person having the duty to report a security-based swap, whether a side or a platform, would be required to correct previously reported erroneous information with respect to that security-based swap if it discovers an error or if it receives notification of an error from a counterparty.

B. Amendments to Rules 906(b) and 907(a)(6)

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108 Under Rule 900(hh), as adopted, a "side" is 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. Under the proposed amendments described above, there would be no "reporting side" for a security-based swap for a platform-executed security-based swap that is submitted to clearing. While the platform would have the duty to report, it would not be a counterparty to the security-based swap and thus would not be a side. Furthermore, neither side would have the duty to report, and thus both sides would be non-reporting sides.

Under the proposed amendment to Rule 900(u) described above,[109] the definition of "participant" would be expanded to include platforms that are required to report platform-executed security-based swaps that are submitted to clearing and registered clearing agencies that are required to report whether or not an alpha is accepted for clearing. Rule 906(b), as adopted, requires each participant of a registered SDR to provide the registered SDR information sufficient to identify any affiliate(s) of the participant that also are participants of the registered SDR and any ultimate parent(s) of the participant.[110] By itself, the proposed amendment to Rule 900(u) would subject platforms and registered clearing agencies that are required to report whether or not they accept alpha transactions for clearing to the requirements of Rule 906(b).[111]

The Commission preliminarily believes that the purposes of Rule 906(b)—namely, facilitating the Commission's ability to measure derivatives exposure within the same ownership group—would not be advanced by requiring platforms and registered clearing agencies to report parent and affiliate information to a registered SDR. To the extent that a platform has an affiliate that transacts in security-based swaps, the positions of any such affiliate can be derived from other transaction reports indicating that affiliate as a counterparty.. There would be no need for the Commission to aggregate the platform's positions with those of its affiliates, because a

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109 See supra Section II(B)(3).

110 See Regulation SBSR Adopting Release, Section XIII(B).

111 The Commission notes that proposed Rule 901(a)(2)(i) and the proposed amendment to Rule 908(b) would have the effect of making a registered clearing agency a participant—under Rule 900(u), as adopted—of any registered SDR to which it reports clearing transactions. Under Rule 900(u), as adopted, a counterparty of a security-based swap that is reported to a registered SDR becomes a participant of that registered SDR (assuming that the counterparty also falls within Rule 908(b), as adopted). The proposed amendment to the definition of "participant" also would make a registered clearing agency a participant of any alpha SDR to which it would be required to report whether it had accepted the alpha for clearing.

platform would not assume any position in security-based swaps executed on its facilities. Furthermore, the risk management of a registered clearing agency is directly overseen by the Commission, and the Commission believes that it has adequate tools to carry out this function without subjecting the registered clearing agency to Rule 906(b). Accordingly, the Commission proposes to amend Rule 906(b) to state that reporting obligations under Rule 906(b) do not apply to participants that are platforms or registered clearing agencies.

The Commission proposes to make a similar amendment to Rule 907(a)(6). This rule, as adopted, requires a registered SDR to have policies and procedures "[f]or 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." The Commission proposes to amend Rule 907(a)(6) to require a registered SDR to obtain this information only from a participant that is not a platform or a registered clearing agency. Thus, under the proposed amendment, Rule 907(a)(6) would require registered SDR to have policies and procedures "[f]or periodically obtaining from each participant other than a platform or a registered clearing agency 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."[112]

C. Extending the Applicability of Rule 906(c)

Rule 906(c), as adopted, requires each participant of a registered SDR that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure that

[112] The Commission notes that, once a participant reports parent and affiliate information to a registered SDR, Rule 906(b) requires the participant to "promptly notify the registered [SDR] of any changes" to its parent and affiliate information.

the participant complies with any obligations to report information to a registered SDR in a manner consistent with Regulation SBSR. As the Commission stated in the Regulation SBSR Adopting Release, the policies and procedures required by Rule 906(c) are intended to promote complete and accurate reporting of security-based swap information by SDR participants that are registered security-based swap dealers or registered major security-based swap participants.[113] Rule 906(c) also requires each registered security-based swap dealer and registered major security-based swap participant to review and update its policies and procedures at least annually.

Because the Commission is proposing amendments to Rule 901(a) to assign reporting obligations to platforms and registered clearing agencies, the Commission preliminarily believes that such registered clearing agencies and platforms, like registered security-based swap dealers and major security-based swap participants, should be required to establish and maintain written policies and procedures designed to promote compliance with their reporting obligations. Accordingly, the Commission proposes to amend Rule 906(c) to extend the requirements of Rule 906(c) to registered clearing agencies and platforms that are participants of a registered SDR.

The Commission preliminarily believes that the proposed amendment to Rule 906(c) should result in greater accuracy and completeness of the security-based swap transaction data reported to registered SDRs. Without written policies and procedures, compliance with reporting obligations might depend too heavily on key individuals or unreliable processes. For example, if knowledge of the reporting function was not reflected in written policies and procedures but existed solely in the memories of one or a few individuals, compliance with applicable reporting requirements by the firm might suffer if these key individuals depart the firm. The Commission

113 See Regulation SBSR Adopting Release, Section XIII(C).

preliminarily believes, therefore, that requiring participants that are platforms and registered clearing agencies to establish, maintain, and enforce written policies and procedures should promote clear, reliable reporting that can continue independent of any specific individuals. The Commission further believes that requiring such participants to establish, maintain, and enforce written policies and procedures relevant to their reporting responsibilities, as would be required by the proposed amendment to Rule 906(c), would help to improve the degree and quality of overall compliance with the reporting requirements of Regulation SBSR.

D. Rule 908(b)—Limitations on Counterparty Reporting Obligations

Rule 908(b) is designed to help further the cross-border application of Regulation SBSR by specifying what types of counterparties would and would not be subject to any duties under Regulation SBSR. Rule 908(b), as adopted, provides that "[n]otwithstanding any other provision of [Regulation SBSR], a person shall not incur any obligation under [Regulation SBSR] unless it is: (1) A U.S. person; or (2) A registered security-based swap dealer or registered major security-based swap participant." Thus, unregistered non-U.S. persons are not among the kinds of persons listed in Rule 908(b) as having any duties under Regulation SBSR.[114]

Under the proposed amendments described above, platforms and registered clearing agencies would have the duty to report security-based swap transactions to registered SDRs in certain circumstances. Under Rule 908(b), as adopted, U.S. persons are among the types of persons that may incur duties under Regulation SBSR. Therefore, platforms and registered

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114 In the Regulation SBSR Adopting Release, however, the Commission stated that it anticipates soliciting additional public comment on whether regulatory reporting and/or public dissemination requirements should be extended to transactions occurring within the United States between non-U.S. persons and which non-U.S. persons should incur reporting duties under Regulation SBSR. See Regulation SBSR Adopting Release, Section XV(D).

clearing agencies that are U.S. persons already fall within Rule 908(b). The Commission preliminarily believes that all platforms and registered clearing agencies should incur the duties specified in the proposed amendments to Rule 901(a),[115] even if they are not U.S. persons. If the Commission does not propose to amend Rule 908(b) to include all platforms and registered clearing agencies, non-U.S.-person platforms and registered clearing agencies would be able to avoid duties to which U.S.-person platforms and registered clearing agencies would be subject. Therefore, the Commission proposes to amend Rule 908(b) to specifically include platforms and registered clearing agencies as entities that may incur duties under Regulation SBSR. Rule 908(b), as amended, would provide: "Notwithstanding any other provision of [Regulation SBSR], a person shall not incur any obligation under [Regulation SBSR] unless it is: (1) A U.S. person; (2) A registered security-based swap dealer or registered major security-based swap participant; (3) A platform; or (4) A registered clearing agency."

E. Request for Comment

The Commission requests comment on all aspects of the proposed amendments to Rules 905, 906(b), 906(c), 907(a)(6), and 908 described above. In particular:

30. Do you believe that Rule 905(a) should be amended to include platforms? Why or why not? Would any other conforming changes to Rule 905 be advisable on account of the proposal to extend reporting duties to platforms?

31. Do you agree with the Commission's proposal to exclude platforms and registered clearing agencies from Rule 906(b)? Why or why not?

32. Should Rule 906(c) be expanded to include platforms and registered clearing agencies? Why or why not?

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115 See supra Section II(B).

33. Do you agree with the proposed conforming amendment to Rule 908(b) to include platforms and registered clearing agencies? Why or why not?

34. Do you believe any other conforming amendments to Regulation SBSR are necessary or desirable in light of the Commission's proposal to extend reporting duties to platforms and registered clearing agencies as discussed above? If so, please describe.

VI. Proposed Rule Prohibiting a Registered SDR from Charging Fees for or Imposing Usage Restrictions on Publicly Disseminated Data

A. Background

In addition to implementing the Title VII mandate for regulatory reporting of all security-based swaps, Regulation SBSR also implements the Title VII mandate for public dissemination of all security-based swaps. Section 13(m)(1)(B) of the Exchange Act[116] authorizes the Commission "to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery." Section 13(m)(1)(C) of the Exchange Act[117] identifies four categories of security-based swaps and directs the Commission to require "real-time public reporting" of transaction, volume, and pricing data for each category. Section 13(m)(1)(D) of the Exchange Act[118] authorizes the Commission to require registered entities (such as registered SDRs) to publicly disseminate the security-based swap transaction and pricing data required to be reported under Section 13(m) of the Exchange Act. Finally, Section 13(n)(5)(D)(ii) of the Exchange Act[119]

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116 15 U.S.C. 78m(m)(1)(B).

117 15 U.S.C. 78m(m)(1)(C).

118 15 U.S.C. 78m(m)(1)(D).

119 15 U.S.C. 78m(n)(5)(D)(ii).

requires SDRs to provide security-based swap information "in such form and at such frequency as the Commission may require to comply with public reporting requirements."

Accordingly, Rule 902(a), as adopted, requires a registered SDR to 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, with certain exceptions noted in Rule 902(c). Rule 900(cc), as adopted, defines "publicly disseminate" to mean "to make available through the Internet or other electronic data feed that is widely accessible and in machine-readable electronic format."

Four commenters on Regulation SBSR, as originally proposed, raised issues that bear on whether—and, if so, under what terms—a registered SDR would be able to charge for the security-based swap data that Regulation SBSR requires it to publicly disseminate.[120] One of these commenters stated that security-based swap transaction data "should be made available on reasonable commercial terms."[121] Another commenter, which currently operates a trade repository, believed that registered SDRs should make "data available to value added providers on a non-discriminatory basis" and that the public utility function of an SDR should be separated from potential commercial use of the data.[122] A third commenter stated that, consistent with

120 See Better Markets II at 2; DTCC II at 27; DTCC III at 2; Markit I at 2; WMBAA II at 8.

121 Markit I at 2.

122 DTCC II at 27 (also stating that it is "good public policy that the aggregating entity not itself use the data for commercial purposes, particularly where data is required to be reported to an aggregator serving a regulatory purpose, and make such data available to value added providers on a non-discriminatory basis, consistent with restrictions placed on the data by the data contributors themselves"); DTCC III at 2 (stating that the mandatory reporting regime "creates an opportunity for the SDR to improperly commercialize the information it receives" and that it is "important that regulators ensure that the public utility function of SDRs, which … support regulatory oversight and supervisory functions, as well as regulator-mandated public reporting, is separated from potential commercial uses of the data").

reporting practices in other markets, "the reporting of SBS transaction information to a registered SDR should not bestow the SDR with the authority to use the security-based swap transaction data for any purpose other than those explicitly enumerated in the Commission's regulations."[123] A fourth commenter believed that "market information must be made available… on an equal basis, in terms of time of availability and content, to all market participants."[124] Finally, a fifth commenter, responding to Regulation SBSR as re-proposed, stated that publicly disseminated data "should be freely available and readily accessible to the public."[125]

In adopting its own rules for public dissemination of swap transactions, the CFTC addressed the issue of whether a swap data repository could charge for its publicly disseminated data. In Section 43.2 of those rules,[126] the CFTC defined "public dissemination" and "publicly disseminate" to mean "to publish and make available swap transaction and pricing data in a non-discriminatory manner, through the Internet or other electronic data feed that is widely published and in machine-readable electronic format." The CFTC also defined "widely published" to mean "to publish and make available through electronic means and <u>in a manner that is freely available and readily accessible to the public</u>."[127] Furthermore, the CFTC adopted Section 43.3(d)(2), which provides: "Data that is publicly disseminated . . . shall be available from an Internet Web site in a format that is freely available and readily accessible to the public." In doing so, the CFTC noted that "implicit in this mandate [of public dissemination] is the requirement that the

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123 WMBAA II at 8. <u>See</u> <u>also</u> SDR Adopting Release, Section VI(D)(3) (discussing commercial use of information by SDRs).

124 Better Markets II at 2.

125 ISDA IV at 17.

126 17 CFR 43.2.

127 <u>Id.</u> (emphasis added).

data be made available to the public at no cost"[128] and that "Section 43.3(d)(2) reflects the [CFTC]'s belief that data must be made freely available to market participants and the public, on a nondiscriminatory basis."[129] However, the CFTC's rules permit a swap data repository to offer, for a fee, value-added data products derived from the freely available regulatorily mandated public data and to charge fair and reasonable fees to providers of swap transaction and pricing data.[130]

After consideration of the comments received and the CFTC's requirement that swap data repositories must publish and make available swap transaction data through electronic means and in a manner that is freely available and readily accessible to the public, the Commission now preliminarily believes that a registered SDR should not be permitted to charge fees for the security-based swap transaction data that it is required to publicly disseminate pursuant to Regulation SBSR. Therefore, the Commission is proposing new Rule 900(tt), which would define the term "widely accessible" as used in the definition of "publicly disseminate" in Rule 900(cc), as adopted, to mean "widely available to users of the information on a non-fee basis." As discussed below, this proposed definition would have the effect of prohibiting a registered SDR from charging fees for, or imposing usage restrictions on, the security-based swap transaction data that it is required to publicly disseminate under Regulation SBSR.

Title VII contains numerous provisions directing the Commission to establish a regime for post-trade transparency in the security-based swap market, which will allow the public to

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128 Commodity Futures Trading Commission, Real-Time Public Reporting of Swap Transaction Data (Final Rule), 77 FR 1182, 1207 (January 9, 2012) (emphasis added).

129 Id. at 1202.

130 See id.

obtain pricing, volume, and other relevant information about all executed transactions.[131] In the Commission's preliminary view, the statutory requirement to make this transaction information publicly available would be frustrated if third parties could charge members of the public for the right to access that disseminated data.

The Commission furthermore believes that Title VII's public dissemination requirements should be interpreted in light of the current structure of the security-based swap market, which developed as an over-the-counter market without transparent volume and pricing information.[132] In the current market, large dealers and certain other large market participants are able to observe their own order flow and executions to develop a better view of the market than smaller market participants. Because of this greater amount of private order flow, larger market participants are better able to assess current market values and have a negotiating advantage over smaller, less informed counterparties. The Commission is concerned that, to the extent that the amount or structure of the fee deters use by smaller market participants, information asymmetries in the security-based swap market would persist and there would be less efficiency and competition in the market than if pricing and volume data were available to all market participants for free.

The Commission has considered the alternative of allowing registered SDRs to charge users fees, on a cost-recovery basis, for receiving the security-based swap transaction data that the registered SDR is required to publicly disseminate. However, the Commission is not proposing that alternative. A person that registers with the Commission as an SDR is also likely to be registered with the CFTC as a swap data repository. A dually registered SDR would likely use the same infrastructure to support public dissemination of swap transaction data as well as

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131 See supra notes 116 to 119 and accompanying text.

132 See Cross-Border Proposing Release, 78 FR at 31126.

security-based swap transaction data. The Commission preliminarily believes that it would be difficult if not impossible to allocate the overhead and ongoing costs of a dually registered SDR to support mandated public dissemination between its swap-related functions and security-based-swap-related functions. As a result, it is unlikely that any such fee imposed on users by the SDR would go exclusively to offsetting the costs of publicly disseminating the regulatorily mandated security-based swap transaction data, rather than the costs associated with publicly disseminating swap data or other SDR functions. Therefore, the Commission preliminarily believes that permitting SEC-registered SDRs to impose fees on users for receiving the security-based swap transaction data that the SDR is required to publicly disseminate, even on a cost-recovery basis, while the CFTC prohibits swap data repositories from doing the same could result in a cross-subsidy for the public dissemination of swap data.

The Commission recognizes that establishing and operating registered SDRs so that they can carry out the duties assigned to them under Title VII entails various costs. However, the Commission preliminarily believes that prohibiting registered SDRs from imposing fees on users for receiving the security-based swap transaction data that the SDR is required to publicly disseminate would not impede their ability to carry out their functions. Another means exists for registered SDRs to obtain funds for their operations that the Commission preliminarily believes is more appropriate: imposing fees on those persons who are required to report transactions. Under such an approach, fees imposed by a registered SDR for reporting would increase in direct proportion to the number of transactions that a market participant is required to report. The Commission notes that CFTC-registered swap data repositories, some of which are likely to apply for registration with the Commission as SDRs for security-based swaps, currently disseminate regulatorily mandated public swap data for free pursuant to the CFTC's rules, and obtain funds for their operations through other means, including reporting fees.[133] Thus, the Commission preliminarily believes that—the proposed definition of "widely accessible" notwithstanding—SEC-registered SDRs would have adequate sources for their funding even if they are prohibited from charging users fees for receiving the security-based swap transaction data that the SDR is required to publicly disseminate.

In addition, the Commission preliminarily believes that it is necessary to prohibit a registered SDR from charging users of regulatorily mandated security-based swap transaction data for public dissemination of the data to reinforce Rule 903(b), as adopted. Rule 903(b) provides that a registered SDR may disseminate information using UICs (such as product IDs or other codes—e.g., reference entity identifiers—embedded within the product IDs) or permit UICs to be used for reporting by its participants only if the information necessary to interpret such UICs is widely available on a non-fee basis. The Commission is concerned that a registered SDR that wished to charge (or allow others to charge) users for the information necessary to understand these UICs—but could not, because of Rule 903(b)—might seek to do so indirectly by recharacterizing the charge as being for public dissemination. Under these circumstances, the economic benefit to the registered SDR would be the same, but how the registered SDR characterizes the fee—i.e., whether as a charge to users for public dissemination or as a charge of accessing the UICs within the publicly disseminated data—would be the difference between the

133 See BSDR Fee Schedule at http://www.bloombergsdr.com/assets/img/BSDR%20-%20Exhibit%20O%20(Fees).pdf (last visited on October 24, 2014); CME Swap Data Repository Fee Schedule at http://www.cmegroup.com/market-data/files/cme-repository-service-fee-schedule.pdf (last visited on October 24, 2014); DTCC Derivatives Repository US Fee Schedule at http://www.dtcc.com/~/media/Files/Downloads/Data-and-Repository-Services/GTR/US-DDR/DDR_Fees.pdf (last visited on October 24, 2014); ICE Trade Vault Service and Pricing Schedule at https://www.theice.com/publicdocs/ICE_Trade_Vault_Fee_Schedule.pdf (last visited on October 24 2014).

fee being permissible or impermissible under Rule 903(b). Thus, permitting a registered SDR to charge users for receiving the publicly disseminated transaction data could undermine the purpose of Rule 903(b). Accordingly, the Commission is proposing a definition of "widely accessible" to mean "widely available to users of the information on a non-fee basis." The language of the proposed definition echoes the language of Rule 903(b), as adopted, which requires a registered SDR to permit information to be reported or publicly disseminated using codes in place of certain data elements only if the information necessary to interpret such codes is "widely available to users of the information on a non-fee basis."

Similar to the Commission's statement regarding Rule 903(b) in the Regulation SBSR Adopting Release,[134] the proposed requirement that information be "widely available to users of the information on a non-fee basis" necessarily implies that a registered SDR would not be permitted to impose—or allow to be imposed—any usage restrictions on the security-based swap transaction information that it is required to publicly disseminate, including restrictions on access to or further distribution of the regulatorily mandated public security-based swap data. Market data usage restrictions typically take the form of an agreement between the provider and the users of the data. If a registered SDR could deny or limit access to a user based solely on the user's violation of a usage restriction, the registered SDR would not be in compliance with Rule 902(a), which requires the registered SDR to publicly disseminate the information in a manner that is "widely available." The Commission preliminarily believes that public dissemination would not satisfy the "widely available" standard if the registered SDR could deny access to

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134 See Regulation SBSR Adopting Release, Section X(B)(3) (noting that the "Commission does not believe that access to [publicly disseminated] information should be impeded by having to pay fees or agree to usage restrictions in order to understand any coded information that might be contained in the transaction data").

users who do not agree to limit their use of the data in any manner directed by the registered SDR. Here, the Commission notes the asymmetric bargaining strength of the parties: a registered SDR might effectively have a monopoly position over the security-based swap transaction data that the registered SDR is required to publicly disseminate. If a registered SDR could impose usage restrictions with which a user does not wish to comply, there would be no other source from which the user could freely obtain these transaction data.

The proposed prohibition on usage restrictions would have the effect of prohibiting a restriction on bulk redistribution by third parties of the regulatorily mandated transaction data that the registered SDR publicly disseminates. The Commission preliminarily believes that it could prove useful to the public for intermediaries to collect, consolidate, and redistribute the regulatorily mandated transaction data to the public. Users of the data might, instead of obtaining data directly from each of several SDRs, find it preferable to obtain the data from a single person who itself obtains the data directly from the multiple registered SDRs and consolidates it. The Commission preliminarily believes that allowing unencumbered redistribution would be more consistent with the policy goals of wide availability of the data and minimization of information asymmetries in the security-based swap market. If the Commission prohibits registered SDRs from imposing a restriction on bulk redistribution, third parties would be able to take in the full data set and scrub, reconfigure, aggregate, analyze, repurpose, or otherwise add value to those data, and potentially sell that value-added product to others.

Rule 902(a), as adopted, and the proposed definition of "widely available" would not prohibit a registered SDR from creating and charging fees for a value-added data product that incorporates the regulatorily mandated transaction data, provided that the registered SDR has first satisfied its duty under Rule 902(a) and effected public dissemination of each security-based swap transaction in accordance with the proposed definition of "widely available."[135] In other words, a registered SDR could make publicly available both a regulatorily mandated and value-added data product. However, to comply with Rule 902(a), as adopted, a registered SDR is required to publicly disseminate a transaction report of a security-based swap (assuming that the transaction does not fall within Rule 902(c), as adopted) immediately upon receipt of information about the security-based swap. Thus, the registered SDR could not make the value-added product available before it publicly disseminated the regulatorily mandated transaction report. If a registered SDR makes a fee-based, value-added product available more quickly than the required transaction report, the registered SDR would not be acting consistent with Rule 902(a) because it would not be disseminating the required transaction report immediately.

This approach is consistent with parallel requirements under CFTC rules that require regulatorily mandated data be freely available to the public, but do not prohibit a CFTC-registered swap data repository from making commercial use of such data subsequent to its public dissemination.[136] This approach also is designed to promote competition in the market for value-added security-based swap data products. Other potential competitors in this market will necessarily have to obtain the regulatorily mandated transaction information from a registered SDR, because the SDR has a monopoly on this information until it is made widely accessible to the public. Potential competitors could be at a disadvantage if, needing to obtain the raw material for their own services, they had to purchase a value-added data product from the registered SDR or could obtain the regulatorily mandated transaction data only on a delayed

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135. The SDR Adopting Release discusses generally the commercial use of security-based swap data. See SDR Adopting Release, Section VI(D)(3)(c)(iii).

136 See "Real-Time Public Reporting of Swap Transaction Data" (December 20, 2011), 77 FR at 1182, 1207 (January 9, 2012) (adopting rules for the public dissemination of swaps).

basis. The Commission believes that the transparency goals of Title VII will be furthered by reducing impediments to competition in the market for value-added post-trade data products relating to security-based swaps.

B. Request for Comment

The Commission requests comment on the proposed definition of "widely accessible" as applied to the public dissemination requirement of Rule 902(a), as adopted. In particular:

35. Do you believe that registered SDRs should be prohibited from charging users fees for or imposing usage restrictions on the security-based swap transaction information that registered SDRs are required to publicly disseminate under Rule 902(a)? Why or why not?

36. What effects would result if registered SDRs were permitted to charge users fees for regulatorily mandated public dissemination even though CFTC-registered SDRs are prohibited from doing so?

37. Do means exist for registered SDRs to recoup their operating costs other than by imposing fees on users for receiving and using the publicly disseminated transaction data? If so, please describe those means.

38. Should a registered SDR be prohibited from imposing any usage restrictions on the regulatorily mandated security-based swap transaction data that it publicly disseminates? Why or why not? What kinds of usage restrictions are typically included in user agreements for other types of market data? What would be the effect of prohibiting such usage restrictions from being imposed on the regulatorily mandated security-based swap transaction information that is publicly disseminated by registered SDRs?

39. Should a registered SDR be permitted to impose a prohibition against bulk re-

dissemination of the regulatorily mandated transaction data that it publicly disseminates? Why or why not?

40. Do you believe that the proposed definition of "widely accessible" as applied to the public dissemination requirement of Rule 902(a), as adopted, would impact the market for value-added post-trade data products in the security-based swap market? Why or why not? If so, how would it affect the market?

VII. Proposed Compliance Schedule for Regulation SBSR

In the Regulation SBSR Proposing Release, the Commission proposed Rule 910, which would have set forth various compliance dates under Regulation SBSR and, in general, was designed to clarify the implementation process. The Commission did not adopt Rule 910 in the Regulation SBSR Adopting Release. Although the Commission received comment on its proposed compliance schedule, the Commission now believes that a new compliance schedule for most of the rules in Regulation SBSR should be proposed in light of the fact that industry infrastructure and capabilities have changed since the initial proposal. Most notably, the CFTC regime for swap data reporting and dissemination is operational. The Commission understands that persons who are likely to apply for registration with the Commission as SDRs are already CFTC-registered swap data repositories, and many swap market participants are also active in the security-based swap market. Thus, these SDRs and many security-based swap market participants already have made substantial investments in compliance and reporting systems that will likely also be utilized to support Regulation SBSR compliance.

Finally, the Commission now believes that it is not necessary to include compliance dates within the text of Regulation SBSR.[137] Not including a compliance schedule in the text of Regulation SBSR would prevent portions of Regulation SBSR from becoming obsolete soon after adoption while still providing affected persons with guidance about when they are required to comply with the various provisions of Regulation SBSR.

A. Initial Proposal

1. Rule 910

In the Regulation SBSR Proposing Release, the Commission proposed Rule 910 to provide clarity as to security-based swap reporting and dissemination timelines and to establish a phased-in compliance schedule for Regulation SBSR.[138] As initially proposed, Rule 910 would have required reporting of pre-enactment security-based swaps by January 12, 2012, and would have implemented a compliance schedule for Regulation SBSR in four phases. Each registered SDR and its participants would have been required to comply with the requirements of each phase by set periods of time measured from the registration date of that registered SDR, as described in more detail below:

- Phase 1, six months after the registration date: (1) reporting parties would have been required to report any transitional security-based swaps to the registered SDR; (2)

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137 Therefore, the Commission did not adopt the defined terms "effective reporting date," "phase-in period," and "registration date" that were included in Rule 900, as originally proposed, which terms appeared only in proposed Rule 910.

138 As part of the Cross-Border Proposing Release, the Commission re-proposed Rule 910 with only minor changes. Rule 910(b)(4) was re-proposed to reflect that certain cross-border security-based swaps would be subject to regulatory reporting but not public dissemination. See Cross-Border Proposing Release, 78 FR at 31067. As originally proposed, Rule 910(b)(4) would have provided that all security-based swaps reported to a registered SDR would be subject to real-time public dissemination as specified in Rule 902. See Regulation SBSR Proposing Release, 75 FR at 75244. The Commission also replaced the term "reporting party" with "reporting side" in re-proposed Rule 910.

reporting parties would have been required to report all newly executed security-based swaps to the registered SDR; (3) participants and the registered SDR would have been required to comply with the error reporting rule (except with respect to dissemination) and the requirements of Rules 906(a) and 906(b); and (4) security-based swap dealers and major security-based swap participants would have been required to comply with Rule 906(c).

- Phase 2, nine months after the registration date: the registered SDR would have been required to disseminate transaction reports and corrected transaction reports for 50 security-based swap instruments.
- Phase 3, 12 months after the registration date: the registered SDR would have been required to disseminate transaction reports and corrected transaction reports for an additional 200 security-based swap instruments.
- Phase 4, 18 months after the registration date: the registered SDR would have been required to disseminate transaction reports and corrected transaction reports for all security-based swaps reported to the registered SDR.

2. Rule 911

The Regulation SBSR Proposing Release included proposed Rule 911, which was designed to prevent evasion of the public dissemination requirement during a period when two or more SDRs had registered with the Commission but were operating under different compliance dates. Rule 911, as re-proposed, would have provided that a reporting side shall not report a security-based swap to a registered SDR in a phase-in period described in Rule 910 during which the registered SDR is not yet required to publicly disseminate transaction reports for that security-based swap instrument unless: (1) the security-based swap also is reported to a registered SDR that is disseminating transaction reports for that security-based swap instrument, consistent with proposed Rule 902; or (2) no other registered SDR is able to receive, hold, and publicly disseminate transaction reports regarding that security-based swap instrument.

B. New Proposed Compliance Schedule

The Commission is proposing a new compliance schedule for Rules 901, 902, 903, 904, 905, 906, and 908 of Regulation SBSR[139] that is designed to provide affected persons, especially registered SDRs and persons with a duty to report security-based swap transactions to registered SDRs, with time to develop, test, and implement reporting and dissemination systems.[140] The proposed compliance schedule is tied to the commencement of operations of a registered SDR in an asset class.[141] Registered SDRs will need time to make the necessary technological and other

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139 For Rules 900, 907, and 909 of Regulation SBSR, the compliance date is the effective date of Regulation SBSR. See Regulation SBSR Adopting Release, Section I(F).

140 As discussed in the Cross-Border Proposing Release, re-proposed Rule 908(a) would have provided an exception to public dissemination for transactions executed by a non-U.S. person who is guaranteed by a U.S. person, where there is no U.S. person or security-based swap dealer on the other side and the transaction is not cleared through a clearing agency having its principal place of business in the United States. As discussed in the Regulation SBSR Adopting Release, the Commission did not adopt this proposed exception. Rather, Rule 908(a)(1), as adopted, requires public dissemination of a security-based swap if one side consists of a non-U.S.-person direct counterparty and a U.S.-person guarantor, where neither is a registered security-based swap dealer or registered major security-based swap participant, and the other side includes no counterparties that are U.S. persons, registered security-based swap dealers, or registered major security-based swap participants (a "covered cross-border transaction"). See Cross-Border Proposing Release, 78 FR at 31062-63. The Commission anticipates seeking additional comment on whether or not to except covered cross-border transactions from public dissemination. Therefore, the Commission also is proposing to defer the compliance date for Rule 908(a)(1)(i) with respect to the public dissemination of covered cross-border transactions until such time as the Commission receives and considers public comment on such an exception or establishes a separate compliance date for these transactions.

141 Rule 13n-1(c)(3) under the Exchange Act provides that the Commission shall grant registration of an SDR if "the Commission finds that such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate,

preparations needed, including implementing policies and procedures,[142] to begin receiving and disseminating security-based swap information. Persons with a duty to report transactions will need time to analyze the policies and procedures of registered SDRs to which they wish to connect, make necessary changes to their internal systems, policies and procedures, and processes to conform to the requirements of the SDR's policies and procedures, and establish and test their linkages to the SDRs.

In light of these activities that must occur before full compliance with Regulation SBSR can be expected, the Commission is proposing the following phased-in compliance schedule for Regulation SBSR:

1. Proposed Compliance Date 1

Proposed Compliance Date 1 relates to the regulatory reporting of newly executed security-based swaps as well pre-enactment and transitional security-based swaps. On the date

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and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder." Although a registered SDR will have demonstrated its operational capability during the registration process, a registered SDR is not required to and likely will not formally commence operations as a registered SDR on the same day that it is approved for registration.

142 As part of the SDR registration process, a potential registrant must provide all of the policies and procedures required by Rule 907; the Commission will review those policies and procedures in assessing whether to approve the registration. See Form SDR (requiring applicants to attach as Exhibit GG all of the policies and procedures required under Regulation SBSR). In connection with its registration as an SDR, the potential registrant also must register as a securities information processor ("SIP") as required by Rule 909. Rule 907 provides, among other things, that a registered SDR must establish certain policies and procedures relating to the receipt, reporting, and dissemination of security-based swap data. Rule 909, as adopted, provides that a registered SDR must also register with the Commission as a SIP. The compliance date for Rules 907 and 909 will be 60 days after publication of the Regulation SBSR Adopting Release in the Federal Register. See Regulation SBSR Adopting Release, Section I(F).

six months after the first registered SDR that accepts reports of security-based swaps in a particular asset class commences operations as a registered SDR, persons with a duty to report security-based swaps under Regulation SBSR would be required to report all newly executed security-based swaps in that asset class to a registered SDR. Furthermore, after Compliance Date 1, persons with a duty to report security-based swaps also would have a duty to report any life cycle events of any security-based swaps that previously had been required to be reported.

The Commission recognizes that market participants will need adequate time to analyze and understand the policies and procedures of registered SDRs, to establish reporting connections to registered SDRs, and to develop new systems for capturing and reporting transaction information. The Commission preliminarily believes that this time period is an appropriate amount of time for market participants to do so. Any registered SDR that has commenced operations will have established policies and procedures that are consistent with Rule 907. Therefore, six months should allow adequate time for market participants to make the preparations necessary to connect with and report to a registered SDR, including analyzing and complying with the policies and procedures of the registered SDR and performing systems testing.

Also, by proposed Compliance Date 1, to the extent the information is available, persons with a duty to report pre-enactment security-based swaps and transitional security-based swaps in the relevant asset class would be required to report these transactions, in accordance with Rule 901(i), to a registered SDR that accepts reports of security-based swap transactions in that asset class.[143] The Commission is proposing to require that all historical security-based swaps in that

143 The Commission notes that, for some transitional security-based swaps, there might be only a short period between the date of execution and the date on which they must be

asset class be reported by Compliance Date 1, not on Compliance Date 1. Thus, a registered SDR that has commenced operations and that accepts reports of transactions in that asset class could allow persons with a duty to report to report such transactions on a rolling basis before Compliance Date 1. However, if it does so, the registered SDR would then be required to comply with the requirements of Regulation SBSR that are not subject to the phased compliance (i.e., those requirements that are immediately effective). Therefore, a registered SDR would need to comply with Rule 901(f) and time stamp, to the second, any security-based swap data that it receives pursuant to Rule 901(i). The registered SDR also would be required to comply with Rule 901(g) and assign a transaction ID to each historical security-based swap that is reported to it on or before proposed Compliance Date 1.

As participants begin reporting historical security-based swaps to a registered SDR in the days leading up to Compliance Date 1, participants and registered SDRs would be required to comply with Rules 901(e) and 905 (except with respect to public dissemination) regarding any historical security-based swaps that are so reported. Thus, if historical security-based swap X is reported to a registered SDR 30 days before Compliance Date 1, the counterparties to transaction X and the registered SDR that holds the mandatory report of transaction X would immediately become subject to the life cycle event reporting and error-correction requirements of Rules 901(e) and 905, respectively with respect to transaction X. However, if transaction Y has not yet been reported to a registered SDR (and assuming that Compliance Date 1 has not yet arrived),

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reported to a registered SDR. For example, assume that Compliance Date 1 with respect to a particular asset class is July 14, 2016; if a security-based swap in that asset class is executed on July 10, 2016, the person with the duty to report that transaction would be required to report it to a registered SDR within four days of execution (i.e., on or before July 14, 2016).

the counterparties and the registered SDR would not yet incur any duties under Rules 901(e) or 905 with respect to transaction Y.

Finally, by proposed Compliance Date 1, registered security-based swap dealers, registered major security-based swap participants, registered clearing agencies, and platforms would be required to comply with Rule 906(c); participants (except for platforms and registered clearing agencies) would be required to comply with Rules 906(a) and 906(b); and registered SDRs also would be required to comply with Rule 906(a).

The Commission preliminarily believes that a six-month compliance phase-in would provide sufficient time for registered security-based swap dealers, registered major security-based swap participants, registered clearing agencies, and platforms to establish their own policies and procedures for reporting transactions in a particular asset class and to implement the systems changes needed to comply with Regulation SBSR. Participants would not be required to report to the first SDR that accepts security-based swaps in that asset class that registers with the Commission; participants could report to any SDR that accepts transactions in that asset class that has been registered by the Commission and has commenced operations by Compliance Date 1. Registered SDRs would not be required to publicly disseminate any transaction reports until Compliance Date 2, as described below.

Registered SDRs also would be required to comply with Rule 904 beginning on proposed Compliance Date 1, with the exception of Rule 904(d). Rule 904 requires a registered SDR to have systems in place to continuously receive and disseminate security-based swap information, with certain exceptions. Under final Rule 904(a), a "registered SDR may establish normal closing hours when, in its estimation, the U.S. market and major foreign markets are inactive." Under final Rule 904(b), a registered SDR "may declare, on an ad hoc basis, special closing hours to perform system maintenance that cannot wait until normal closing hours." In each case, the registered SDR must provide participants and the public with reasonable advance notice of its normal closing hours and special closing hours. Rule 904 also requires a registered SDR to have the ability to hold in queue any transaction data that it receives during normal and special closing hours or, if the registered SDR does not have the ability to received and hold data in queue, the registered SDR must immediately notify participants that it has resumed operations and any participant with a duty to report would be required to promptly re-report security-based swap information to the registered SDR.

Also beginning on proposed Compliance Date 1, registered SDRs would be required to comply with the requirement in Rule 906(a) to provide to each participant a report of any missing UICs, and any participant receiving such a report would be required to comply with the requirement in Rule 906(a) to provide the missing UICs to the registered SDR. The registered SDR and its participants also would be subject to the error correction requirements of Rule 905, except that the registered SDR would not yet be required to publicly disseminate any corrected transaction reports (because it would not yet be required to publicly disseminate a report of the initial transaction). Participants (except for platforms and registered clearing agencies) also would be required to comply with the requirement in Rule 906(b) to provide the registered SDR information sufficient to identity its ultimate parent(s) and any affiliate(s) that also are participants of the registered SDR. The Commission preliminarily believes that these requirements will facilitate accurate and complete reporting of transaction information.

2. Proposed Compliance Date 2

Proposed Compliance Date 2 relates to the public dissemination of security-based swap transaction data. Within nine months after the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR (i.e., three months after Compliance Date 1), each registered SDR in that asset class that has registered and commenced operation would be required to comply with Rules 902 (regarding public dissemination), 904(d) (requiring dissemination of transaction reports held in queue during normal or special closing hours), and 905 (with respect to public dissemination of corrected transaction reports) for all security-based swaps in that asset class—except for "covered cross-border transactions," as that term is described in the immediately following section. The Commission preliminarily believes that nine months after the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR is a sufficient amount of time for registered SDRs to begin disseminating security-based swap transaction data, including corrected transaction reports. This will allow registered SDRs a period of three months after they begin receiving reports of individual security-based swap transactions to identify and resolve any issues related to trade-by-trade reporting by participants and further test their data dissemination systems.

3. Effect of Registration of Additional SDRs

As discussed immediately above, the first SDR that is registered by the Commission and commences operations as a registered SDR starts the countdown to proposed Compliance Dates 1 and 2 for any asset class in which that SDR chooses to accept transaction reports. A subsequent SDR that is approved by the Commission, can accept reports of security-based swaps in that asset class, and commences operations would be subject to the same proposed Compliance Dates, as shown in the following examples:

- Example 1. SDR A registers with the Commission and, subsequently, commences operations as a registered SDR on June 1, 2015. Therefore, Compliance Date 1 (with respect to transactions in any asset class that can be accepted by SDR A) is December 1, 2015. SDR B, which accepts security-based swaps in the same asset class, registers and subsequently commences operations as a registered SDR on November 2, 2015. Mandatory transaction-by-transaction reporting pursuant to Rule 901 still begins on December 1, 2015. However, persons with the duty to report may report to either SDR A or SDR B, even though SDR B would have been registered for less than one month.

- Example 2. Again, SDR A registers with the Commission and, subsequently, commences operations as a registered SDR on June 1, 2015. Therefore, Compliance Date 1 (with respect to transactions in any asset class that can be accepted by SDR A) is December 1, 2015, and Compliance Date 2 is March 1, 2016. SDR C registers and, subsequently, commences operations as a registered SDR on February 15, 2016. (There is no SDR B in this example.) Mandatory transaction-by-transaction reporting pursuant to Rule 901 began on December 1, 2015. As of the first day on which it operates, SDR C must be prepared to accept transaction-by-transaction reports, as required by Rule 901. Both SDR A and SDR C must begin publicly disseminating last-sale reports, as required by Rule 902, on March 1, 2016.
- Example 3. Again, SDR A registers with the Commission and, subsequently, commences operations as a registered SDR on June 1, 2015. Therefore, Compliance Date 1 (with respect to transactions in any asset class that can be accepted by SDR A) is December 1, 2015, and Compliance Date 2 is March 1, 2016. SDR D registers and, subsequently, commences operations as a registered

SDR on June 15, 2017. SDR D must be prepared to accept transaction-by-transaction reports, as required by Rule 901, and to publicly disseminate last-sale reports, as required by Rule 902, as of the first day on which it operates as a registered SDR. SDR D's registration would not create a new set of compliance timeframes.

4. Proposed Changes to Certain Exemptions Related to the Proposed Compliance Schedule

In connection with Compliance Date 1, the Commission is also proposing to extend its exemption related to the reporting of pre-enactment security-based swaps in order to ensure consistency between the proposed compliance schedule and the exemption. In June 2011, the Commission exercised its authority under Section 36 of the Exchange Act[144] to exempt any person from having to report any pre-enactment security-based swaps pursuant to Section 3C(e)(1) of the Exchange Act[145] until six months after an SDR that is capable of receiving security-based swaps in that asset class is registered by the Commission.[146] At the time, the Commission noted that the exemption was consistent with Rule 910, as proposed.[147] Because Compliance Date 1 is tied to the commencement of operations of a registered SDR and because some time may elapse between the date on which the Commission approves an SDR's registration and the date on which it commences operations as a registered SDR, the Commission is proposing to modify the reporting exemption to harmonize it with the proposed compliance

144 15 U.S.C. 78mm.

145 15 U.S.C. 78c-3(e)(1).

146 See Securities Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287, 36291 (June 22, 2011) (Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps) ("Effective Date Release").

147 See id.

schedule. The Commission is therefore proposing to exercise its authority under Section 36 of the Exchange Act to exempt any person from having to report any pre-enactment security-based swaps pursuant to Section 3C(e)(1) of the Exchange Act until six months after an SDR that is capable of receiving security-based swaps in that asset class is registered by the Commission and has commenced operations as a registered SDR.[148] The Commission preliminarily believes that this exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors because such action would prevent the existing exemption from expiring before persons with a duty to report pre-enactment security-based swaps can report them to a registered SDR, taking into account that an SDR may require some time between the date on which the Commission approves its registration and the date on which it is able to commence operations as a registered SDR with respect to a particular asset class.

In addition, in the Effective Date Release, the Commission also exercised its authority under Section 36 of the Exchange Act to temporarily exempt any security-based swap contract entered into on or after July 16, 2011, from being void or considered voidable by reason of Section 29(b) of the Exchange Act,[149] because any person that is a party to the security-based swap contract violated a provision of the Exchange Act that was amended or added by Subtitle B of Title VII of the Dodd Frank Act and for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the

[148] Thus, as proposed, this exemption would expire on proposed Compliance Date 1 with respect to persons having a duty to report pre-enactment security-based swap transactions in the asset class of the first SDR to register with the Commission and commence operations as a registered SDR with respect to that asset class. For persons having a duty to report pre-enactment security-based swaps in any other asset class, the exemption would remain in force until six months after the first registered SDR that can accept reports of security-based swaps in that asset class has commenced operations as a registered SDR with respect to that asset class.

[149] 15 U.S.C. 78cc(b).

Commission, or for which the Commission has provided an exception or exemptive relief, until such date as the Commission specifies.[150] In relevant part, Section 29(b) of the Exchange Act provides that "[e]very contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract . . . heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of much the making or performance of such contract was in violation of any such provision rule or regulation . . ."[151] The Commission is proposing that, with respect to security-based swaps in a particular asset class, the exemption from Section 29(b) of the Exchange Act, in connection with Section 3C(e)(1), would terminate on proposed Compliance Date 1 (i.e., six months after the first registered SDR in that asset class commences operations with respect to that asset class).

C. Discussion of Comments Received in Response to the Initial Proposal

Commenters responding to the Regulation SBSR Proposing Release generally recommended that the Commission implement Regulation SBSR in phases, but their detailed suggestions varied.[152] Several commenters emphasized the need to provide adequate time for the

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150 See Effective Date Release, 76 FR at 36305.

151 15 U.S.C. 78cc(b).

152 See Bachus/Lucas Letter at 3; Barnard I at 4; CCMR I at 2; Cleary I at 17-21; DTCC I at 24-25; DTCC III at 8-9; DTCC IV at 8; FINRA Letter at 4-5; Institutional Investors Letter at 3; ISDA III at 2 (suggesting a phase-in for reporting of historical security-based swaps); ISDA/SIFMA I at 9-10; ISDA/SIFMA Block Trade Study at 2; MarkitSERV I at

development and implementation of reporting and compliance systems and procedures.[153] One of these commenters stated, for example, that "virtually all existing systems would have to be significantly overhauled to satisfy the real-time reporting obligations" of Regulation SBSR.[154] Another commenter emphasized that "market infrastructure must be in place prior to requiring market participant compliance" and that many financial entities that are not swap dealers or major swap participants may need additional time to comply.[155] A third commenter noted that requiring reporting prior to the registration of security-based swap dealers and major security-based swap participants would complicate reporting and the determination of the reporting counterparty because "parties entering into security-based swaps . . . may be expected . . . to report ahead of the point their obligation becomes certain."[156] A fourth commenter stated that any implementation timeline "must recognize the practical challenges that security-based swap data repositories and market participants will face in defining and implementing industry-wide collection and dissemination mechanisms and internal data collection systems, respectively."[157] A fifth commenter stated that, although much of the existing infrastructure of DTCC's Trade Information Warehouse could form the core of the processes required by Regulation SBSR, substantial new industry-wide processes requiring significant coordination, testing, and

10; MFA I at 6; MFA Recommended Timeline at 1; Morgan Stanley Letter at 6; Roundtable Letter at 4-9; UBS Letter at 2-3; ISDA IV at 2-3.

153 See CCMR I at 2; Cleary I at 19-21; DTCC II at 24-25; ISDA/SIFMA I at 9.

154 ISDA/SIFMA I at 9.

155 Institutional Investors Letter at 3.

156 See ISDA IV at 2.

157 Cleary I at 19. See also WMBAA II at 4 (stating that "[i]t is necessary that any compliance period or registration deadline provides sufficient opportunity for existing trade execution systems or platforms to modify and test systems, policies and procedures to ensure that its operations are in compliance with the final rules").

development would have to be implemented, particularly around real-time reporting.[158] One commenter believed that, given the complexity and novelty of the proposed reporting framework, a pilot program would allow the Commissions to evaluate the operational integrity of the infrastructure implementing the reporting rules.[159] One commenter recommended a "relatively thorough phase-in period" during which only regulators would receive security-based swap information because of the potential for disseminating misleading real-time pricing information, which potentially could result in market disruptions and economic damage.[160]

One commenter also noted that a phased-in implementation would allow regulators to assess the impact of transparency on the security-based swap market and make adjustments, if necessary, to the timing of dissemination and the data that is disseminated.[161] Other commenters echoed the belief that a phased-in approach would allow the Commission to assess the impact of public dissemination on liquidity in the security-based swap market, monitor changes in the market, and adjust the reporting rules, if necessary.[162] One of these commenters believed that, without staged implementation, the new security-based swap transparency requirements could cause market disruptions if some dealers withhold capital until they were able to determine

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158 See DTCC II at 25.

159 See Cleary I at 20.

160 DTCC IV at 9. This commenter also stated that a phased-in implementation of Regulation SBSR would allow time for extensive testing and preparation needed to avoid systemic risk and the dissemination of inaccurate information. See DTCC I at 2.

161 See FINRA Letter at 5. See also ISDA/SIFMA Block Trade Study at 2 (stating that phased-in implementation would provide regulators with time to test and refine preliminary standards).

162 See CCMR I at 2; Cleary I at 19; ISDA/SIFMA Block Trade Study at 2; UBS Letter at 2. Another commenter believed that the reporting requirements could apply first to products that are cleared and executed on a trading platform, then to products that are cleared, but not executed on a trading platform, and finally to uncleared products. See Morgan Stanley Letter at 6.

whether the reporting requirements would adversely impact their ability to manage risk.[163] Another commenter agreed with the phased-in approach initially proposed by the Commission and believed that the obligations on affected parties were clear, sufficient, and achievable.[164] Another commenter recommended the adoption of an incremental approach to reporting that would begin with "macro" reporting followed by more comprehensive reporting at a later time.[165]

Several commenters also recommended that the Commission utilize a gradual implementation approach similar to that of the TRACE trade reporting system. One commenter—the Financial Industry Regulatory Association ("FINRA"), which operates the TRACE trade reporting system for fixed income securities—supported proposed Rule 910's approach of staggered implementation of various requirements under Regulation SBSR, noting that it had implemented TRACE reporting in phases based on product liquidity, beginning with the largest and most liquid issues.[166] FINRA stated that phased-in implementation would facilitate a more orderly transition that minimizes the likelihood of market disruptions and an unintended loss of liquidity, and would provide market participants with time to adjust to a market in which security-based swap transaction data were publicly known.[167] Other

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163 See CCMR I at 2.

164 See Barnard I at 4. The commenter also believed that the suggested numbers of security-based swaps included in each of the initially proposed phases of implementation were reasonable. See id.

165 See Roundtable Letter at 4 (stating that market participants could prepare reports indicating the aggregate notional amount of swaps outstanding, subdivided by major category, and the identity of any counterparty representing 5% or more of their open positions by notional amount in that major category).

166 See FINRA Letter at 4.

167 See id. at 5.

commenters also expressed the view that TRACE is a useful model of a phased-in approach to implementation.[168] One of these commenters stated, for example, that the "TRACE experience demonstrates the length of time required to study, review and assess the effects of real-time reporting on market liquidity, as well as the need to provide adequate lead time for market participants to build a common infrastructure for reporting."[169] Another commenter believed that Regulation SBSR would require, at a minimum, an implementation period similar to the four years required to implement TRACE, "given that the swap markets are significantly more complex and varied and less developed infrastructurally than the corporate bond markets."[170]

While one participant at the Implementation Roundtable suggested that certain asset classes could need less than six months for implementation,[171] several others stated that the time needed for implementation depended on the complexity of the asset class and believed that more time than the implementation schedule in Regulation SBSR, as initially proposed, would likely be necessary.[172] Another participant believed that it could take up to two years following the adoption of final rules to implement the new rules because of "the substantial effort required to conduct the renegotiation of tens of thousands of contracts between customers and

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168 See CCMR I at 2; Cleary I at 19-20; DTCC II at 10; ISDA/SIFMA I at 10; UBS Letter at 2-3.

169 UBS Letter at 3.

170 Cleary I at 20. See also ISDA/SIFMA I at 10 (stating that the reporting requirements for security-based swaps are significantly more complex than for TRACE, and the phase-in should reflect this degree of complexity); CCMR I at 2 (noting that TRACE took a "cautious approach" to implementation, even though it was implemented initially for a single asset class, corporate bonds).

171 See Implementation Roundtable, Day 2 at 170-71 (Cummings).

172 See Implementation Roundtable, Day 1 at 299, 301 (Gooch); Implementation Roundtable, Day 2 at 177-8 (Joachim).

counterparties."[173] However, several participants at the Implementation Roundtable suggested that six to nine months would be needed for implementation following adoption of final rules by the SEC and CFTC.[174] Similarly, two commenters indicated that market participants would require an implementation period of at least six months following the adoption of final rules.[175]

Several commenters also discussed general and specific implementation issues that might arise in the context of implementing Regulation SBSR. Some commenters,[176] along with several participants at the Implementation Roundtable,[177] supported phasing in implementation by asset class. Because different asset classes use different and often incompatible booking systems, one commenter recommended that both reporting to SDRs and public dissemination be phased in by asset class to allow market participants to work within the current market set-up.[178] Other Roundtable participants did not specify the amount of time that they believed would be required

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173 Institutional Investors Letter at 3. See also Roundtable Letter at 4 (stating that there could be a "'bottleneck' both in the document negotiation process and in the move to clearing").

174 See Implementation Roundtable, Day 1 at 264 (Levi), 298 (Gooch); Implementation Roundtable, Day 2 at 174-8 (Collazo, Cummings, Joachim).

175 See DTCC II at 24 ("A six month period seems appropriate"); ISDA IV at 2 (expressing support for a six-month implementation period, provided that Regulation SBSR aligns closely with the CFTC's swap data reporting rules and requesting a nine-month implementation period if Regulation SBSR deviates from the CFTC's swap data reporting rules).

176 See DTCC II at 25 (noting that because credit products' operational processes are more highly automated, credit products are more reporting-ready than equities products); SIFMA II at 5; UBS Letter at 2 (stating that the initial phase of public security-based swap reporting for single-name CDS be limited to CDS on the top 125 most actively traded reference entities).

177 See Implementation Roundtable, Day 1 at 32 (unidentified speaker), 43 (Thompson). See also Implementation Roundtable, Day 2 at 168, 173 (Collazo) (suggesting implementation in the following order: CDS, interest rate swaps, FX swaps, equity swaps, then commodity-based swaps).

178 See Barclays I at 4.

for implementation and instead noted various implementation concerns.[179] One commenter stated that the CFTC and SEC should synchronize compliance dates for their respective reporting rules as much as possible.[180] Another commenter, noting that the CFTC and the Commission are undertaking a Dodd-Frank mandated study regarding the feasibility of standardized computer-readable algorithmic descriptions for derivatives, believed that it would be premature to adopt reporting rules before the completion of this study and consideration of its results.[181] One Roundtable participant recommended setting an implementation date and establishing consequences for failure to meet the implementation date.[182]

The Commission notes the concerns about implementation expressed by commenters. However, it is the Commission's understanding that the industry has made considerable progress in improving reporting capability, which will facilitate compliance with Regulation SBSR. The CFTC already has adopted final rules for swap data repository registration, regulatory reporting, and public dissemination of swaps, and market participants have been reporting to CFTC-registered SDRs since year-end 2012.[183] The Commission preliminarily believes that much of

179 See Implementation Roundtable, Day 2 at 159 (Okochi) (stating that implementation will vary based on clearing of trades, customization of trades based on the business segment they are in, asset class, and volume); 183-84 (Thum) (stating that reporting by non-dealers will require additional work), 192-94 (Gooch) (stating that inclusion of timestamps, place of execution, subfund allocations will require additional configurations to existing systems and processes to support real-time reporting).

180 See Implementation Roundtable, Day 1 at 77 (Olesky).

181 See Cleary I at 20. The Commission notes that the referenced study was completed on April 7, 2011. See Securities Exchange Act Release No. 63423 (December 2, 2010), 75 FR 76706 (December 9, 2010). See also http://www.sec.gov/news/studies/2011/719b-study.pdf (noting that current technology is capable of representing derivatives using a common set of computer-readable descriptions).

182 See Implementation Roundtable, Day 1 at 51 (Cawley).

183 The CFTC phased in compliance requirements for swap data reporting (depending on the reporting party and asset class) beginning on December 31, 2012. See CFTC Division of

the established infrastructure that supports swap reporting and dissemination can be modified to support security-based swap reporting and dissemination. At the same time, the Commission recognizes that there are certain differences in the reporting requirements of the SEC and the CFTC; therefore, entities subject to Regulation SBSR will need time to meet the regulation's specific requirements.

The Commission preliminarily agrees with those commenters who suggested that the Commission generally model the implementation of Regulation SBSR after the implementation of TRACE, and has designed the newly proposed compliance schedule to allow participants and registered SDRs the benefit of phased-in compliance. The Commission also is aware of the need for extensive testing and preparation in the implementation of the systems necessary to meet the requirements of Regulation SBSR and has developed the proposed compliance schedule with such needs in mind. The proposed schedule, discussed above, provides for a six-month period from the date on which the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR. By the end of that six-month period, to the extent such information is available, all pre-enactment and transitional security-based swaps in that asset class would be required to be reported.[184] Furthermore, market participants would

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Market Oversight Advisory (March 8, 2013) at 2-3, available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmoadvisory030813.pdf (last visited on October 30, 2014).

184 One commenter recommended that pre-enactment and transitional security-based swaps should be reported on the same timeline, as firms' systems cannot easily distinguish between the two categories. See ISDA IV at 18. The Commission notes that the proposed compliance schedule would provide for this outcome. This commenter further stated that reporting entities have found it practical to report "live" historical security-based swaps in advance of the effective reporting date applicable to new transactions and life cycle reporting, and recommended an aligned reporting effective date for historical security-based swaps that are still live, or expected to be live, as of the reporting effective date. However, the commenter recommended that historical security-based swaps that

have six months from the commencement of operations of the first registered SDR that can accept security-based swaps in a particular asset class as a registered SDR before reporting of newly executed transactions in that asset class would be required. Although a registered SDR may already be operational as swap data repository under CFTC rules, to the extent there is a gap between the Commission's grant of registration and the SDR's commencement of operations as a registered SDR, the Commission wants to ensure that reporting parties have six months after a registered SDR commences operations as a registered SDR in a particular asset class to further test and implement processes for reporting security-based swap transaction information in that asset class. The Commission preliminarily believes that six months would provide affected persons with sufficient time to resolve any potential issues related to the reporting of security-based swap transactions on an individual basis. Under the proposed compliance schedule, there would then be an additional three months before transactions must be publicly disseminated. This period is designed to give registered SDRs and persons having a duty to report an opportunity to resolve any reporting issues before transactions must be publicly disseminated.

Although several commenters advocated for longer timeframes, the Commission preliminarily believes that six months between the commencement of operations of the first registered SDR in an asset class as a registered SDR and the commencement of mandated trade-by-trade reporting is sufficient. The Commission bases this view on the existence of market

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are no longer live should have a later reporting effective date than reporting for other security-based swaps, and recommends a year delay. See id. Under the proposed compliance schedule, all historical security-based swaps in an asset class would be required to be reported in the same timeframe as for new security-based swaps going forward—i.e., by six months from the date of operation of the first registered SDR that can accept security-based swaps in the asset class. The Commission is not proposing a longer reporting period for historical security-based swaps that are not "live," but requests comment on the issue.

infrastructure that supports swap data reporting pursuant to CFTC rules. Several commenters noted that challenges related to the implementation of the reporting and dissemination requirements of proposed Regulation SBSR were related to lack of appropriate industry infrastructure and processes.[185] As noted above, the Commission understands that persons seeking to register as SDRs are likely to be registered and operating as swap data repositories under CFTC rules, and that many swap market participants subject to CFTC reporting rules may also be security-based swap market participants. Therefore, the Commission preliminarily believes that these persons and market participants would be able to leverage existing infrastructure to report and disseminate security-based swap data.

The Commission also preliminarily believes that it is unnecessary to delay the implementation of Regulation SBSR until registration requirements take effect for security-based swap dealers and major security-based swap participants, as suggested by one commenter.[186] As described in Section V(B)(1) of the Regulation SBSR Adopting Release, the Commission has adopted a modified version of the security-based swap reporting hierarchy in Rule 901(a)(2) to ensure that no person will need to evaluate whether it meets the definition of "security-based swap dealer" or "major security-based swap participant" solely in connection with identifying

185 See Institutional Investors Letter at 3 ("market infrastructure must be in place prior to requiring market participant compliance"); Cleary I at 19 (any implementation timeline "must recognize the practical challenges that security-based swap data repositories and market participants will face in defining and implementing industry-wide collection and dissemination mechanisms and internal data collection systems, respectively."); DTCC II at 25 (noting that although much of the existing infrastructure of DTCC's Trade Information Warehouse could form the core of the processes required by Regulation SBSR, substantial new industry-wide processes requiring significant coordination, testing, and development would have to be implemented, particularly around real-time reporting).

186 See ISDA IV at 2-3.

which counterparty must report a security-based swap under Regulation SBSR.[187] Under the reporting hierarchy as adopted, until registration requirements come into effect, there will be no registered security-based swap dealers or major security-based swap participants, so the sides will be required to select the reporting side. The Commission preliminarily believes that having the sides choose who reports should not complicate reporting.

The Commission preliminarily believes that it is not necessary or appropriate to establish multiple or phased compliance dates for reporting security-based swaps within the same asset class to registered SDRs.[188] Preliminarily, the Commission seeks to have all regulatory reports of security-based swaps reported to registered SDRs in the manner set forth in Regulation SBSR at the earliest practicable date. This information would greatly increase relevant authorities' understanding of the security-based swap market, help them perform their regulatory duties, and provide more and better data to support the Commission's additional Title VII rulemakings. For example, with required regulatory reporting of all security-based swaps in an asset class, the Commission and other relevant authorities would be able to more easily determine the positions of security-based swap dealers, giving them greater visibility into possible systemic risks. Phased compliance within a security-based swap class would not provide a holistic view of

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187 In the Cross-Border Adopting Release, the Commission estimated the assessment costs for making such evaluations. See Cross-Border Adopting Release, 79 FR at 47330-34. The Commission's approach in Regulation SBSR is consistent with the approach described in the Cross-Border Adopting Release, where the Commission noted that security-based swap dealers and major security-based swap participants "will not be subject to the requirements applicable to those dealers and major participants until the dates provided in the applicable final rules." 79 FR at 47368. See also Intermediary Definitions Adopting Release, 77 FR at 30700.

188 See Roundtable Letter at 4 (stating that market participants could initially prepare reports indicating the aggregate notional amount of swaps outstanding, subdivided by major category, and the identity of any counterparty representing 5% or more of their open positions by notional amount in that major category).

dealer positions until the final security-based swaps in that asset class were required to be reported.

However, the Commission is proposing a separate compliance date (proposed Compliance Date 2) for public dissemination. The three-month delay between the date on which persons with a duty to report must begin reporting new security-based swaps to a registered SDR and the date on which the registered SDR must publicly disseminate transaction reports is designed to provide ample time for registered SDRs and market participants to identify and address any problems with trade-by-trade reporting to registered SDRs before registered SDRs are required to publicly disseminate newly executed transactions.[189]

One commenter agreed with the requirements of proposed Rule 911[190] and believed that they were sufficient to prevent the evasion of reporting.[191] The Commission continues to be concerned with potential efforts to evade public dissemination, but believes that Rule 911 is not necessary in light of the proposed new compliance timeframes. Another commenter believed that the Commission should delay the implementation of Regulation SBSR until more than one SDR is registered because, absent such a delay, the first SDR to register would have a monopoly on security-based swap reporting and a competitive advantage over new entrants.[192] The

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189 This timeframe generally comports with the recommendation of several of the participants at the Implementation Roundtable, who suggested that six to nine months would be needed for implementation following adoption of final rules by the SEC and CFTC. See Implementation Roundtable, Day 1 at 264 (Levi), 298 (Gooch); Implementation Roundtable, Day 2 at 174-8 (Collazo, Cummings, Joachim).

190 Rule 911, as proposed, was designed to prevent evasion of the public dissemination requirement during a period when two or more SDRs had registered with the Commission and were operating under different compliance dates.

191 See Barnard I at 4.

192 See MFA I at 6 (also arguing that a diverse range of options for reporting security-based swap data would benefit the market and market participants). See also ISDA IV at 3

Commission preliminarily believes instead that a delay in implementation to permit additional registrations would be inconsistent with the objectives of Title VII. Title VII closed major gaps in the regulation of security-based swaps and provided the Commission and other relevant authorities with new regulatory tools to oversee the OTC derivatives markets, which are large and are capable of affecting significant sectors of the U.S. economy. The primary goals of Title VII include increasing transparency in the security-based swap markets and reducing the potential for counterparty and systemic risk.[193]

Furthermore, other Commission rules are designed to minimize the potential that any a "first mover" or monopoly advantage that the first SDR might burden users of SDR services. All SDRs, even the only SDR that can accept transactions in a particular asset class, must offer fair, open, and not unreasonably discriminatory access to users of its services,[194] and any fees that it charges must be fair and reasonable and not unreasonably discriminatory.[195] The Commission preliminarily believes that basing the compliance schedule on the date that the first registered SDR commences operations as a registered SDR would encourage all potential SDRs to file complete applications for registration to the Commission and develop their systems and

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(recommending that the Commission have a single registration date for all SDRs that will be approved ahead of the effective reporting date to "ensure that all market participants have equal time to build to their chosen [SDR]").

193 See, e.g., S. Comm. on Banking, Hous., & Urban Affairs, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 32 ("As a key element of reducing systemic risk and protecting taxpayers in the future, protections must include comprehensive regulation and rules for how the OTC derivatives market operates. Increasing the use of central clearinghouses, exchanges, appropriate margining, capital requirements, and reporting will provide safeguards for American taxpayers and the financial system as a whole").

194 See Rule 13n-4(c)(1)(iii) under the Exchange Act, discussed in the SDR Adopting Release.

195 See Rule 13n-4(c)(1)(i) under the Exchange Act, discussed in the SDR Adopting Release.

procedures for accepting and maintaining security-based swap data as expeditiously as possible, which will in turn more quickly allow regulators and the public the benefit of increased transparency in the security-based swap market and allow them to better monitor systemic risk.

Given these potential benefits, the Commission preliminarily believes that the compliance schedule should begin even if only one registered SDR that can receive reports of transactions in a particular asset class has commenced operations. The Commission preliminarily believes that it is not necessary or appropriate to wait for multiple SDRs to register and commence operations as registered SDRs before beginning the proposed six-month countdown to proposed Compliance Date 1.[196] The Commission seeks to ensure that registration of new SDRs not delay post-trade transparency for security-based swaps. This could occur if the Commission were to phase in compliance on an SDR-by-SDR basis. If each registered SDR had its own phase-in period, the first registered SDR could be in a phase where public dissemination was required where the second registered SDR may not be. This could create an incentive for persons with a duty to report to choose to report to later-registering SDRs in order to avoid having their transactions publicly disseminated.

D. Request for Comment

The Commission requests comment on all aspects of the proposed compliance dates for Regulation SBSR. In particular:

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196 However, as the Commission noted in the SDR Adopting Release: "In considering initial applications for registration on Form SDR filed contemporaneously with the Commission, the Commission intends to process such applications for multiple SDRs accepting [security-based swap] transaction data from the same asset classes within the same period of time so as to address competition concerns that could arise if such SDRs were granted registration at different times." SDR Adopting Release, Section VI(A)(2)(c). The Commission also noted that certain unexpected events that raise compliance concerns could affect the Commission's ability to process these applications within the same time period. See id.

41. Would the proposed compliance timeline allow reporting parties and registered SDRs sufficient time to implement the requirements of Regulation SBSR? Why or why not? If not, why not and what alternative time period(s) of time would be sufficient?

42. Do you generally agree with the Commission's proposed approach to calculating the compliance dates based on the first registered SDR to accept security-based swaps in a particular asset class commencing operations as a registered SDR? If not, how should the Commission calculate compliance dates? If the Commission used an alternative method for calculating compliance dates, how could the Commission prevent or minimize evasion of the public dissemination requirement?

43. Do you believe that the proposed implementation schedule and SDR registration process would minimize potential "first mover" advantages for the first SDR to register? Why or why not? How could the Commission further minimize any potential "first mover" advantage?

44. Do you agree that the current infrastructure that supports swap reporting also can be used to support security-based swap reporting? Why or why not? If so, how much time would be necessary for participants and registered SDRs to make necessary changes to report security-based swaps to registered SDRs? If not, how much time would be needed to create the necessary infrastructure?

45. Do you believe that registered SDRs would be able to satisfy their obligations by proposed Compliance Date 1? Why or why not? If six months after the first registered SDR that accepts security-based swaps in a particular asset class

commences operations as a registered SDR is not a sufficient amount of time to comply, what amount of time would be sufficient? In particular, do you believe that six months after the first registered SDR that accepts security-based swaps in an asset class commences operations is a sufficient amount of time to have reported all historical security-based swaps that are no longer "live," as discussed by one commenter?[197] Why or why not? If not, by when do you believe that such security-based swaps should be reported, and why?

46. Do you believe that persons with the duty to report would be able to satisfy their obligations by proposed Compliance Date 1? Why or why not? If six months after the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR is not a sufficient amount of time to comply, what amount of time would be sufficient? Would persons with the duty to report require additional time to comply with certain requirements by proposed Compliance Date 1? If so, which requirement(s), and what additional amount of time would be necessary?

47. Do you agree with the Commission's proposal to extend the exemption for the reporting of pre-enactment security-based swaps until six months after an SDR that is capable of receiving security-based swaps in that asset class is registered by the Commission and has commenced operations as a registered SDR? Why or why not?

48. Do you agree with the Commission's proposal to terminate the exemption from Section 29(b) of the Exchange Act in connection with Section 3C(e)(1) on

[197] See ISDA IV at 18 and supra note 184.

proposed Compliance Date 1? Why or why not? If not, when should the Section 29(b) exemption terminate?

49. Do you believe that registered SDRs will be able to time stamp and assign transaction IDs to pre-enactment and transitional security-based swaps even if they are reported prior to Compliance Date 1? Why or why not? If not, would registered SDRs require additional time to comply with the requirements to time stamp and/or assign transaction IDs?

50. Do you believe that registered security-based swap dealers, registered major security-based swap participants, registered clearing agencies, and platforms would be able to satisfy their obligations to establish policies and procedures for carrying out their reporting obligations by proposed Compliance Date 1? Why or why not? If six months after the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR is not a sufficient amount of time to comply, what amount of time would be sufficient?

51. Do you believe that registered SDRs would be able to satisfy their obligations by proposed Compliance Date 2? Why or why not? If nine months after the first registered SDR that accepts security-based swaps in a particular asset class commences operations as a registered SDR is not a sufficient amount of time to comply, what amount of time would be sufficient?

52. Do commenters agree with the Commission's preliminary belief that persons likely to apply for registration as SDRs with the Commission would already be registered with the CFTC as swap data repositories? If so, how easily and how

quickly could the systems and processes that support swap data dissemination be configured to support security-based swap data dissemination? Would this process will take more or less than the 3 months that is proposed? Why or why not?

53. Registered clearing agencies may be required to modify their rules to address their reporting obligations under Regulation SBSR, as proposed to be modified in this release. Would the implementation timeframe described above provide registered clearing agencies sufficient time to implement any rule changes that may be required by Regulation SBSR? How would the timing be affected if the registered clearing agency also intends to register as an SDR or is affiliated with a person that intends to register as an SDR?

VIII. Economic Analysis

The Dodd-Frank Act amended the Exchange Act to require the reporting of security-based swap transactions to registered SDRs. Regulation SBSR, as adopted, implements this mandate and assigns the reporting obligation for covered transactions.[198] In addition, Regulation SBSR requires registered SDRs, with a handful of exceptions, to publicly disseminate a subset of the reported transaction information immediately upon receipt.

The proposed amendments to Rule 901(a) would assign to a platform the duty to report security-based swaps executed on its facilities and submitted for clearing, and would assign the duty to report any transactions to which a registered clearing agency is a counterparty to that clearing agency. In addition, this release proposes guidance for how Regulation SBSR would apply to security-based swaps executed in connection with prime brokerage arrangements, which

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198 See supra notes 15 and 16 and accompanying text.

involve an executing broker, a customer, and a prime broker who offers credit intermediation services to the customer. This release also proposes a definition of "widely accessible" in Rule 900(tt), which would have the effect of prohibiting registered SDRs from charging users fees or imposing usage restrictions on the security-based swap transaction data that they are required to publicly disseminate. Finally, this release proposes new compliance dates for the rules in Regulation SBSR for which the Commission has not specified a compliance date.

The Commission is sensitive to the economic consequences and effects, including costs and benefits, of its rules. Some of these costs and benefits stem from statutory mandates, while others are affected by the discretion exercised in implementing these mandates. The following economic analysis seeks to identify and consider the benefits and costs—including the effects on efficiency, competition, and capital formation—that would result from the proposed rules and rule amendments. The costs and benefits considered in relation to these proposed rules and rule amendments have informed the policy choices described throughout this release.

A. Broad Economic Considerations

In the Regulation SBSR Adopting Release, the Commission highlighted certain overarching effects on the security-based swap markets that it believes will result from the adoption of Regulation SBSR. These benefits could include, generally, improved market quality, improved risk management, greater efficiency, and improved oversight by the Commission and other relevant authorities.[199] Regulation SBSR, as adopted, requires market participants to make infrastructure investments in order to report security-based swap transactions to registered SDRs and, as is most relevant for these proposed rules and amendments, for SDRs to make investments

[199] See Regulation SBSR Adopting Release, Section XXII.

in order to receive transaction data from market participants and to publicly disseminate a subset of that transaction information.

The rules, amendments, and guidance proposed in this release are focused on the requirements relevant to the reporting of certain information regarding cleared security-based swaps, which will affect the platforms, registered clearing agencies, and registered SDRs that constitute an infrastructure for the security-based swap market and provide services to counterparties who participate in security-based swap transactions. In particular, the Commission preliminarily believes that the proposed rules and amendments could affect the manner in which firms that provide these services compete with one another and exercise market power over security-based swap counterparties. In turn, there could be implications for the counterparties who are customers of these infrastructure providers and the security-based swap market generally.

1. Security-Based Swap Market Infrastructure

Title VII requires the Commission to create a new regulatory regime for the security-based swap market that includes trade execution, central clearing, and reporting requirements aimed at increasing transparency and customer protection as well as mitigating the risk of financial contagion.[200] These new requirements, once implemented, will oblige market participants, who may have previously engaged in bilateral transaction activity without any need to engage third-party service providers, to interface with platforms, registered clearing agencies, and registered SDRs.

As a general matter, rules that require regulated parties to obtain services can have a material impact on the prices of those services in the absence of a competitive market for those

[200] See Cross-Border Adopting Release, 79 FR at 47285.

services. In particular, if service providers are monopolists or otherwise have market power, requiring market participants to obtain their services can potentially allow the service providers to increase the profits they earn from providing the required services.[201] Because Title VII requires the Commission to implement rules requiring market participants to use the services provided by platforms, registered clearing agencies, and registered SDRs, these requirements could reduce the sensitivity of demand to changes in prices or quality of the services of firms that create and develop security-based swap market infrastructure.[202] As such, should security-based swap infrastructure providers—such as platforms, registered clearing agencies, and registered SDRs—enjoy market power, they might be able to change their prices or service quality without a significant effect on demand for their services. In turn, these changes in prices or quality could have effects on activity in the security-based swap market.

As discussed below, the proposed rules, amendments, and guidance proposed herein could have an impact on the level of competition among suppliers of trade reporting services and affect the relative bargaining power of suppliers and consumers in determining the prices of those services. In particular, when the supply of trade reporting services is concentrated among a small number of firms, consumers of these services have few alternative suppliers from which to choose. Such an outcome could limit the incentives to produce more efficient trade reporting processes and services and could, in certain circumstances, result in less security-based swap transaction activity than would otherwise be optimal. In the case of security-based swap

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201 These effects, as they relate specifically to the proposed rules and amendments, as well as alternative approaches, are discussed in in Section VIII(D), infra.

202 These requirements might reduce the price elasticity of demand for the services provided by platforms, registered clearing agencies, and registered SDRs.

transaction activity, these welfare losses could result from higher costs to counterparties for hedging financial or commercial risks.

2. Competition Among Security-Based Swap Infrastructure Providers

The Commission's economic analysis of the proposed rules, amendments, and guidance considers how the competitive landscape for platforms, registered clearing agencies, and registered SDRs might affect the market power of these entities and hence the level and allocation of costs related to regulatory requirements. Some of the factors that may influence this competitive landscape have to do with the nature of the trade reporting and are unrelated to regulation, while others may be a result of, or influenced by, the rules that we are proposing. To the extent that the proposed rules inhibit competition among infrastructure providers, this could result in fees charged to counterparties that deviate from the underlying costs of providing the services.

As a general matter, and for reasons unrelated to the regulation of the security-based swap market, trade execution, clearing, and reporting services are likely to be concentrated among a small number of providers. For example, SDRs and clearing agencies must make significant infrastructure and human capital investments to enter their respective markets, but once these start-up costs are incurred, the addition of data management or transaction clearing services is likely to occur at low marginal costs. As a result, the average cost to provide infrastructure services quickly falls for SDRs and clearing agencies as their customer base grows, because they are able to amortize the fixed costs associated with serving counterparties over a larger number of transactions. These economies of scale should favor incumbent service providers who can leverage their market position to discourage entry by potential new competitors that face significant fixed costs to enter the market. As a result, the markets for clearing services and SDR services are likely to be dominated by a small number of firms that each have large market share, which is borne out in the current security-based swap market.[203]

Competition among registered clearing agencies and registered SDRs could also be influenced by the fact that security-based swap market participants incur up-front costs for each connection that they establish with an SDR or clearing agency. If these costs are sufficiently high, an SDR or clearing agency could establish itself as an industry leader by "locking-in" customers who are unwilling or unable to make a similar investment for establishing a connection with a competitor.[204] An SDR or clearing agency attempting to enter the market or increase market share would have to provide services valuable enough, or set fees low enough, to offset the costs of switching from a competitor. In this way, costs to security-based swap market participants of interfacing with market infrastructure could serve as a barrier to entry for firms that would like to provide market infrastructure services provided by SDRs and clearing agencies.

The proposed rules, amendments, and guidance might also influence the competitive landscape for firms that provide security-based swap market infrastructure. Fundamentally, requiring the reporting of security-based swap transactions creates an inelastic demand for the service that would not be present if not for regulation. This necessarily reduces a counterparty's

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203 See infra Section IX(B).

204 See Joseph Farrell and Paul Klemperer, "Coordination and Lock-in: Competition with Switching Costs and Network Effects," in Handbook of Industrial Organization, Mark Armstrong and Robert Porter (ed.) (2007), at 1,972. The authors describe how switching costs affect entry, noting that, on one hand, "switching costs hamper forms of entry that must persuade customers to pay those costs" while, on the other hand, if incumbents must set a single price for both new and old customers, a large incumbent might focus on harvesting its existing customer base, ceding new customers to the entrant. In this case, a competitive market outcome would be characterized by prices for services that equal the marginal costs associated with providing services to market participants.

ability to bargain with infrastructure service providers over price or service because the option of not reporting is unavailable. Moreover, infrastructure requirements imposed by Title VII regulation will increase the fixed costs of an SDR operating in the security-based swap market and increase the barriers to entry into the market, potentially discouraging firms from entering the market for SDR services. For example, under Rule 907, as adopted, registered SDRs are required to establish and maintain certain written policies and procedures. The Commission estimated that this requirement will impose initial costs on each registered SDR of approximately \$12,250,000.[205]

The proposed rules, amendments, and guidance might also affect the competitive landscape by increasing the incentives for security-based swap infrastructure service providers to integrate horizontally or vertically. As a general matter, firms engage in horizontal integration when they expand their product offerings to include similar goods and services or acquire competitors. For example, SDRs that presently serve the swap market might horizontally integrate by offering similar services in the security-based swap market. Firms vertically integrate by entering into businesses that supply the market that they occupy ("backward vertical integration") or by entering into businesses that they supply ("forward vertical integration").

As discussed in more detail in Section VIII(D)(1), infra, while proposing a reporting methodology that assigns reporting responsibilities to registered clearing agencies, who will hold the most complete and accurate information for cleared transactions, could minimize potential data discrepancies and errors, rules that give registered clearing agencies discretion over where to report transaction data could provide incentives for registered clearing agencies to create affiliate SDRs and compete with other registered SDRs for post-trade reporting services. The

205 See Regulation SBSR Adopting Release at note 1250.

cost to a clearing agency of entering the market for SDR services is likely to be low, given that many of the infrastructure requirements for entrant SDRs are shared by clearing agencies. Clearing agencies already have the infrastructure necessary for capturing transaction records from clearing members and might be able to leverage that pre-existing infrastructure to provide services as an SDR at low incremental cost. Because all clearing transactions, like all other security-based swaps, must be reported to a registered SDR, there would be a set of potentially captive transactions that clearing agencies could initially use to vertically integrate into SDR services.[206]

Entry into the SDR market by registered clearing agencies could potentially lower the cost of SDR services if clearing agencies are able to transmit data to an affiliated SDR at a lower cost relative to transmitting the same data to an independent SDR. The Commission preliminarily believes that this is likely to be true for clearing transactions, given that the clearing agency and affiliate SDR would have greater control over the reporting process relative to sending to an unaffiliated SDR. Even if registered clearing agencies did not enter the market for SDR services, their ability to pursue a vertical integration strategy could motivate incumbent SDRs to offer service models that are sufficiently competitive to discourage entry by registered clearing agencies.

However, the Commission recognizes that the entry of clearing agency-affiliated SDRs might not necessarily result in increased competition among SDRs or result in lower costs for SDR services. In an environment where registered clearing agencies with affiliated SDRs have

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206 A registered clearing agency expanding to provide SDR services is an example of forward vertical integration. In the context of these proposed rules and amendments, SDRs "consume" the data supplied by registered clearing agencies. Clearing agencies engage in forward vertical integration by creating or acquiring the SDRs that consume the data that they produce as a result of their clearing business.

discretion to send their clearing transaction data to their affiliates, security-based swap market participants who wish to submit their transactions to clearing may have reduced ability to direct the reporting of the clearing transaction to an unaffiliated SDR. As a result, clearing agency-affiliated SDRs would not directly compete with unaffiliated SDRs on the basis of price or quality, because they inherit their clearing agency affiliate's market share. This might allow clearing agency incumbents to exercise market power through their affiliate SDRs relative to stand-alone SDRs.

In summary, the Commission's economic analysis of these proposed rules and amendments considers the features of the market for infrastructure services that support security-based swap market participants. The Commission acknowledges that the allocation of reporting obligations that result from these proposed rules and amendments could affect the balance of competition between different providers of infrastructure. As discussed below, the effect of these proposed rules and amendments on competition between infrastructure providers could ultimately affect security-based swap counterparties.

B. Baseline

The Commission's analysis of the economic effects of the proposed rules, amendments, and guidance includes in its baseline the effects of Regulation SBSR, as adopted, and the SDR core principles and registration rules, as adopted in the SDR Adopting Release. Hence, the Commission's analysis of the potential impacts of the proposed rules, amendments, and guidance takes into account the anticipated effects of the adoption of Regulation SBSR and the SDR rules as described in those releases.

Furthermore, the overall Title VII regulatory framework will have consequences for the transaction activity addressed by this proposal. For example, the scope of future mandatory clearing requirements will affect the overall costs borne by registered clearing agencies, which under the proposal would be obligated to report security-based swap transactions that arise as a consequence of clearing. Similarly, the scope of future mandatory trade execution requirements will affect the volume of transactions that take place on platforms, and ultimately the number of transactions that platforms would be obligated to report under this proposal. Finally, as noted in the Cross-Border Adopting Release,[207] the market for security-based swaps is global in nature and regulatory requirements may differ across jurisdictions. To the extent that the costs of regulatory requirements differ, certain market participants may have incentives to restructure their operations to avoid regulation under Title VII, which generally would reduce the number of transactions affected by this proposal.

The following sections provide an overview of aspects of the security-based swap market that are likely to be most affected by the proposal, as well as elements of the current market structure, such as central clearing and platform trading, that are likely to determine the scope of transactions that will be covered by the proposed rules, amendments, and guidance.[208]

1. Current Security-Based Swap Market

The Commission's analysis of the current state of the security-based swap market is based on data obtained from DTCC-TIW, especially data regarding the activity of market participants in the single-name credit default swap ("CDS") market during the period 2008 to 2013.[209] While other trade repositories may collect data on equity security-based swaps, the

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207 See 79 FR at 47280.

208 See Regulation SBSR Adopting Release, Section XXIII(B) (providing additional information regarding the OTC derivatives market generally, and counterparties specifically).

209 The data available from DTCC-TIW do not encompass CDS transactions (1) based on non-U.S. reference entities and (ii) where neither counterparty is a U.S. person.

Commission currently has no access to detailed data about these products (or other products that are security-based swaps). As such, the Commission is unable to analyze security-based swaps other than single-name CDS. However, the Commission believes that the single-name CDS data are representative of the overall security-based swap market and therefore can directly inform the Commission's analysis of the security-based swap market.[210]

2. Clearing Activity in Single-Name Credit Default Swaps

Currently, there is no regulatory requirement in the United States to clear security-based swaps. Clearing for certain single-name CDS products occurs on a voluntary basis. Voluntary clearing activity in single-name CDS has steadily increased alongside the Title VII rulemaking

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Commission staff quantified the proportion of transaction activity included in the DTCC-TIW transaction data. In 2013, DTCC-TIW reported on its website new trades in single-name CDSs with gross notional of $12.0 trillion. DTCC-TIW provided to the Commission data that included only transactions with a U.S. counterparty or a U.S. reference entity. During the same period, these data included new trades with gross notional equaling $9.3 trillion, or 77% of the total reported by DTCC-TIW. Hence, the Commission believes that the DTCC-TIW data provide sufficient information to identify the types of market participants active in the security-based swap market and the general pattern of dealing within that market.

210 According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of December 2013 was $2.28 trillion. The notional amount outstanding in single-name CDS was approximately $11.32 trillion, in multi-name index CDS was approximately $8.75 trillion, and in multi-name, non-index CDS was approximately $950 billion. See Semi-annual OTC derivatives statistics at end-December 2013 (June 2014), Table 19, available at http://www.bis.org/statistics/dt1920a.pdf. For the purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based index CDS and, therefore, do not fall within the "security-based swap" definition. See Section 3(a)(68)(A) of the Exchange Act; Product Definitions Adopting Release, 77 FR 48208. The Commission also assumes that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Based on those assumptions, single-name CDS appear to constitute roughly 78% of the security-based swap market. Although the BIS data reflect the global OTC derivatives market and not just the U.S. market, the Commission has no reason to believe that these ratios differ significantly in the U.S. market.

process. As a result, any rule that would allocate reporting obligations for clearing transactions would affect the accessibility of data related to a large number of security-based swap transactions. In addition, the size of this part of the market would affect the magnitude of the regulatory reporting burdens. As of the end of 2013, ICE Clear Credit accepted for clearing security-based swap products based on a total of 161 North American corporate reference entities, 121 European corporate reference entities, and six individual sovereign (nation-state) reference entities.

Figure 1, below, shows characteristics of new trades in single-name CDS that reference North American standard corporate ISDA documentation. In particular, the figure documents that about half of all clearable transactions are cleared. Moreover, over the sample period, transaction volume accepted for clearing increased as a fraction of total volume in these products. Analysis of trade activity from July 2012 to December 2013 indicates that, out of $938 billion of notional amount traded in North American corporate single-name CDS products that are accepted for clearing during the 18 months ending December 2013, approximately 71%, or $666 billion, had characteristics making them suitable for clearing by ICE Clear Credit and represented trades between two ICE Clear Credit clearing members. Approximately 79% of this notional value, or $525 billion, was cleared through ICE Clear Credit, or 56% of the total volume of new trade activity. As of the end of 2013, ICE Clear Europe accepted for clearing single-name CDS products referencing a total of 136 European corporate reference entities. Analysis of new trade activity from July 2012 to December 2013 indicates that, out of €531 billion of notional amount traded in European corporate single-name CDS products that are accepted for clearing during the 18 months ending December 2013, approximately 70%, or €372 billion had characteristics making them suitable for clearing by ICE Clear Europe and represented trades between two ICE Clear Europe clearing members. Approximately 51% of this notional amount, or €191 billion. was cleared through ICE Clear Europe, or 36% of the total volume of new trade activity.[211]

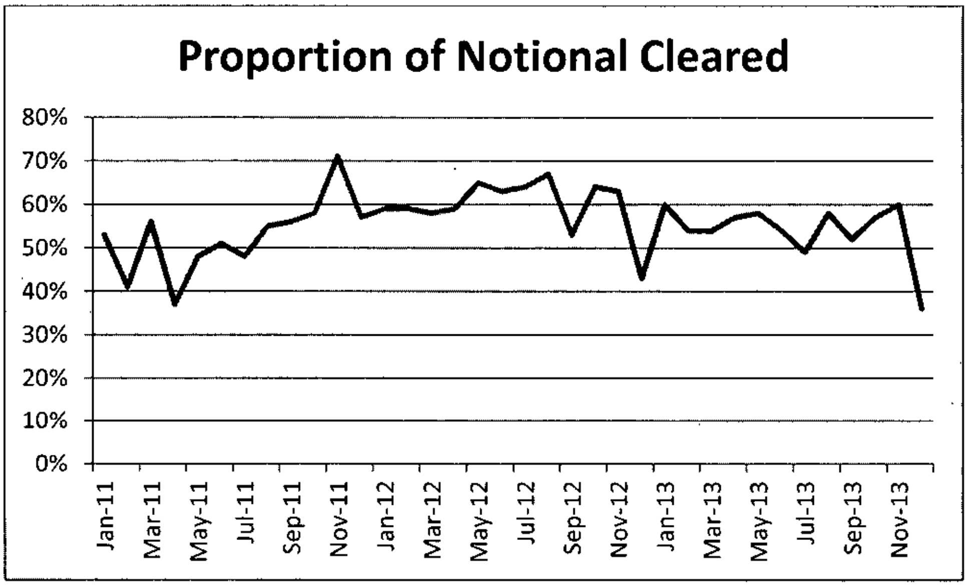

Figure 1: The fraction of total gross notional amount of new trades and assign-entries in North American single-name CDS products that were accepted for clearing by ICE Clear Credit and were cleared within 14 days of the initial transaction.[212]

3. Execution Methods in the Security-Based Swap Market

The proposed rules and amendments address regulatory reporting obligations for, among others, security-based swap transactions executed on platforms and submitted to clearing. While trading in security-based swaps is currently dominated by bilateral negotiation and the use of

211 These numbers do not include transactions in European corporate single-name CDS that were cleared by ICE Clear Credit. However, during the sample period, there was only one day (December 20, 2013) on which there were transactions in European corporate single-name CDS that were cleared by ICE Clear Credit, and the traded notional of these transactions was de minimis. For historical data, see https://www.theice.com/marketdata/reports/99.

212 The Commission preliminarily believes that it is reasonable to assume that, when clearing occurs within 14 days of execution, counterparties made the decision to clear at the time of execution and not as a result of information arriving after execution.

interdealer brokers, the Commission anticipates that future rulemaking will address mandatory trade execution requirements that will likely result in increased incidence of trading on platforms.[213]

4. Current Market Structure for Security-Based Swap Infrastructure

a. Exchanges and SB SEFs

The proposed rules and amendments would address how transactions conducted on platforms (i.e., national securities exchanges and SB SEFs) would be required to be reported under Regulation SBSR. Currently, there are no SB SEFs registered with the Commission, and as a result, there is no registered SB SEF trading activity to report. There are, however, currently 24 SEFs that are either temporarily registered with the CFTC or whose temporary registrations are pending with the CFTC and currently are exempt from registration with the Commission.[214] As the Commission noted in the Cross-Border Adopting Release, the cash flows of security-based swaps and other swaps are closely related and many participants in the swap market also participate in the security-based swap market.[215] Likewise, the Commission preliminarily believes that many entities that currently act as swap execution facilities are likely to also register with the Commission as SB SEFs. The Commission anticipates that, owing to the

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213 See Securities Exchange Act Release No. 67177 (June 11, 2012), 77 FR at 35640 (June 14, 2012) ("General Policy on Sequencing").

214 See Effective Date Release, 76 FR at 36306 (exempting persons that operate a facility for the trading or processing of security-based swaps that is not currently registered as a national securities exchange or that cannot yet register as an SB SEF because final rules for such registration have not yet been adopted from the requirements of Section 3D(a)(1) of the Exchange Act until the earliest compliance date set forth in any of the final rules regarding registration of SB SEFs). A list of SEFs that are either temporarily registered with the CFTC or whose temporary registrations are pending with the CFTC is available at http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities (last visited November 3, 2014).

215 See Cross-Border Adopting Release, 79 FR at 47300.

smaller size of the security-based swap market, there will be fewer platforms for executing transactions in security-based swaps than the 24 SEFs reported within the CFTC's jurisdiction. Under proposed Rule 901(a)(1), a platform would be required to report to a registered SDR any security-based swap transactions executed on its facilities and submitted to clearing.

b. Clearing Agencies

The market for clearing services and data reporting services in the security-based swap market is currently concentrated among a handful of firms. **Table 1** lists the firms that currently clear index and single-name CDS and identifies the segments of the market each firm serves. While there may be limited choices available to participants interested in cleared index CDS transactions, only two firms (albeit with the same parent) clear sovereign single-name CDS and only a single firm serves the market for North American single-name CDS. Concentration of clearing services within a limited set of clearing agencies can be explained, in part, by the existence of strong economies of scale in central clearing.[216]

Table 1: Clearing agencies currently clearing index and single-name CDS.

	North American	European	Sovereign	Index
ICE Clear Credit[217]	X	X	X	X
ICE Clear Europe[218]		X	X	X

216 See Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR at 66265 (November 2, 2012) (noting that economies of scale can result in natural monopolies). See also Craig Pirrong, "The Industrial Organization of Execution, Clearing and Settlement in Financial Markets," Working Paper (2007), available at http://www.bauer.uh.edu/spirrong/Clearing_silos.pdf (last visited November 2, 2014) (discussing the presence of economies of scale in central clearing).

217 A current list of single-name and index CDS cleared by ICE Clear Credit is available at: https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Clearing_Eligible_Products.xls (last visited November 3, 2014).

CME[219]				X
LCH.Clearnet[220]		X		X

c. SDRs

The market for data services has evolved along similar lines. While there is currently no mandatory reporting requirement for the single-name CDS market, virtually all transactions are voluntarily reported to DTCC-TIW, which maintains a legal record of transactions.[221] That there currently is a single dominant provider of record-keeping services for security-based swaps is consistent with the presence of a natural monopoly for a service that involves a predominantly fixed cost investment with low marginal costs of operation.

There are currently no SDRs registered with the Commission. Registration requirements are part of the new rules discussed in the SDR Adopting Release. In the absence of SEC-registered SDRs, the analysis of the economic effects of the proposed rules and amendments discussed in this release on SDRs is informed by the experience of the CFTC-registered SDRs that operate in the swap market. The CFTC has provisionally registered four SDRs to accept

218 A current list of single-name and index CDS cleared by ICE Clear Europe is available at: https://www.theice.com/publicdocs/clear_europe/ICE_Clear_Europe_Cleared_Products_List.xls (last visited November 3, 2014).

219 A current list of products cleared by CME is available at: http://www.cmegroup.com/trading/otc/files/otc-cds-product-scope.pdf (last visited November 3, 2014).

220 A current list of single-name and index CDS cleared by LCH.Clearnet is available at: http://www.lchclearnet.com/documents/731485/762470/cdsclear+clearable+product+list+%28october+2014%29.xlsx/b0f514f2-d876-4aa4-9e6b-5b4c76985fb8 (last visited November 3, 2014).

221 See http://www.isdacdsmarketplace.com/exposures_and_activity (last visited September 22, 2014) (describing the function and coverage of DTCC-TIW).

transactions in swap credit derivatives.[222]

It is reasonable to estimate that a similar number of persons provisionally registered with the CFTC to service the equity and credit swap markets might seek to register with the Commission as SDRs, and that other persons could seek to register with both the CFTC and the Commission as SDRs. There are economic incentives for the dual registration attributed to the fact that many of the market participants in the security-based swap market also participate in the swap market. Moreover, once an SDR is registered with the CFTC and the required infrastructure for regulatory reporting and public dissemination is in place, the marginal costs for an SDR to also register with the Commission, adding products and databases and implementing modifications to account for difference between Commission and CFTC rules, will likely to be lower than the initial cost of registration with the CFTC.

d. Vertical Integration of Security-Based Swap Market Infrastructure

The Commission has already observed vertical integration of swap market infrastructure: clearing agencies have entered the market for record-keeping services for swaps by provisionally registering themselves, or their affiliates, as SDRs with the CFTC. Under the CFTC swap reporting regime, two provisionally registered SDRs are, or are affiliated with, clearing agencies that clear swaps. These clearing agencies have adopted rules providing that they will satisfy their CFTC swap reporting obligations by reporting to their own, or their affiliated, SDR.[223] As a result, beta and gamma transactions and subsequent netting transactions that arise from the clearing process are reported by each of these clearing agencies to their associated SDRs.

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222 A list of SDRs provisionally registered with the CFTC is available at http://sirt.cftc.gov/sirt/sirt.aspx?Topic=DataRepositories (last visited November 13, 2014).

223 See CME Clearing Rule 1001 (Regulatory Reporting of Swap Data); ICE Clear Credit Clearing Rule 211 (Regulatory Reporting of Swap Data).

C. Programmatic Costs of Proposed Amendments to Regulation SBSR

1. Proposed Amendments to Rule 901

Proposed Rule 901(a)(2)(i) would provide that the reporting side for a clearing transaction is the clearing agency that is a counterparty to the clearing transaction. Rule 901(a)(3) would require any person that has a duty to report a security-based swap that has been submitted to clearing at a registered clearing agency to promptly provide that registered clearing agency with the transaction ID of the submitted security-based swap and the identity of the registered SDR to which the transaction will be reported or has been reported.

These proposed amendments to Rule 901 would impose initial and ongoing costs on platforms, clearing agencies, and reporting sides. The Commission preliminarily believes that certain of these costs would be a function of the number of reportable events and the data elements required to be submitted for each reportable event. The discussion below first highlights those burdens and costs related to proposed Rule 901(a)(2)(i), followed by burdens and costs related to proposed Rule 901(a)(3).

a. For Platforms and registered Clearing Agencies—Rule 901(a)(1) and Rule 901(a)(2)(i)

The Commission preliminarily believes that platforms and registered clearing agencies would face the same costs that reporting sides face. Specifically, platforms and registered clearing agencies would have to: (1) develop transaction processing systems; (2) implement a reporting mechanism; and (3) establish an appropriate compliance program and support for the operation of the transaction processing system. The Commission also preliminarily believes that, once a platform or registered clearing agency's reporting infrastructure and compliance systems are in place, the burden of reporting each individual reportable event would represent a small fraction of the burdens of establishing the reporting infrastructure and compliance systems. The

Commission preliminarily believes that all reportable events, for which platforms and registered clearing agencies would be responsible for reporting, would be reported through electronic means. The Commission preliminarily believes that there would be ten platforms and four registered clearing agencies that would incur duties to report security-based swap transactions under the proposed amendments to Rule 901.

The Commission preliminarily estimates that transaction processing system related to Rule 901 and applicable to platforms and registered clearing agencies would result in initial one-time aggregate costs of approximately $1,428,000, which corresponds to $102,000 for each platform or registered clearing agency.[224] The Commission estimates that the cost to establish and maintain connectivity to a registered SDR to facilitate the reporting required by Rule 901 would impose an annual (first-year and ongoing) aggregate cost of approximately $2,800,000, which corresponds to $200,000 for each platform or registered clearing agency.[225] The Commission estimates, as a result of having to establish a reporting mechanism for security-based swap transactions, platforms and registered clearing agencies would experience certain

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224 This estimate is based on the following: [((Sr. Programmer (160 hours) at $303 per hour) + (Sr. Systems Analyst (160 hours) at $260 per hour) + (Compliance Manager (10 hours) at $283 per hour) + (Director of Compliance (5 hours) at $446 per hour) + (Compliance Attorney (20 hours) at $334 per hour)) x 14 platforms and registered clearing agencies)] = approximately $1,428,000, or $102,000 per platform or registered clearing agency. All hourly cost figures are based upon data from SIFMA's Management & Professional Earnings in the Securities Industry 2013 (modified by Commission staff to account for an 1,800-hour-work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead). See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

225 The Commission derived the total estimated expense from the following: ($100,000 hardware- and software-related expenses, including necessary backup and redundancy, per SDR connection) x (2 SDR connections per platform or registered clearing agency) x (14 platforms or registered clearing agencies) = $2,800,000, or $200,000 per platform or registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

development, testing, and supports costs. Such costs would amount to an initial one-time aggregate cost of approximately $686,000, which corresponds to an initial one-time cost of $49,000 for each platform or registered clearing agency.[226] The Commission preliminarily estimates that order management costs related to the proposed amendments to Rule 901 would impose ongoing annual aggregate costs of approximately $1,078,000, which corresponds to $77,000 per platform or registered clearing agency.[227] In addition, the Commission estimates that platforms and registered clearing agencies would incur an initial and ongoing aggregate annual cost of $14,000, which corresponds to $1,000 for each platform or registered clearing agency.[228] The Commission estimates that designing and implementing an appropriate compliance and support program will impose an initial one-time aggregate cost of approximately $756,000, which corresponds to a cost of approximately $54,000 for each platform or registered clearing agency.[229] The Commission estimates that maintaining its compliance and support

226 This figure is calculated as follows: [((Sr. Programmer (80 hours) at $303 per hour) + (Sr. Systems Analyst (80 hours) at $260 per hour) + (Compliance Manager (5 hours) at $283 per hour) + (Director of Compliance (2 hours) at $446 per hour) + (Compliance Attorney (5 hours) at $334 per hour) x (14 platforms or registered clearing agencies)] = approximately $686,000, which equates to $49,000 per platform or registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

227 This estimate is based on the following: [((Sr. Programmer (32 hours) at $303 per hour) + (Sr. Systems Analyst (32 hours) at $260 per hour) + (Compliance Manager (60 hours) at $283 per hour) + (Compliance Clerk (240 hours) at $64 per hour) + (Director of Compliance (24 hours) at $446 per hour) + (Compliance Attorney (48 hours) at $334 per hour)) x 14 platforms and registered clearing agencies)] = approximately $1,078,000, or $77,000 per platform or registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

228 This estimate is calculated as follows: [$250/gigabyte of storage capacity x (4 gigabytes of storage) x (14 platforms or registered clearing agencies)] = $14,000, or $1,000 per platform or registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

229 This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer (100 hours) at $303 per hour) + (Sr. Systems Analyst (40

program would impose an ongoing annual aggregate cost of approximately $539,000, which corresponds to a cost of approximately $38,500 for each platform or registered clearing agency.[230]

In the Regulation SBSR Adopting Release, the Commission revised its previous estimates of the number of reportable events associated with security-based swap transactions per year.[231] These revised estimates were a result of the Commission obtaining additional, more recent, and more granular data regarding participation in the security-based swap market from DTCC-TIW. In the Regulation SBSR Adopting Release, the Commission estimated that there will be approximately 3 million reportable events per year under Rule 901, an estimate that the Commission continues to believe is valid for the purposes of this release.[232] The Commission

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hours) at $260 per hour) + (Compliance Manager (20 hours) at $283 per hour) + (Director of Compliance (10 hours) at $446 per hour) + (Compliance Attorney (10 hours) at $334 per hour) x (14 platforms and registered clearing agencies)] = approximately $756,000, or $54,000 per platform or registered clearing agency.

230 This figure is based on discussions with various market participants and is calculated as follows: [((Sr. Programmer (16 hours) at $303 per hour) + (Sr. Systems Analyst (16 hours) at $260 per hour) + (Compliance Manager (30 hours) at $283 per hour) + (Compliance Clerk (120 hours) at $64 per hour) + (Director of Compliance (12 hours) at $446 per hour) + (Compliance Attorney (24 hours) at $334 per hour) x (14 platforms and registered clearing agencies)] = approximately $539,000, or $38,500 per platform or registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

231 See Regulation SBSR Adopting Release, Section XXI.

232 The Commission originally estimated that there would be 15.5 million reportable events per year under Regulation SBSR. See Regulation SBSR Proposing Release, 75 FR at 75247-48. In the Cross-Border Proposing Release, the Commission updated its estimate of the number of reportable events to approximately 5 million per year. The Commission noted that the change in the estimate of the number of reportable events per year was due to better and more precise data available from the industry on the scope, size, and composition of the security-based swap market. See Cross-Border Proposing Release, 78 FR at 31114-15. For these same reasons, the Commission has further updated its estimate of the number of reportable events to approximately 3 million per year. See infra note 233.

estimated in the Regulation SBSR Adopting Release that Rule 901(a), as adopted, will result in approximately 2 million reportable events related to covered transactions.[233]

The Commission preliminarily estimates that 1 million of the 3 million total reportable events would result from the proposed amendments to Rule 901.[234] This estimate of 1 million reportable events would include the initial reporting of the security-based swaps by platforms and registered clearing agencies as well as any life cycle events of such transactions. Specifically, the Commission preliminarily estimates that, of the 1 million reportable events, approximately 370,000 would involve the reporting of new security-based swap transactions and

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233 The Commission now estimates that there were approximately 2.26 million single-name CDS transactions in 2013. The data studied by the Commission cover single-name CDS transactions, which the Commission continues to believe account for approximately 80-90% of the security-based swap market. The Commission continues to use 78% as its measure of CDS as a percentage of the entire security-based swap market, resulting in a revised estimate of 3 million security-based swap transactions (i.e., 2,260,000/0.78 = 2,897,436 reportable events). See Regulation SBSR Adopting Release, Section XXI(B)(4)(b).

234 The Commission is proposing to amend Rule 901(a)(2) to require a clearing agency to be the reporting side for clearing transactions to which it is a counterparty. The Commission is further proposing to amend Rule 901(e)(1) to provide that a "clearing agency shall report whether or not it has accepted a security-based swap for clearing." Pursuant to Rule 901(e)(1), a registered clearing agency would be required to report whether or not it has accepted a security-based swap for clearing. Proposed Rule 901(a)(2)(i), discussed above, would require clearing agencies to report security-based swap transaction information for clearing transactions. These reportable events have been included in the Commission's estimates of the number of reportable events for the purposes of Rule 901.

In arriving at the Commission's estimate of 1 million reportable events, the Commission has included the following: (1) the termination of the original or "alpha" security-based swap; (2) the creation of beta and gamma security-based swaps; (3) the termination of beta, gamma, and any previous open positions during each netting cycle; and (4) any other transactions that are entered into by the registered clearing agency, arriving at 645,000 observations. Inflating this figure by 0.78, the Commission's measure of CDS as a percentage of the entire security-based swap market, is 645,000/0.78 = 826,923 or approximately 1 million reportable events.

approximately 630,000 would involve the reporting of life cycle events under Rule 901(e).[235] As a result, the Commission preliminarily estimates that platforms would be responsible for the reporting of approximately 120,000 security-based swaps,[236] at an annual cost of approximately $45,300 or $4,530 per platform.[237] The Commission preliminarily estimates that registered clearing agencies would be responsible for the reporting of approximately 250,000 security-based swaps, at an annual cost of approximately $94,375 or $23,593.75 per registered clearing agency.[238] The Commission preliminarily estimates that the proposed amendments to Rule

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235 Commission staff arrived at this estimate by summing the number of beta and gamma transactions that would result from observed termination of alphas by a registered clearing agency (197,798) and the number of other betas and gammas for which terminations were not available due to same-day clearing (88,935) to arrive at 286,733 total transactions. Inflating this figure by 0.78, the Commission's measure of CDS as a percentage of the entire security-based swap market, results in an estimate of 286,733/0.78, or approximately 370,000 reportable events.

236 As discussed in Section II(C)(2), supra, proposed Rule 901(a)(1) would require a platform to report any security-based swap executed on its facilities that will be submitted to clearing. Platforms, however, would not be responsible for reporting life cycle events of such security-based swaps. The Commission preliminarily believes that the only life cycle event of a platform-executed security-based swap that is submitted to clearing will be whether the security-based swap is accepted for clearing. Proposed Rule 901(e)(1)(ii) would require the registered clearing agency to report that information, not the platform. The Commission estimates that platforms would be responsible only for the reporting of approximately one third of the 370,000 security-based swaps (or about 120,000 security-based swaps) and registered clearing agencies (as a result of the creation of new security-based swaps during the clearing process) would be responsible for the reporting of the remaining two-thirds of security-based swaps (or 250,000 security-based swaps).

237 The Commission estimates: ((120,000 x 0.005 hours per transaction) / (10 platforms)) = 60 hours per platform, or 600 total hours. The Commission further estimates the total cost to be: [((Compliance Clerk (30 hours) at $64 per hour) + (Sr. Computer Operator (30 hours) at $87 per hour)) x (10 platforms)] = approximately $45,300, or $4,530 per platform. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

238 The Commission estimates: ((250,000 x 0.005 hours per transaction) / (4 registered clearing agencies)) = 312.5 hours per registered clearing agency, or 1,250 total hours. The Commission further estimates the total cost to be: [((Compliance Clerk (156.25 hours) at $64 per hour) + (Sr. Computer Operator (156.25 hours) at $87 per hour)) x (4

901(a) would result in registered clearing agencies having to report a significant number of life cycle events under Rule 901(e) over the course of a year—consisting primarily of terminations of clearing transactions occurring as part of the netting process—at an annual cost of approximately $237,825 or $59,456.25 per registered clearing agency.[239] The Commission preliminarily believes that all reportable events that would be reported by platforms and registered clearing agencies pursuant to these proposed amendments would be reported through electronic means.

In the Cross-Border Proposing Release, the Commission stated that, to the extent that security-based swaps become more standardized and trade more frequently on electronic platforms (rather than manually), the act of reporting transactions to a registered SDR should become less costly.[240] Together, these trends are likely to reduce the number of transactions that would necessitate the manual capture of bespoke data elements, which is likely to take more time and be more expensive than electronic capture.

b. For Platforms and Reporting Sides of Alphas—Rule 901(a)(3)

Pursuant to proposed Rule 901(a)(3), a person—either the platform upon which the security-based swap was executed or the reporting side for those security-based swaps other than clearing transactions—to report, for those security-based swaps submitted to a registered clearing

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registered clearing agencies)] = $94,375, or $23,593.75 per registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

239 The Commission estimates: ((630,000 x 0.005 hours per transaction) / (4 registered clearing agencies)) = 787.5 hours per registered clearing agency, or 3,150 total hours. The Commission further estimates the total cost to be: [((Compliance Clerk (393.75 hours) at $64 per hour) + (Sr. Computer Operator (393.75 hours) at $87 per hour)) x (4 registered clearing agencies)] = approximately $237,825, or $59,456.25 per registered clearing agency. See also Regulation SBSR Adopting Release, Section XXII(C)(2)(b).

240 See Cross-Border Proposing Release, 78 FR at 31198.

agency, the transaction ID of the submitted security-based swap and the identity of the registered SDR to which the transaction will be or has been reported.

Rule 901(a)(3) requires certain information (transaction ID and the identity of the registered SDR) to be reported to a registered clearing agency only if such security-based swap has been submitted to a registered clearing agency for clearing. As a result, platforms and reporting sides required to report transaction IDs and the identity of a registered SDR will already have put into place any infrastructure needed to report these security-based swaps to a registered clearing agency. However, requiring the person who has the duty to report the alpha transaction to a registered SDR to provide these data elements to the registered clearing agency to which the alpha has been submitted would result in certain additional development and maintenance costs. Specifically, the Commission preliminarily believes that the additional one-time cost related to the development of the ability to capture the relevant transaction information would be $2,815, and the additional one-time burden related to the implementation of a reporting mechanism for these two data elements would be $1,689 per platform or reporting side.[241] The Commission preliminarily believes that the additional ongoing cost related to the development of the ability to capture the relevant transaction information would be $2,815 and the additional

[241] The Commission estimates that the addition burdens would be: [(Sr. Programmer (5 hours at $303 per hour) + Sr. Systems Analyst (5 hours) at $260 per hour) = 10 burden hours (development of the ability to capture transaction information) = $2,815 per platform or reporting side; (Sr. Programmer (3 hours) at $303 per hour + Sr. Systems Analyst (3 hours) at $260 per hour) = $1689 per platform or reporting side (implementation of reporting mechanism)]. The total one-time cost associated with proposed Rule 901(a)(3) would be $4,504 per platform or reporting side for a total one-time cost $1,396,240 ($4,504 x 310 (300 reporting sides + 10 platforms)).

ongoing burden related to the maintenance of the reporting mechanism would be $563, per platform or reporting side.[242]

c. Total Costs of Platforms, Registered Clearing Agencies, and Reporting Sides Relating to Proposed Amendments to Rule 901

Summing these costs, the Commission preliminarily estimates that the initial, first-year cost of complying with the proposed amendments to Rule 901 (including the initial reporting and the reporting of any life cycle events) would be $5,288,450, which corresponds to 528,845 per platform.[243] The Commission estimates that the ongoing aggregate annual costs, after the first year, of complying with the proposed amendments to Rule 901 (including the initial reporting and the reporting of any life cycle events) would be $3,215,930, which corresponds to $321,593 per platform.[244] The Commission estimates that the initial, first-year cost of complying with the proposed amendments to Rule 901 (including the initial reporting and the reporting of any life cycle events) would be $2,418,200, which corresponds to $604,550 per registered clearing agency.[245] The Commission preliminarily estimates that the ongoing aggregate annual costs, after the first year, of complying with the proposed amendments to Rule 901 (including the

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242 The Commission estimates that the additional burdens would be: [(Sr. Programmer (5 hours) + Sr. Systems Analyst (5 hours)) = 10 burden hours (maintenance of transaction capture system); (Sr. Programmer (1 hour) + Sr. Systems Analyst (1 hour)) = 2 burden hours (maintenance of reporting mechanism)]. The total ongoing burden associated with the amendments to 901(a) would be 12 burden hours per platform and reporting side for a total ongoing burden of 3720 hours (12 x 310 (300 reporting sides + 10 platforms)).

243 This estimate is based on the following: (($102,000 + $200,000 + $49,000 +$77,000 + $54,000 + $1,000 + $38,500 + $4,530 + $2,815) x (10 platforms)) = $5,288,450, which corresponds to $528,845 per platform.

244 This estimate is based on the following: (($200,000 + $77,000 + $1,000 + $38,500 + $4,530 + $563) x (10 platforms)) = $3,215,930, or $321,593 per platform.

245 This estimate is based on the following: (($102,000 + $200,000 + $49,000 +$77,000 + $54,000 + $1,000 + $38,500 + $23,593.75 + $59,456.25) x (4 registered clearing agencies)) = $2,418,200, which corresponds to $604,550 per registered clearing agency.

initial reporting and the reporting of any life cycle events) would be $1,598,200, which corresponds to $399,550 per registered clearing agency.[246] The Commission estimates that the initial, first-year cost of complying with proposed Rule 901(a)(3) would be $844,500, which corresponds to $2,815 per reporting side.[247] The Commission preliminarily estimates that the ongoing aggregate annual costs, after the first year, of complying with proposed Rule 901(a)(3) would be $168,900, which corresponds to $563 per reporting side.[248]

2. Proposed Amendment to Rule 905(a)

In the Regulation SBSR Adopting Release, the Commission estimated that Rule 905(a), as adopted, will impose an initial, one-time burden associated with designing and building a reporting side's reporting system to be capable of submitting amended security-based swap transaction information to a registered SDR.[249] The Commission stated its belief that designing and building appropriate reporting system functionality to comply with Rule 905(a)(2) will be a component of, and represent an incremental "add-on" to, the cost to build a reporting system and develop a compliance function as required under Rule 901, as adopted.[250] Specifically, the Commission estimated that, based on discussions with industry participants, the incremental burden would be equal to 5% of the one-time and annual burdens associated with designing and building a reporting system that is in compliance with Rule 901, plus 10% of the corresponding

246 This estimate is based on the following: (($200,000 + $77,000 + $1,000 + $38,500 + $23,593.75 + $59,456.25) x (4 registered clearing agencies)) = $1,598,200, or $399,550 per registered clearing agency.

247 This estimate is based on the following: ($2,815 x (300 reporting sides)) = $844,500, which corresponds to $2,815 per reporting side.

248 This estimate is based on the following: ($563 x 300 reporting sides) = $168,900, or $563 per reporting side.

249 See Regulation SBSR Adopting Release, Section XXII(C)(6).

250 See id.

one-time and annual burdens associated with developing the reporting side's overall compliance program required under Rule 901.[251] This estimate was based on similar calculations contained in the Regulation SBSR Proposing Release,[252] updated to reflect new estimates relating to the number of reportable events and the number of reporting sides.[253]

The Commission preliminarily believes that the above methodology is applicable to error reporting by platforms under the proposed amendment to Rule 905(a). Thus, for platforms, the Commission preliminarily estimates that the proposed amendment to Rule 905(a) would impose an initial (first-year) aggregate cost of $118,250, or $11,825 per platform,[254] and an ongoing aggregate annualized cost of $39,750, which is $3,975 per platform.[255]

3. Proposed Amendments to Rule 906(c)

For Registered Clearing Agencies and Platforms. Rule 906(c), as adopted, requires each participant of a registered SDR that is a registered security-based swap dealer and registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR. Rule 906(c), as

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251 See id.

252 See 75 FR at 75254.

253 See Regulation SBSR Adopting Release, Section XXII(C)(1).

254 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [((($49,000 for one-time development of reporting system) x (0.05)) + (($2,500 annual maintenance of reporting system) x (0.05)) + (($54,000 one-time compliance program development) x (0.1)) + (($38,500 annual support of compliance program) x (0.1))) x (10 platforms)] = $118,250, which is $11,825 per platform.

255 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [(($2,500 annual maintenance of reporting system) x (0.05)) + (($38,500 annual support of compliance program) x (0.1))) x (10 platforms)] = $39,750, which is $3,975 per platform.

adopted, also requires such participants to review and update the required policies and procedures at least annually.

The proposed amendment to Rule 906(c) would extend these same requirements to participants of a registered SDR that are platforms or registered clearing agencies. The Commission preliminarily estimates that the one-time, initial burden for each registered clearing agency or platform to adopt written policies and procedures as required under the proposed amendment would be similar to the Rule 906(c) burdens discussed in the Regulation SBSR Adopting Release for registered security-based swap dealers and registered major security-based swap participants. As a result, the Commission preliminarily estimates that the first year cost of complying with the proposed amendment to Rule 906(c) would be approximately $58,000 per registered clearing agency or platform.[256] As discussed in the Regulation SBSR Proposing Release,[257] this figure is based on the estimated cost to develop written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, the Commission preliminarily estimates the cost of maintaining such policies and procedures, including a full review at least annually—as would be required by the proposed amendment to Rule 906(c)—would be approximately $34,000 per registered clearing agency or platform.[258] This figure includes an estimate of the cost related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing.

D. Economic Effects and Effects on Efficiency, Competition, and Capital Formation

[256] See Regulation SBSR Adopting Release, note 1238.

[257] See Regulation SBSR Proposing Release, 75 FR at 75257.

[258] See Regulation SBSR Adopting Release, note 1240.

Section 3(f) of the Exchange Act[259] requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act[260] requires the Commission, when making rules under the Exchange Act, to consider the impact of such rules on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission preliminarily believes that this proposal will result in further progress towards the goals identified in the Regulation SBSR Adopting Release: providing a means for the Commission and other relevant authorities to gain a better understanding of the aggregate risk exposures and trading behaviors of participants in the security-based swap market; facilitating public dissemination of security-based swap transaction information, thus promoting price discovery and competition by improving the level of information to all market participants; and improving risk management by security-based swap counterparties, which would need to capture and store their transactions in security-based swaps to facilitate reporting.[261]

The economic effects of the proposed rules, amendments, and guidance on firms that provide services to security-based swap counterparties and the security-based swap market are discussed in detail below. The Commission also considered the effects that the proposed rules, amendments, and guidance might have on competition, efficiency, and capital formation. The

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[259] 15 U.S.C. 78c(f).

[260] 15 U.S.C. 78w(a)(2).

[261] See Regulation SBSR Adopting Release, Section XXII(D).

Commission preliminarily believes that the proposal is likely to affect competition between firms that provide services to security-based swap counterparties and affect efficiency as a result of the way that the proposed rules and amendments allocate regulatory burdens. The Commission preliminarily believes that most of the effects of the proposal on capital formation would be indirect and would be related to the way in which the proposed rules and amendments result in efficient delivery of services by registered clearing agencies and registered SDRs, reducing transactions costs and freeing resources for investment.[262]

This analysis has been informed by the relationships among regulation, competition, and market power discussed in Section VIII(A), supra. An environment in which there is limited competition in SDR services could impose certain costs on the security-based swap market, including higher prices or lower quality services from SDRs. For example, a registered SDR might be able to extract monopoly profits from reporting sides when there are few competitors, if reporting sides cannot identify a competing SDR offering prices close enough to marginal cost to make changing service providers privately efficient for the reporting side. However, it is also possible that limited competition in the market for SDR services could yield certain benefits for both regulatory authorities and the public. In particular, a small set of registered SDRs could make it simpler for relevant authorities to build a complete picture of transaction activity and outstanding risk exposures in the security-based swap market, and could limit the need for users of publicly disseminated transaction data to merge these data from multiple sources before using it as an input to economic decisions.

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262 These transactions costs would include both implicit and explicit costs. Implicit transactions costs are the spread between transaction prices and the fundamental value of the assets being traded. Explicit transactions costs, by contrast, are commissions and other fees paid by counterparties to access the security-based swap market.

1. Reporting of Clearing Transactions

Proposed Rule 901(a)(2)(i) would assign the duty to report all security-based swaps that have a registered clearing agency as a direct counterparty to that registered clearing agency. Regulation SBSR, as adopted, does not assign reporting obligations for any clearing transactions; thus, in the absence of proposed Rule 901(a)(2)(i), these transactions would not be subject to any regulatory reporting requirement. Without these data, the ability of the Commission and other relevant authorities to carry out their market oversight functions would be limited. For example, while the Commission would have access to uncleared transactions that are reported to a registered SDR, the Commission—in the absence of proposed Rule 901(a)(2)(i)—would not be able to obtain from registered SDRs information about changes to the open positions of the relevant counterparties after alpha transactions are cleared. Without access to this information from registered SDRs, the Commission would be unable to easily observe risk exposures in the security-based swap market, because information about the net open positions in cleared security-based swaps would not be held in registered SDRs. Ensuring that clearing transactions are reported to registered SDRs and delineating reporting responsibilities for these transactions is particularly important given the level of voluntary clearing activity in the market as well as the mandatory clearing determinations required under Title VII.[263]

The Commission preliminarily believes that the costs associated with required reporting pursuant to the proposed amendments could represent a barrier to entry for new, smaller clearing agencies that might not have the ability to comply with the proposed reporting requirements or for whom the expected benefits of compliance might not justify the costs of compliance. To the extent that the proposed rules and amendments might deter new clearing agencies from entering

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263 See General Policy on Sequencing, 77 FR at 35636.

the security-based swap market, this could negatively impact competition between registered clearing agencies.

A registered clearing agency is responsible for executing each of the clearing transactions to which it is a counterparty and, thus, is well-situated to report the resulting transaction information. By proposing to assign the reporting responsibility to registered clearing agencies, the Commission intends to eliminate additional steps in the reporting process that would be needed if another market participant were assigned the duty to report a clearing transaction or if the duty were to remain unassigned.[264] By proposing a reporting methodology with as few steps as possible, the Commission intends to minimize potential data discrepancies and errors by assigning reporting responsibilities to persons that hold the most complete and accurate information for cleared security-based swaps.[265] Inaccurate information would negatively impact the ability of the Commission and other relevant authorities to understand and act on the transaction information reported; accurate information should positively affect their ability to oversee the security-based swap market.

Proposed Rule 901(a)(1)(i) would place the obligation for reporting all clearing transactions on registered clearing agencies and allow them to choose the registered SDR to which they submit transaction data. As noted in Section VIII(A), supra, the Commission preliminarily believes that, because many of the infrastructure requirements for entrant SDRs are shared by registered clearing agencies, registered clearing agencies might pursue vertical

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264 If, for example, the non-clearing agency counterparty had the duty to report a clearing transaction, the registered clearing agency would first have to convey the transaction information to the counterparty—and the counterparty might have to reconfigure the transaction data into the format required by a registered SDR—before the counterparty could report it to a registered SDR.

265 See CME/ICE Letter at 3-4.

integration into the market for SDR services at a lower cost relative to potential entrants from unrelated markets. If the costs of reporting to affiliated SDRs are lower than the costs of reporting to unaffiliated SDRs, then one likely response to the proposed rules and amendments is that registered clearing agencies will choose to report clearing transactions to an affiliated SDR. Such vertical integration of security-based swap clearing and reporting could be beneficial to other market participants if they ultimately share in these efficiency gains. For example, efficiency gains due to straight-through processing from execution to reporting could lower transactions costs for market participants and reduce the likelihood of data discrepancies and delays.

The Commission is also aware of the potential costs of placing the duty on registered clearing agencies to report transactions and allowing them to choose the registered SDR to which they report, as such clearing agencies would likely select their affiliated SDRs. If proposed Rule 901(a)(1)(i) would encourage the formation of affiliate SDRs that would not otherwise emerge, then the aggregate number of registered SDRs might reflect an inefficient level of service provision. As noted in Section VIII(A)(2), supra, economies of scale exist in the market for SDR services from the ability to amortize the fixed costs associated with infrastructure over a large volume of transactions. As a result, the entry of clearing agency-affiliated SDRs could indicate that, in aggregate, transaction data is processed at a higher average cost than if there were fewer SDRs. Inefficiencies could be introduced by the Commission and the public receiving security-based swap transaction data from a larger number of registered SDRs. Connecting to a larger number of SDRs and merging transaction data with potentially different data formats and schema could be costly and could lead to losses in data integrity.

The potential for efficiency gains through vertical integration of registered clearing agencies and registered SDRs could foreclose entry into the market for SDR services except by those firms that are willing to simultaneously enter the market for clearing services. The Commission preliminarily believes that registered clearing agencies are more likely to benefit from these efficiencies in shared infrastructure than stand-alone SDRs, given that it is likely to be more difficult for a registered SDR to enter into clearing activity than for a registered clearing agency to enter into SDR activity. Moreover, to the extent that an affiliate SDR is not as cost-effective as a competing unaffiliated SDR, the registered clearing agency could subsidize the operation of its affiliate SDR to provide a competitive advantage in its cost structure over SDRs unaffiliated with a registered clearing agency. Even if the registered clearing agency does not provide a subsidy to its affiliate SDR, and the resulting service is not as price competitive as an unaffiliated SDR, counterparties have less recourse in choosing alternative reporting venues because the duty to report would reside with the registered clearing agency.

Hence, providing registered clearing agencies with the discretion to report transaction information to the registered SDR of their choice could provide a competitive advantage for clearing agency-affiliated SDRs relative to unaffiliated SDRs. This could also have implications for the reporting of uncleared swaps. In particular, a clearing agency-affiliated SDR could leverage its repository activity for cleared transactions by offering SDR services to clearing members for uncleared swaps. If security-based swap counterparties who clear transactions prefer to have their transaction records consolidated in a single database, then a clearing agency-affiliated SDR would be able to offer these counterparties recordkeeping and cost saving benefits by also recording their uncleared transactions. By contrast, to the extent that an unaffiliated SDR is unable to compete with a clearing agency's affiliated SDR for cleared transactions, it would not be able to offer a consolidated record of a counterparty's trade activity. This then provides a unique advantage to clearing agency-affiliated SDRs.

Alternatively, a clearing member seeking to consolidate its transactions at an unaffiliated SDR might contract with the registered clearing agency, for a fee, to transmit data for clearing transactions to an SDR of the clearing member's choice, either as a duplicate report or as a required report by Regulation SBSR. This would allow the registered clearing agency to satisfy its obligations while permitting the clearing member to maintain access to centralized data. However, in this case, the registered clearing agency could choose a fee schedule that encourages the clearing member to report its uncleared bilateral transactions to the affiliate SDR. Such a fee schedule might involve the clearing agency offering to terminate alpha transactions reported to its affiliate SDR for a lower price than alpha transactions at a third-party SDR.

As discussed in Section VIII(C)(1)(a), supra, the Commission has estimated the annual and on-going costs associated with requiring registered clearing agencies to establish connections to registered SDRs. The Commission preliminarily believes that, for a given registered clearing agency, these costs may be lower for connections to affiliate SDRs than for connections to unaffiliated SDRs. Because the registered clearing agency might have been involved in developing its affiliated SDR's systems, the clearing agency might, as a result, avoid costs related to translating or reformatting data due to incompatibilities between data reporting by the registered clearing agency and data intake by the SDR.

2. Reporting of Clearing Transactions Involving Allocation

This release explains the Commission's preliminary view of the application of Regulation SBSR to allocations of bunched order executions that are submitted to clearing. The final placement of risk of a bunched order alpha is the series of clearing transactions—the "gamma series"—that results from clearing the bunched order alpha and is economically relevant to risk monitoring and market surveillance. This proposed interpretation would not create any new duties under Regulation SBSR but rather would explain the application of Regulation SBSR to events that occur as part of the allocation process.[266] Additionally, because the proposed interpretation explains how Regulation SBSR, as adopted and as proposed to be amended by this release, would apply to a platform-executed bunched order that will be submitted to clearing, and the security-based swaps that result from the allocation of any bunched order execution, if the resulting security-based swaps are cleared, the Commission preliminarily believes that the proposed interpretation is not likely to have consequences for efficiency, competition, or capital formation beyond those stemming from allocating transaction reporting obligations to platforms and registered clearing agencies discussed in Section VIII(D)(1), supra, and in Section VIII(D)(4), infra.

The proposed interpretation discusses the manner in which the bunched order alpha and the security-based swaps resulting from its allocation would be reported to a registered SDR. This proposed interpretation is designed to accommodate the various workflows that market participants employ to execute and allocate bunched order alphas. For example, in a case where a registered clearing agency receives allocation instructions only subsequent to clearing, the registered clearing agency would decrement the size of the "intermediate gamma" until it eventually reached zero and would novate all of the security-based swaps in a "gamma series."[267] Under proposed Rule 901(a)(2)(i), the registered clearing agency would have the duty to report

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266 The Commission's estimates of events reportable under these proposed rules and amendments includes observable allocation by clearing agencies in the DTCC-TIW data. Therefore, the costs associated with clearing transactions involving allocation are included in our estimate of the programmatic costs of proposed Rules 901(a)(1) and 901(a)(2)(i).

267 See supra Section III(A) (providing additional examples of workflows for allocation of security-based swaps that are cleared).

each new security-based swap that it creates as part of the gamma series. Pursuant to Rule 901(d)(10), as adopted, the registered clearing agency also would be responsible for including the transaction ID of the bunched order alpha in the transaction report of each new security-based swap in the gamma series that results from the termination of the bunched order alpha. The benefit of regulatory reporting of clearing transactions is that relevant authorities would be able to observe allocations at the level of client accounts, facilitating more granular monitoring of risk and market abuse.[268]

3. Alternative Approaches to Reporting Clearing Transactions

As part of the economic analysis of these proposed rules and amendments, the Commission has considered the market power that providers of security-based swap market infrastructure might be able to exercise in pricing the services that they offer counterparties to security-based swaps and/or shifting regulatory burdens onto their customers. The Commission recognizes that the treatment of clearing transactions in this proposal might influence the market power of certain providers of these services by imposing the reporting duty on registered clearing agencies. The Commission considered three alternative allocations of reporting obligations for clearing transactions, each of which implies different allocations of costs across market participants along with different effects on efficiency and competition, and, indirectly, capital formation.

a. Apply the Re-Proposed Reporting Hierarchy

The first alternative to the proposed approach is to apply the reporting hierarchy in Regulation SBSR, as re-proposed. Under this approach, a registered clearing agency would occupy the lowest spot in the hierarchy, along with other persons who are neither registered

268 See Regulation SBSR Adopting Release, Section VIII.

security-based swap dealers nor registered major security-based swap participants. Under this alternative, when one of the sides of the transaction included a security-based swap dealer or major security-based swap participant and the other side did not, the side including the security-based swap dealer or major security-based swap participant would have the duty to report any resulting clearing transactions, as well as the choice of which registered SDR to which to report. As described in more detail below, placing the duty to report with non-clearing agency reporting sides would likely leave them in a position to either request transaction information from registered clearing agencies to re-transmit that information to registered SDRs, or request that the registered clearing agency report to a registered SDR on their behalf. To the extent that each transmission of data introduces some possibility for error or delay, the additional step of requesting data from a registered clearing agency could result in security-based swap data that are marginally less reliable than under our proposed approach. Alternatively, having the registered clearing agency report clearing transactions would require fewer processing steps and would result in the same outcome for data integrity as the proposed rules.

Under this alternative, one of the sides of the initial alpha transaction would report the resulting clearing transactions according to the hierarchy originally proposed in the Regulation SBSR Proposing Release. For the beta, gamma, and any subsequent clearing transactions (resulting from netting and compression of multiple betas and gammas), the non-clearing agency counterparties could obtain the information needed for regulatory reporting from the registered clearing agency and transmit this information to the registered SDR of its choice.

The Commission preliminarily believes that it is unlikely that non-clearing agency counterparties would be subject to significant additional costs associated with building infrastructure to support regulatory reporting for clearing transactions under this alternative.

This is for two reasons. First, to the extent that market participants that submit security-based swaps to clearing also engage in uncleared transactions and fall high on the reporting hierarchy, they likely already have the required infrastructure in place to support regulatory reporting of alphas and uncleared transactions. The Commission anticipates that, as a result, there might be only marginal additional costs for reporting sides to report clearing transactions, if the Commission selected this alternative. Moreover, the Commission anticipates that, once infrastructure is built, the per-transaction cost of data transmission would not vary substantially between registered clearing agencies, who would be required to report pursuant to proposed Rule 901(a)(1)(i), and reporting sides, who would be required to report under this alternative.

Second, counterparties (who are not themselves a registered clearing agency), particularly those who engage solely in cleared trades or who are not high on the Regulation SBSR reporting hierarchy, may enter into an agreement under which the registered clearing agency would submit the information to a registered SDR on their behalf. This service could be bundled as part of the other clearing services purchased, and would result in an outcome substantially similar to giving the registered clearing agency the duty to report. One difference, however, is that the customer of the registered clearing agency could, under this alternative, request that the information be submitted to a registered SDR unaffiliated with the registered clearing agency, a choice that would, under the proposed approach, be at the discretion of the registered clearing agency. Nevertheless, the Commission preliminarily believes that, to the extent that it is economically efficient for the registered clearing agency to report the details of cleared transactions on behalf of its counterparties, this alternative would likely result in ongoing costs of data transmission for market participants and infrastructure providers that are, in the aggregate, similar to the Commission's approach in proposed Rule 901(a)(2)(i).

If registered clearing agencies reporting to registered SDRs on behalf of counterparties is not available under this alternative, then some counterparties would be required to build infrastructure to support regulatory reporting for clearing transactions. Analysis of single-name CDS transactions in 2013 in which a clearing agency was a direct counterparty shows approximately 10 market participants that are not likely to register as security-based swap dealers or major security-based swap participants, and therefore might be required to build infrastructure to support regulatory reporting for clearing transactions in order to maintain current trading practices in the security-based swap market.[269]

Under this alternative, non-clearing agency counterparties would have the ability to choose which registered SDR receives their reports. Because non-clearing agency counterparties would have this choice, registered SDRs under the alternative approach might have additional incentive to provide high levels of service to attract this reporting business by, for example, providing such counterparties with convenient access to reports submitted to the registered SDR or by supporting the counterparties' efforts at data validation and error correction. Additionally, ensuring that these counterparties have discretion over which registered SDR receives their data could allow them to consolidate their security-based swap transactions into a single SDR for record-keeping purposes, or for operational reasons, though only to the extent that they can identify a registered SDR that accepts reports for all relevant asset classes.

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269 To arrive at this estimate, Commission staff used single-name CDS transaction data for 2013 to produce a list of all direct counterparties to a clearing agency and removed those persons likely to register as security-based swap dealers or major security-based swap participants. The list of likely registrants was constructed using the methodology described in the Cross-Border Adopting Release. See Cross-Border Adopting Release, 79 FR at 47296, note 150 (describing the methodology employed by the Commission to estimate the number of potential security-based swap dealers); id. at 47297, note 153 (describing the methodology employed by the Commission to estimate the number of potential major security-based swap participants).

In assessing this alternative, the Commission recognizes that registered clearing agencies have a comparative advantage in processing and preparing data for reporting cleared transactions to a registered SDR. Registered clearing agencies terminate alpha transactions, as well as create beta and gamma transactions and all subsequent netting transactions, and so already possess all of the relevant information to report these transaction events to a registered SDR. Moreover, the volume of transactions at registered clearing agencies means that they can amortize the fixed costs of establishing and maintaining connections to a registered SDR over a large quantity of reportable activity, potentially allowing them to report transactions at a lower average cost per transaction than many other market participants, particularly non-registered persons.

The Commission preliminarily believes that, given this comparative advantage, applying to clearing transactions the same reporting hierarchy that it has adopted for uncleared transactions would result in registered clearing agencies reporting the transaction data to registered SDRs as a service to the non-clearing agency counterparties to clearing transactions. In this respect, the outcome would be the same as with proposed Rule 901(a)(2)(i), which would assign this duty to registered clearing agencies. The key difference is that the non-clearing agency counterparty would generate this responsibility through private contract and could terminate the agreement and assume the reporting responsibility, should it perceive the fee or service terms as unreasonable. The ability to terminate such an agreement could diminish the potential bargaining power that the registered clearing agency would otherwise have if the registered clearing agency were assigned the duty to report. However, because the non-clearing agency counterparty might still have to rely on assistance from the clearing agency to satisfy the reporting obligations—particularly for any subsequent clearing transactions resulting from netting and compression of multiple betas and gammas—the reduction in clearing agency bargaining power might not be substantial. A registered clearing agency that supplies this information and converts it into the formats prescribed by the counterparties' chosen SDRs so that a non-clearing agency counterparty can fulfill their reporting requirement could still have significant bargaining power with respect to providing that information.

The Commission preliminarily believes that the proposed rules are generally consistent with the outcome under this alternative in a number of key respects. Under both approaches to reporting—one in which the Commission assigns the reporting responsibility for clearing transactions to registered clearing agencies, and the other in which the market allocated the reporting responsibility in the same way—registered clearing agencies would report clearing transactions to their affiliated SDRs.[270] Under an approach in which the Commission does not assign any reporting duties to registered clearing agencies, counterparties would likely be assessed an explicit fee by registered clearing agencies for submitting reports on the counterparties' behalf. Under proposed Rule 901(a)(1)(i), the fees associated with these services would likely be part of the total fees associated with clearing security-based swaps. Under this alternative and under the proposed approach, efficiency gains stemming from consolidation of the reporting function within registered clearing agencies would be split between such clearing agencies and security-based swap counterparties. The difference between these two regulatory approaches turn on how these gains are split.

The Commission preliminarily believes that this alternative would not necessarily restrict the ability of registered clearing agencies to exercise market power in ways that may allow them

270 Unless it preferred a particular registered SDR for operational reasons discussed above, a non-clearing agency counterparty to a clearing transaction would likely contract with the clearing agency to report clearing transactions to the registered SDR that offers the lowest price, most likely the clearing agency affiliate.

to capture the bulk of any efficiency gains. First, while a counterparty to a registered clearing agency could contract with the clearing agency to receive the information about netting and compression transactions that would enable re-transmission to a registered SDR, depending on the policies and procedures of the registered clearing agency, these data might not be in the format that is required for submission to the counterparty's SDR of choice. As a result, counterparties to registered clearing agencies would bear the costs associated with restructuring the data that they receive from registered clearing agencies before submitting transaction reports to a registered SDR. Such costs could limit the feasibility of assuming the reporting responsibility rather than contracting to have the registered clearing agency to perform the duty.

Second, in an environment where reporting obligations for clearing transactions rest with counterparties and there is limited competition among registered clearing agencies, registered clearing agencies might be able to charge high fees to counterparties who must rely on them to provide information necessary to make required reports to registered SDRs. A registered clearing agency could otherwise impair the ability of its counterparties to perform their own reporting if the clearing agency does not provide sufficient support or access to clearing transaction data. In particular, the clearing agency might have incentives to underinvest in the infrastructure necessary to provide clearing transaction data to its counterparties unless the Commission, by rule, established minimum standards for communication of clearing transactions data from registered clearing agencies to their counterparties. The result could be greater difficulties faced by counterparties in reporting data and an increased likelihood of incomplete, inaccurate, or untimely data being submitted to registered SDRs.

Third, under this alternative the registered clearing agency that also is party to the transaction potentially has weaker incentives to provide high-quality regulatory data to the counterparty with a duty to report, which could reduce the quality of regulatory data collected by registered SDRs. The person with the duty to report a transaction has strong incentives to ensure that the transaction details are transmitted in a well-structured format with data fields clearly defined, and that contain data elements that are validated and free of errors because, pursuant to Regulation SBSR, this person is responsible for making accurate reports and, if necessary, making corrections to previously submitted data. Not only would the registered clearing agency have no duty under Regulation SBSR to provide information to its counterparty, but additionally, market forces might not provide sufficient motivation to the registered clearing agency to provide data to the counterparty in a manner that would minimize the counterparty's reporting burden. If registered clearing agencies exercise their market power against counterparties, the counterparties might have limited ability to demand high-quality data reporting services from registered clearing agencies. The Commission notes, however, that it could, by imposing minimum standards on data services provided by registered clearing agencies and regulating the fees associated with data transmission by registered clearing agencies, mitigate some of the effects of market frictions under these alternatives.

The Commission preliminarily believes, however, that despite a similarity in ultimate outcomes, and any benefits that might flow from enabling registered SDRs to compete for clearing transaction business, this alternative does not compare favorably to the proposed approach.

b. Move Registered Clearing Agencies Within the Regulation SBSR Reporting Hierarchy

A second, closely related alternative would involve placing registered clearing agencies within the Regulation SBSR reporting hierarchy below registered security-based swap dealers and registered major security-based swap participants but above counterparties that are not registered with the Commission. This alternative would assign the reporting obligation to a registered security-based swap dealer or registered major security-based swap participant when it is a counterparty to a registered clearing agency, while avoiding the need for non-registered persons to negotiate reporting obligations with registered clearing agencies.

As with the previous alternative of maintaining the reporting hierarchy in Regulation SBSR, as adopted, this alternative potentially results in additional reporting steps and could marginally reduce the quality of regulatory data relative to the proposed approach. A key difference, however, is that this alternative would reduce the likelihood of reporting obligations falling on unregistered persons, who would likely have less market power in negotiations with registered clearing agencies over the terms of reporting to a registered SDR. Larger counterparties, i.e., those with greater transaction flow, are likely to be better able to negotiate the terms of reporting transactions on their behalf or access to the clearing data so that they can perform their own reporting.

Above, the Commission noted three particular ways in which limited competition among registered clearing agencies could result in poorer outcomes for non-clearing agency counterparties. First, when these counterparties obtain clearing data from a registered clearing agency, they would likely incur any costs related to reformatting the data for submission to a registered SDR. Second, registered clearing agencies might charge these counterparties high fees for access to regulatory data that counterparties are required to submit to registered SDRs. Third, registered clearing agencies might have weak incentives to ensure that the data that they supply to reporting sides are of high quality, since the non-clearing agency counterparties would bear the costs of error correction.

Limiting the extent to which registered clearing agencies can exercise the market power from limited competition over their counterparties may reduce some of the drawbacks to the first alternative. In particular, registered clearing agencies may be less likely to exercise market power in negotiations with larger market participants, particularly when these market participants are also clearing members. Clearing members play key roles in the governance and operation of registered clearing agencies, often contributing members to the board of directors. Moreover, clearing members contribute to risk management at registered clearing agencies by, for example, contributing to clearing funds that mutualize counterparty risk.[271] Nevertheless, the Commission preliminarily believes that this alternative does not fully address frictions that arise from limited competition between registered clearing agencies, such as high clearing fees or low quality services. The Commission preliminarily believes that this alternative would be less efficient than requiring the registered clearing agency to report the transaction information directly to a registered SDR, because the registered clearing agency is the only person who has complete information about a clearing transaction immediately upon its creation.

c. Require the Reporting Side for an Alpha to Also Report the Beta and Gamma Transactions

The Commission also considered a third alternative that would make the reporting side for the alpha responsible for reporting both the beta and gamma. This alternative would require the reporting side for the alpha also to report information about a security-based swap—the clearing transaction between the registered clearing agency and the non-reporting side of the alpha—to which it is not a counterparty. The Commission could require the non-reporting side

271 See Securities Exchange Act Release No. 34-68080 (October 22, 2013), 77 FR 66220, 66267 (November 2, 2012) ("Clearing Agency Standards Adopting Release") (discussing financial resources of clearing agencies).

of the alpha to transmit information about its clearing transaction to the reporting side of the alpha. In theory, this would allow the reporting side of the alpha to report both the beta and the gamma. The Commission believes, however, that this result could be difficult to achieve operationally and, in any event, could create confidentiality concerns, as an alpha counterparty may not wish to reveal information about its clearing transactions except to the registered clearing agency (and, if applicable, its clearing member). This alternative also would require reporting sides to negotiate with registered clearing agencies to obtain transaction data and to bear the costs of reformatting these data and correcting errors in these data, exposing them to the market power exercised by registered clearing agencies. Moreover, all other things being equal, having more steps in the reporting process—e.g., more data transfers between execution and reporting—introduces greater opportunity for data discrepancies and delays than having fewer steps. Also, because the reporting side of the alpha would report the beta and gamma, this alternative is premised on the view that the beta and gamma are life cycle events of the alpha. The Commission, however, considered and rejected this approach in the Regulation SBSR Adopting Release.[272]

In addition, this alternative could result in incomplete regulatory data because it could raise questions about who would report clearing transactions associated with the compression and netting of beta or gamma transactions. For example, suppose a non-dealer clears two standard contracts on the same reference entity using a single registered clearing agency, each

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272 See Regulation SBSR Adopting Release, Section V(B)(2) at note 267 ("Under Rule 900(g), a security-based swap that results from clearing is an independent security-based swap and not a life cycle event of a security-based swap that is submitted to clearing. Thus, Rule 901(e), which addresses the reporting of life cycle events, does not address what person has the duty to report the clearing transactions that arise when a security-based swap is accepted for clearing").

contract having a different registered security-based swap dealer as counterparty. Under this alternative to the proposed approach, each dealer would be responsible for reporting a gamma security-based swap between the non-dealer and the registered clearing agency. However, this alternative does not specify which of four potential persons would be required to report the contract that results from netting of the two gamma security-based swaps between the non-dealer and the registered clearing agency.

4. Reporting by Platforms

With the ability to clear trades, it is possible for two counterparties to trade anonymously on an SB SEF or an exchange. In an anonymous trade, because neither counterparty would be aware of the name or registration status of the other, it might not be possible for either counterparty to use the reporting hierarchy in Rule 901(a)(1)(i), as adopted, to determine who must report this initial alpha transaction to a registered SDR.[273] Therefore, because the platform would be the only entity at the time of execution, before the transaction is submitted for clearing, who is certain to know the identity of both transaction sides, the Commission proposes to assign to the platform the duty to report all alpha transactions executed on the platform that will be submitted to clearing.

As discussed above in the context of reporting obligations for registered clearing agencies, the Commission preliminarily believes that the costs associated with required reporting pursuant to the proposed amendments could represent a barrier to entry for new, smaller trading platforms that might not have the ability to comply with the proposed reporting requirements or for whom the expected benefits of compliance might not justify the costs of compliance. To the

273 Some commenters specifically pointed out this fact and argued that SB SEFs and exchanges should therefore incur the duty to report. See supra note 55.

extent that the proposed rules and amendments might deter new trading platforms from entering the security-based swap market, this could negatively impact competition.

Requiring the execution platform to report information associated with anonymous transactions, preserves counterparties' anonymity and reduces the number of data transmission steps between execution and reporting to a registered SDR. The Commission, however, proposes having the platform report all alpha transactions that will be submitted to clearing, even those that are not anonymous.

Under proposed Rule 901(a)(1), platforms would be required to report all transactions occurring on their facilities that are submitted to clearing. A platform that matches orders and executes transactions will possess all of the primary and secondary trade information necessary to be reported to a registered SDR, and proposed Rule 901(a)(1) would make it unnecessary for counterparties to report these transactions. This approach is designed to result in a more efficient reporting process for platform-executed trades that are submitted to clearing. By reducing the number of steps between the generation of transaction data and reporting to a registered SDR, the Commission preliminarily believes that proposed Rule 901(a)(1) would minimize the possibility of data discrepancies and delays.

At the same time, the Commission recognizes that, because anonymous transactions executed on platforms must be cleared, the platforms that support anonymous trading will more than likely select the registered clearing agency at which to clear a trade. Moreover, because only platforms know the identities of counterparties to anonymous transactions, they will be responsible for submitting these transactions for clearing. If the infrastructure necessary for submitting transactions for clearing is similar to that required to report transactions to clearing agency-affiliated SDRs, then these platforms may prefer to use clearing-agency affiliated SDRs for all of their transaction reports. This is particularly true if the fixed costs to platforms of submitting transactions for clearing and regulatory reporting are high because platforms could avoid interfacing separately with clearing agencies and unaffiliated SDRs. As a result, the proposed rules for platform-executed trades subsequently submitted to clearing might disadvantage registered SDRs that are not affiliated with registered clearing agencies.

While the level of security-based swap activity that currently takes place on platforms and is subsequently submitted for clearing is currently low, future rulemaking under Title VII could cause platform volumes to increase. The Commission has proposed, but not adopted, rules governing the registration and operation of SB SEFs and anticipates considering rules to determine which security-based swaps are subject to mandatory trade execution on national securities exchanges or registered or exempt SB SEFs.[274]

5. Alternative Approaches to Reporting Platform-Executed Transactions

For platform-executed transactions that are submitted to clearing but are not anonymous, a reasonable alternative would be for the Commission to require these transactions to be reported to a registered SDR using the reporting hierarchy in Rule 901(a)(2)(ii), as adopted. Under such an alternative, a platform would have to determine which of the trades it executed were anonymous and which were not, performing due diligence to ensure that transaction reports it sends to its participants do not violate the anonymity of counterparties.[275] The Commission preliminarily believes that it is likely that the platform would pass these costs to counterparties, or, alternatively, offer to report on behalf of the reporting side, for a fee. Counterparties who

274 See General Policy on Sequencing, 77 FR at 35640.

275 The Commission is aware that certain market structures could result in situations where a single security-based swap transaction results in a split trade where one portion is anonymously executed and another portion is not anonymously executed. This could complicate separation of anonymous and non-anonymous executions.

trade on a platform would have to determine who among them is responsible for reporting their trade and would incur the costs of reporting to a registered SDR. Moreover, such an alternative would exhibit many of the shortcomings of the alternative to proposed Rule 901(a)(1)(i) discussed in Section XI(C)(3), even though it would allow the reporting counterparty to choose the SDR that receives transaction information.

A second alternative would be to assign the reporting duty for all platform-executed transactions that are submitted to clearing to the registered clearing agency. While the registered clearing agency receiving information about a platform-executed alpha will likely have the information necessary for reporting—because the registered clearing agency will need much of the same information about the alpha transaction to clear it—the Commission preliminarily believes that it would be more appropriate to assign the reporting duty to the platform. This approach would imply a more direct flow of information from the point of execution on the platform to the registered SDR, thus minimizing opportunities for data discrepancies or delays. This approach would also reduce the need for registered clearing agencies to invest resources in systems to receive data elements from platforms beyond what is already required for clearing.

6. Application of Regulation SBSR to Prime Brokerage Transactions

This release proposes interpretive guidance for how Regulation SBSR should be applied to prime brokerage transactions. As this guidance would not create any new duties—but instead would merely explain how the series of related transactions under a prime brokerage arrangement would have to be reported and publicly disseminated under Regulation SBSR, as adopted—there would be no additional costs or benefits beyond those already considered in the

Regulation SBSR Adopting Release.[276]

Prime brokerage transactions involve a reallocation of counterparty risk when the prime broker interposes itself between the counterparties to the original transaction (a customer of the prime broker and a third-party executing dealer). Regulatory reporting of this activity would allow relevant authorities to more accurately conduct market surveillance and monitor counterparty risk. As a result of public dissemination of all three related transactions, market observers would have access to information of the transaction between the two original counterparties and the subsequent two transactions with the prime broker, thereby allowing them to compare the prices and conditions of these transactions. This would allow users of publicly disseminated data to infer from these disseminated reports the fees that the prime broker charges for its credit intermediation service and separate these fees from the transaction price of the security-based swap.

7. Proposed Prohibition on Fees for Public Dissemination

The Commission is proposing new Rule 900(tt), which would define the term "widely accessible" as used in the definition of "publicly disseminate" in Rule 900(cc), as adopted, to mean "widely available to users of the information on a non-fee basis." This proposed definition would have the effect of prohibiting a registered SDR from charging fees for or imposing usage restrictions on the security-based swap transaction data that it is required to publicly disseminate under Regulation SBSR.

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276 See Regulation SBSR Adopting Release, Section XXII(C)(1). The Commission's estimates in that release of the number of reportable events included all legs of prime brokerage transactions.

Allowing access to transaction information without cost or restriction allows it to be quickly incorporated into security-based swap prices by market participants, leading to increased informational efficiency of these prices and prices in related financial markets. Free and unrestricted access to transaction prices and volumes facilitates a more level playing field for market participants, particularly those that otherwise have less access to security-based swap order flow information, potentially enhancing competition between market participants..[277] Finally, unburdened access to security-based swap market data also could benefit non-security-based swap financial market participants who may use data from the security-based swap market as input for their decision making, potentially improving the efficiency of capital allocation and indirectly improving the environment for capital formation.[278] For instance, if a single-name CDS on a reference entity trades more often than the underlying bonds, single-name CDS transaction prices may help investors in evaluating whether the prices of the underlying bonds incorporate available information about the credit risk of the issuer.[279]

The proposed prohibition on a registered SDR charging fees for public dissemination of the regulatorily mandated security-based swap transaction data also is consistent with the

277 See Regulation SBSR Adopting Release, Section XXII(D)(3).

278 See Philip Bond, Alex Edmans, and Itay Goldstein, "The Real Effects of Financial Markets," Annual Review of Financial Economics, Vol. 4 (October 2012) (reviewing the theoretical literature on the feedback between financial market price and the real economy).

279 See Sugato Chakravarty, Huseyin Gulen, and Stewart Mayhew, "Informed Trading in Stock and Option Markets," Journal of Finance, Vol. 59, No. 3 (2004) (estimating that the proportion of information about underlying stocks revealed first in option markets ranges from 10% to 20%); Gary Gorton, "Are Naked Credit Default Swaps Too Revealing?" (June 4, 2010), available at http://faculty.som.yale.edu/garygorton/documents/NakedCDSTooRevealingIDDJune2010.pdf (last visited October 2, 2014) (discussing how the introduction of CDS contracts may increase the information sensitivity of underlying bonds).

CFTC's current prohibition on CFTC-registered SDRs charging for public dissemination of regulatorily mandated swap transaction data. Such consistency lessens the incentives for SDRs registered with the CFTC to enter the security-based swap market and also register with the Commission and charge for public dissemination of security-based swap market data.[280] Entering the security-based swap market would allow them to charge for public dissemination of security-based swap market data and use those revenues from this business to subsidize their operations in the swap market, in which they are not permitted to charge for public dissemination of swap market data. If an SEC-registered SDR charges fees for security-based swap data in order to subsidize its reporting activity in the CFTC regime, then security-based swap market participants reporting to this SDR could face higher costs than those it would face if the SDR participated only in the security-based swap market.

The Commission notes two ways in which market forces may limit the extent of cross-subsidization by registered SDRs that also publicly disseminate swap data. First, if SDRs compete for customers of raw security-based swap data, then SDRs operating in both regimes who choose to subsidize their activities in the swap market by charging higher fees for security-based swap data will likely find themselves at a disadvantage relative to SDRs that operate only in the security-based swap regime who can afford to offer lower fees since they, by definition, do not cross-subsidize because they do not participate in both markets. However, this result depends significantly on the assumption of a competitive market for security-based swap data, which is less likely to exist when the number of registered of SDRs is small. Second, it is possible that there are synergies available to SDRs that operate in both regimes. These synergies

280 Dual registration is likely to occur independent of the ability to charge for public dissemination of data in the security-based swap market. However, the ability to charge for public dissemination would add an additional incentive to do so.

would lower the average cost of public dissemination by these SDRs and reduce the level of subsidies needed to cover these costs. As a result, these synergies could limit the size of the subsidy that users of security-based swap data would pay to users of swap data.

Additionally, the Commission preliminarily believes that requiring free and unrestricted access to publicly-disseminated data will reinforce the economic effects of Rule 903(b). Rule 903(b), as adopted, provides that a registered SDR may disseminate information using UICs (such as product IDs or other codes—e.g., reference entity identifiers—embedded within the product IDs) or permit UICs to be used for reporting by its participants only if the information necessary to interpret such UICs is widely available on a non-fee basis. In the absence of a prohibition on fees for or restricted access to publicly-disseminated data, the Commission is concerned that a registered SDR that wished to charge (or allow others to charge) users for the information necessary to understand these UICs—but could not, because of Rule 903(b)—might seek to do so indirectly by recharacterizing the charge as being for public dissemination. The Commission preliminarily believes that this could reduce the economic benefits of Rule 903(b).

The Commission acknowledges that receiving data from market participants; cleaning, processing, and storing these data; and making these data available to the Commission and the public are costly services for registered SDRs to provide. If charging fees for raw security-based swap data is prohibited, registered SDRs could employ a number of alternative measures to ensure they have sufficient resources to comply with the statutory and regulatory requirements imposed on registered SDRs. Some of these measures may have negative consequences for market participants, reducing the benefits of publicly-disseminated data. For example, registered SDRs could charge fees to recipients of value-added data and services. Registered SDRs that provide such data and services for a fee may have incentives to limit the usefulness of transaction information through free public feeds, particularly in form and manner in which it is made available, to push market participants towards the fee-based services. Such an outcome could hinder the transparency goals of the reporting regime because those market participants with resources sufficient to buy value added data and services would continue to have an informational advantage over those without.

Registered SDRs also could pass the costs of publicly disseminating security-based swap data through to the reporting parties who report transaction data to the registered SDR. Direct fees imposed on market participants would likely be in proportion to the number of transactions they execute, with more active market participants, who contribute more to the production of transaction information, paying a larger share of the costs of disseminating that information. These costs of SDR reporting would likely be passed through to non-dealers as a component of transactions costs. Non-security-based swap market participants, by contrast, would not bear any of the costs. This could have the effect of security-based swap market participants subsidizing other users of the raw security-based swap data through free public feeds.

8. Proposed Compliance Schedule for Regulation SBSR

The compliance schedule proposed in this release is designed to provide affected persons, especially registered SDRs and persons with a duty to report security-based swap transactions to registered SDRs, with time to develop, test, and implement reporting and dissemination systems. The new proposed compliance schedule takes into consideration the fact that the CFTC's regulatory reporting and public dissemination rules are now in effect. As a result, several SDRs have registered and are operating under the CFTC regime in the swap market, and swap market participants have developed substantial infrastructure to support swap transaction reporting.[281] It is likely that much of the infrastructure implemented in the swap market can be repurposed for the security-based swap market, and if so, would enable more efficient implementation of the Commission's regime for security-based swap reporting.

In the newly proposed compliance schedule, the two compliance dates, with respect to security-based swaps in a particular asset class, are based on the date that the first registered SDR that can accept security-based swaps in that asset class commences operations. This approach is designed to prevent regulatory reporting and public dissemination of security-based swap transaction data from being delayed while additional SDRs register with the Commission and commence operations, while still offering time for SDRs and market participants to develop the necessary policies, procedures, and infrastructure to become operational. For example, while reporting to a registered SDR on a transaction-by-transaction basis would be required on the date six months after the first registered SDR in an asset class commences operations (i.e., proposed Compliance Date 1), public dissemination would not be required for an additional three months (i.e., on proposed Compliance Date 2). This three-month period is designed to allow registered SDRs to evaluate compliance with the SDRs' requirements for transaction reports being submitted on a mandatory basis beginning on Compliance Date 1, and to allow persons having the duty to report—which, as a result of the amendments proposed herein, would include platforms, registered clearing agencies, and reporting sides—to make any necessary adjustments to the transaction records that they submit. Registered SDRs also would have time to test that

281 See Sec. Indus. & Fin. Mkts. Ass'n v. CFTC, Civil Action No. 13-1916 (PLF), slip op. at 89 (D.D.C., September 16, 2014) (noting that "the plaintiffs' associations' members' declarants have made clear that the members (or their foreign affiliates) already have come into compliance with the [CFTC] Rules as they apply extraterritorially").

the appropriate subset of information provided in the regulatory report will be publicly disseminated, with flags as required by the registered SDR's policies and procedures.[282]

There are potential drawbacks to the proposed compliance schedule as well. First, new entrants into the SDR market might be at a competitive disadvantage since they would have to adhere to compliance dates that were set based on registration of the first SDR in that asset class that commences operations. This would be true particularly if persons with a duty to report face high switching costs between SDRs and could be locked in to the first registered SDR with which they engage. Second, the proposed compliance schedule hinges on a person registering and then commencing operations as an SDR. As a result, reporting to an SDR, and the associated public dissemination, might not occur for an extended period of time.

The Commission preliminarily believes, however, that most persons that have the desire and ability to operate as SEC-registered SDRs are already operational in the swaps market as CFTC-registered SDRs, and each should have a strong incentive to submit applications to register with the Commission quickly. Thus, there is less likelihood of multiple applications arriving over an extended period of time, which could have been the case when the Commission originally proposed Rules 910 and 911 in the Regulation SBSR Proposing Release in 2010, before the CFTC had finalized its rules and SDRs were registered by the CFTC. The newly proposed compliance schedule could give added incentive to avoid delaying the submission of an application for registration, and to commence operation as an SEC-registered SDR as quickly as possible. This result would help the Commission and other relevant authorities obtain more complete information about the security-based swap market for oversight purposes as quickly as

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282 See Rules 907(a)(3) and 907(a)(4), as adopted.

possible, and also allow the public to obtain price, volume, and transaction information about all security-based swaps as quickly as possible.

IX. Paperwork Reduction Act

Certain provisions of these proposed amendments to Regulation SBSR contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[283] As discussed in Section I, supra, these proposed amendments to Regulation SBSR would impact Rules 900, 901, 905, 906, and 908. This release also proposes guidance for complying with certain aspects of Regulation SBSR and proposes new compliance dates for the rules in Regulation SBSR for which the Commission has not specified a compliance date. The titles of the collections for Regulation SBSR are: (1) Rule 901—Reporting Obligations—For Reporting Sides; (2) Rule 901—Reporting Obligations—For Registered SDRs; (3) Rule 902—Public Dissemination of Transaction Reports; (4) Rule 904—Operating Hours of Registered Security-Based Swap Data Repositories; (5) Rule 905—Correction of Errors in Security-Based Swap Information—For Reporting Sides; (6) Rule 905—Correction of Errors in Security-Based Swap Information—Non-Reporting Sides; (7) Rule 906(a)—Other Duties of All Participants—For Registered SDRs; (8) Rule 906(a)—Other Duties of All Participants—For Non-Reporting Sides; (9) Rule 906(b)—Other Duties of All Participants—For All Participants; (10) Rule 906(c)—Other Duties of All Participants—For Covered Participants; (11) Rule 907—Policies and Procedures of Registered Security-Based Swap Data Repositories; and (12) Rule 908(c)—Substituted Compliance (OMB Control No. 3235-0718). The estimated collection of information burdens for Regulation SBSR are contained in the Regulation SBSR Adopting

283 44 U.S.C. 3501 et seq.

Release.[284] The estimated changes to these burdens and costs that would result from the proposed rules and amendments are discussed below. Compliance with these collections of information requirements is mandatory. The Commission is submitting these collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number.

A. Definitions—Rule 900

Rule 900 sets forth definitions of various terms used in Regulation SBSR. In this release, the Commission is proposing to amend the definition of "participant" in Rule 900(u) and to create a new defined term "widely accessible"—in proposed Rule 900(tt)—that is used in the definition of "publicly disseminate" in Rule 900(cc), as adopted. The proposed definition of "widely accessible" would have to effect of prohibiting a registered SDR from charging fees for or imposing usage restrictions on the security-based swap transaction data that it is required to publicly disseminate under Regulation SBSR.

Although the Commission discusses certain costs associated with these proposed definitions in this Section, the Commission does not believe that these changes themselves would result in a "collection of information" within the meaning of the PRA.

B. Reporting Obligations—Rule 901

1. Rule 901—As Adopted

Rule 901, as adopted, specifies, with respect to each reportable event pertaining to covered transactions, who is required to report, what data must be reported, when it must be

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[284] See Regulation SBSR Adopting Release, Section XXI.

reported, where it must be reported, and how it must be reported. Rule 901(a), as adopted, establishes a "reporting hierarchy" that specifies the side that has the duty to report a security-based swap that is a covered transaction. Pursuant to Rule 901(b), as adopted, if there is no registered SDR that will accept the report required by Rule 901(a), the person required to make the report must report the transaction to the Commission. Rule 901(c) sets forth the primary trade information and Rule 901(d) sets forth the secondary trade information that must be reported. Rule 901(e) requires the reporting of life cycle events and adjustments due to life cycle events, which pursuant to Rule 901(j) must be reported within 24 hours of the time of occurrence, to the entity to which the original transaction was reported. Rule 901(f) requires a registered SDR to timestamp, to the second, any information submitted to it pursuant to Rule 901, and Rule 901(g) requires a registered SDR to assign a transaction ID to each security-based swap, or establish or endorse a methodology for transaction IDs to be assigned by third parties. Rule 901(h) requires reporting sides to electronically transmit the information required by Rule 901 in a format required by the registered SDR. Rule 901(i) requires reporting of pre-enactment security-based swaps and transitional security-based swaps to the extent that information about such transactions is available.

For Reporting Sides. The Commission estimated that Rule 901, as adopted, will impose an estimated total first-year burden of approximately 1,394 hours[285] per reporting side for a total

285 See Regulation SBSR Adopting Release, Section XXI(B). The Commission derived its estimate from the following: (355 hours (one-time hourly burden for establishing and OMS) + 172 hours (one-time hourly burden for establishing security-based swap reporting mechanisms) + 180 hours (one-time hourly burden for compliance and ongoing support) = 707 hours (one-time total hourly burden). See Regulation SBSR Proposing Release, 75 FR at 75248-50, notes 186, 194, and 201. (436 hours (annual-ongoing hourly burden for internal order management) + 33.3 hours (revised annual-ongoing hourly burden for security-based swap reporting mechanisms) + 218 hours (annual-ongoing

first-year burden of 418,200 hours for all reporting sides.[286] The Commission estimated that Rule 901, as adopted, will impose ongoing annualized aggregate burdens of approximately 687 hours[287] per reporting side for a total aggregate annualized cost of 206,100 hours for all reporting sides.[288] The Commission further estimated that Rule 901, as adopted, will impose initial and ongoing annualized dollar cost burdens of $201,000 per reporting side, for total aggregate initial and ongoing annualized dollar cost burdens of $60,300,000.[289]

For Registered SDRs. The Commission estimated that the first-year aggregate annualized burden on registered SDRs associated with Rules 901(f) and 901(g) will be 2,820 burden hours, which corresponds to 282 burden hours per registered SDR.[290] The Commission also estimated that the ongoing aggregate annualized burden associated with Rules 901(f) and

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hourly burden for compliance and ongoing support) = 687.3 hours (one-time total hourly burden. See id. at 75248-50, notes 187 and 201 (707 one-time hourly burden + 687 revised annual-ongoing hourly burden = 1,394 total first-year hourly burden).

286 See Regulation SBSR Adopting Release, Section XXI(B). The Commission derived its estimate from the following: (1,394 hours per reporting side x 300 reporting sides) = 418,200 hours.

287 See Regulation SBSR Adopting Release, Section XXI(B). See Cross-Border Proposing Release, 78 FR at 31112-15.

288 See Regulation SBSR Adopting Release, Section XXI(B). The Commission derived its estimate from the following: (687 hours per reporting side x 300 reporting sides) = 206,100 hours.

289 See Regulation SBSR Adopting Release, Section XXI(B). The Commission derived its estimate from the following: ($201,000 per reporting side x 300 reporting sides) = $60,300,000. See Cross-Border Proposing Release, 78 FR at 31113-15. The Commission originally estimated this burden based on discussions with various market participants. See Regulation SBSR Proposing Release, 75 FR at 75247-50.

290 See Regulation SBSR Adopting Release, Section XXI(B). See Regulation SBSR Proposing Release, 75 FR at 75250. This figure is based on the following: [(1,200) + (1,520)] = 2,720 burden hours, which corresponds to 272 burden hours per registered SDR.

901(g) will be 1,520 burden hours, which corresponds to 152 burden hours per registered SDR.[291]

2. Rule 901—Proposed Amendments

The proposed amendments to Rule 901 would establish certain requirements relating to the reporting of security-based swap transactions to a registered SDR. Rule 901 of Regulation SBSR, as adopted, contained "collection of information requirements" within the meaning of the PRA, and the proposed amendments to Rule 901 contain additional "collection of information requirements" within the meaning of the PRA, which are discussed below. The title of this collection is "Rule 901—Reporting Obligations for Platforms and Clearing Agencies."

a. Summary of Collection of Information

The Commission is proposing reporting obligations for those security-based swaps that are clearing transactions or that are executed on a platform and will be submitted to clearing. In order to facilitate such reporting, the Commission is proposing Rules 901(a)(1), 901(a)(2)(i), and 901(a)(3). Pursuant to new subparagraph (1) of Rule 901(a), 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 have the duty to report the transaction to a registered SDR. The Commission also is proposing a new subparagraph (2)(i) of Rule 901(a) that would assign the reporting duty for a clearing transaction to the registered clearing agency that is a counterparty to the security-based swap.

The Commission also is proposing to add a new subparagraph (3) to Rule 901(a) that would require any person that has a duty to report a security-based swap that is submitted to clearing—which would be a platform or a reporting side—to provide the registered clearing

291 See Regulation SBSR Adopting Release, Section XXI(B).

agency with the transaction ID of the alpha and the identity of the registered SDR to which the alpha will be reported or has been reported.

b. Proposed Use of Information

The security-based swap transaction information that would be required by the proposed amendments to Rule 901 would be used by registered SDRs, market participants, the Commission, and other relevant authorities. The information reported by platforms and registered clearing agencies pursuant to Rule 901 would be used by registered SDRs to publicly disseminate reports of security-based swap transactions, as well as to offer a resource for the Commission and other relevant authorities to obtain detailed information about the security-based swap market. Market participants also would use the information about these transactions that is publicly disseminated, among other things, to assess the current market for security-based swaps and any underlying securities and to assist in the valuation of their own positions. The Commission and other relevant authorities would use information about security-based swap transactions reported to and held by registered SDRs to monitor and assess systemic risks, as well as to examine for and consider whether to take enforcement action against potentially abusive trading behavior, as appropriate.

c. Respondents

In the Regulation SBSR Adopting Release, the Commission estimated 300 reporting side respondents and that, among the 300 reporting sides, approximately 50 are likely to be required to register with the Commission as security-based swap dealers and approximately five are likely to register as major security-based swap participants.[292] The Commission noted that these 55 reporting sides likely will account for the vast majority of recent security-based swap

292 See Regulation SBSR Adopting Release, Section XXI(B)(3).

transactions and reports and that there are only a limited number of security-based swap transactions that do not include at least one of these larger counterparties on either side.[293] Finally, the Commission estimated that the number of registered SDRs would not exceed ten.[294]

Proposed Rules 901(a)(1) and 901(a)(2)(i) would assign reporting duties for security-based swap transactions, in certain enumerated cases set forth in these rules, to platforms and registered clearing agencies, respectively. The Commission preliminarily believes that these proposed amendments to Rule 901(a) would result in 14 additional respondents incurring the duty to report under Regulation SBSR. Specifically, the Commission believes that there would be ten platforms (exchanges and SB SEFs) and four registered clearing agencies that would incur such duties. Proposed Rule 901(a)(3) would require a person—either the platform upon which the security-based swap was executed or the reporting side for those security-based swaps other than clearing transactions—to report, for those security-bases swaps submitted to a registered clearing agency, the transaction ID of the submitted security-based swap and the identity of the registered SDR to which the transaction will be or has been reported. The Commission preliminarily believes that proposed Rule 901(a)(3) would place reporting obligations on 300 reporting sides and 10 platforms.

d. Total Initial and Annual Reporting and Recordkeeping Burdens

i. Platforms and Registered Clearing Agencies

Pursuant to Rule 901, all security-based swap transactions must be reported to a registered SDR or to the Commission. Together, paragraphs (a), (b), (c), (d), (e), (h), and (j) of Rule 901 set forth the parameters that reporting entities must follow to report security-based

293 See id.

294 See id.

swap transactions. Because platforms and registered clearing agencies now would have the duty to report, initial and ongoing burdens would be placed on these entities. The Commission preliminarily believes that these burdens will be a function of, among other things, the number of reportable events and the data elements required to be reported for each such event.

In the Regulation SBSR Adopting Release, the Commission estimated that respondents would face three categories of burdens to comply with Rule 901.[295] The Commission preliminarily believes that platforms and registered clearing agencies would face the same categories of burdens as those identified in the Regulation SBSR Adopting Release for other types of respondents. First, each platform and registered clearing agency would likely have to develop the ability to capture the relevant transaction information.[296] Second, each platform and registered clearing agency would have to implement a reporting mechanism. Third, each platform and registered clearing agency would have to establish an appropriate compliance program and support for the operation of any system related to the capture and reporting of transaction information. The Commission preliminarily believes that platforms and registered clearing agencies would need to develop capabilities similar to those highlighted in the Regulation SBSR Adopting Release in order to be able to capture and report security-based swap transactions. The Commission also preliminarily believes that, once a platform or registered

[295] See Regulation SBSR Adopting Release, Section XXI(B)(4).

[296] In the Regulation SBSR Adopting Release, the Commission discussed the development, by reporting sides, of an internal order and trade management system. The Commission believes that the costs of developing a transaction processing system are comparable to the costs discussed therein. Although the actual reporting infrastructure needed by platforms and registered clearing agencies could have some attributes that differ from the attributes of an internal order and trade management system, the Commission nonetheless preliminarily believes that the cost of implementing a transaction processing system, and establishing an appropriate compliance program and support for the operation of the system, will be similar to the costs for reporting sides discussed in the Regulation SBSR Adopting Release.

clearing agency's reporting infrastructure and compliance systems are in place, the burden of reporting each individual reportable event will be small when compared to the burdens of establishing the reporting infrastructure and compliance systems.[297] The Commission preliminarily believes that all of the reportable events, for which platforms and registered clearing agencies would be responsible for reporting, will be reported through electronic means.

The Commission estimates that the total burden placed upon reporting sides as a result of Rule 901 would be approximately 1,361 hours[298] per reporting side during the first year.[299] The Commission preliminarily believes that this per-entity cost would be the same for platforms and registered clearing agencies, resulting in a total first-year burden of 19,054 hours for all platforms and registered clearing agencies under the proposed amendments to Rule 901.[300] The Commission estimates that the proposed amendments to Rule 901 would impose ongoing annualized aggregate burdens of approximately 654 hours[301] per reporting entity for a total

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297 In the Regulation SBSR Adopting Release, the Commission reiterated its belief that reporting specific security-based swap transactions to a registered SDR—separate from the establishing of infrastructure and compliance systems that support reporting—would impose an annual aggregate cost of approximately $5,400,000. See Regulation SBSR Adopting Release, Section XXI(B)(4).

298 The Commission derived its estimate from the following: (355 hours (one-time hourly burden for establishing and OMS) + 172 hours (one-time hourly burden for establishing security-based swap reporting mechanisms) + 180 hours (one-time hourly burden for compliance and ongoing support) = 707 hours (one-time total hourly burden). See Regulation SBSR Proposing Release, 75 FR at 75248-50, notes 186, 194, and 201. (436 hours (annual-ongoing hourly burden for order management) + 218 hours (annual-ongoing hourly burden for compliance and ongoing support) = 654 hours (one-time total hourly burden. See id. at 75248-50, notes 187 and 201 (707 one-time hourly burden + 654 revised annual-ongoing hourly burden = 1,361 total first-year hourly burden).

299 See Regulation SBSR Adopting Release, Section XXI(B)(4).

300 The Commission derived its estimate from the following: (1,361 hours per reporting entity x 14 platforms and registered clearing agencies) = 19,054 hours.

301 See supra note 298.

aggregate annualized cost of 9,156 hours for all platforms and registered clearing agencies.[302] The Commission further preliminarily estimates that the proposed amendments to Rule 901 would impose initial and ongoing annualized dollar cost burdens of $201,000 per reporting entity,[303] for total aggregate initial and ongoing annualized dollar cost burdens of $2,814,000.[304]

In the Regulation SBSR Adopting Release, the Commission revised its previous estimates of the number of reportable events associated with security-based swap transactions to approximately 3 million reportable events per year under Rule 901, an estimate that the Commission continues to believe is valid for the purposes of the Regulation SBSR Proposed Amendments.[305] The Commission estimated in the Regulation SBSR Adopting Release that Rule 901(a), as adopted in that release, will result in approximately 2 million reportable events related to covered transactions.[306]

The Commission preliminarily estimates that 1 million of the 3 million total reportable events would be reported as a result of the proposed amendments to Rule 901.[307] The

302 The Commission derived its estimate from the following: (654 hours per reporting entity x 14 platforms and registered clearing agencies) = 9,156 hours.

303 This figure is based on the sum of per-reporting entity estimates for connectivity to SDRs for data reporting, as follows: [($100,000 hardware- and software-related expenses, including necessary back-up and redundancy, per SDR connection) x (2 SDR connections per reporting entity)] + [($250/gigabyte of storage capacity) x (4 gigabytes of storage capacity)] = $201,000. See Regulation SBSR Proposing Release, 75 FR at 75248-49, notes 188 and 193.

304 The Commission derived its estimate from the following: ($201,000 per reporting side x 14 reporting sides) = $2,814,000. See also Cross-Border Proposing Release, 78 FR at 31112-15.

305 See Regulation SBSR Adopting Release, Section XXI(B)(4)(b).

306 See id.

307 The Commission is proposing to amend Rule 901(a)(2) to require a registered clearing agency to be the reporting side for clearing transactions to which it is a counterparty. The Commission is further proposing to amend Rule 901(e)(1) to provide that a "registered

Commission believes that these 1 million reportable events would include the initial reporting of the security-based swap by platforms and clearing agencies as well as the reporting of any life cycle events. The Commission preliminarily estimates that of the 1 million reportable events, approximately 370,000 would involve the reporting of new security-based swap transactions, and approximately 630,000 would involve the reporting of life cycle events under Rule 901(e).[308] As a result, the Commission preliminarily estimates that platforms will be responsible for the reporting of approximately 120,000 security-based swaps.[309] The Commission preliminarily estimates that the proposed amendments to Rule 901(a) would result in platforms having a total burden of 600 hours attributable to the reporting of security-based swaps by platform to registered SDRs under Rules 901(c) and 901(d) over the course of a year.[310] The Commission

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clearing agency shall report whether or not it has accepted a security-based swap for clearing." Proposed Rule 901(a)(2)(i), discussed above, would require registered clearing agencies to report security-based swap transaction information for clearing transactions. These reportable events have been included in the Commission's estimates of the number of reportable events for the purposes of Rule 901. In arriving at the of 1 million reporting events, the Commission has included the following: (1) the termination of the original or "alpha" security-based swap; (2) the creation of beta and gamma security-based swaps; (3) the termination of beta, gamma, and any previous open positions during each netting cycle; and (4) any other transactions that are entered into by the registered clearing agency.

308 See supra note 235.

309 The Commission preliminarily believes that platforms will be responsible only for the reporting of any initial security-based swaps that are executed on their facilities. Since only platform-executed security-based swaps that will be submitted to a registered clearing agency for clearing are subject to this proposal, platforms would not be responsible for any life cycle event reporting under Rule 901(e). The Commission estimates that platforms would be responsible for reporting only approximately one third of the 360,000 security-based swaps (or 120,000 security-based swaps) and registered clearing agencies (as a result of the creation of new security-based swaps during the clearing process) would be responsible for the reporting of the remaining two-thirds of security-based swaps (or 250,000 security-based swaps).

310 See Regulation SBSR Adopting Release, Section XXI(B)(4). In the Regulation SBSR Proposing Release, the Commission estimated that it would take approximately 0.005

preliminarily estimates that the proposed amendments to Rule 901(a) would result in registered clearing agencies having a total burden of 1,250 hours attributable to the reporting of security-based swaps to registered SDRs over the course of a year.[311] The Commission preliminarily estimates that the proposed amendments to Rule 901(a) would result in registered clearing agencies having a total burden of 3,150 hours attributable to the reporting of life cycle events to registered SDRs under Rule 901(e) over the course of a year.[312] The Commission preliminarily believes that the proposed amendments would result in a total reporting burden for registered clearing agencies under Rules 901(c) and (d) along with the reporting of life cycle events under Rule 901(e) of 4,400 burden hours.[313] The Commission believes that all reportable events that

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hours for each security-based swap transaction to be reported. See 75 FR at 75249, note 195. The Commission calculates the following: ((120,000 x 0.005) / (10 platforms)) = 60 burden hours per platform or 600 total burden hours attributable to the reporting of security-based swaps.

311 See Regulation SBSR Adopting Release, Section XXI(B)(4). In the Regulation SBSR Proposing Release, the Commission estimated that it would take approximately 0.005 hours for each security-based swap transaction to be reported. See 75 FR at 75249, note 195. The Commission calculates the following: ((250,000 x 0.005) / (4 registered clearing agencies)) = 312.5 burden hours per registered clearing agency or 1,250 total burden hours attributable to the reporting of security-based swaps.

312 See Regulation SBSR Adopting Release, Section XXI(B)(4). In the Regulation SBSR Proposing Release, the Commission estimated that it would take approximately 0.005 hours for each security-based swap transaction to be reported. See 75 FR at 75249, note 195. The Commission calculates the following: ((630,000 x 0.005) / (4 registered clearing agencies)) = 787.5 burden hours per registered clearing agency or 3,150 total burden hours attributable to the reporting of life cycle events under Rule 901(e).

313 As is discussed immediately above, the Commission preliminarily believes that registered clearing agencies would incur a burden of 1,250 hours attributable to the reporting of security-based swaps pursuant to proposed Rule 901(a)(2)(i) along with a burden of 3,150 hours attributable to the reporting of life cycle events under Rule 901(e). As discussed in note 309, supra, platforms would not be responsible for the reporting of any life cycle events of any platform-executed security-based swap that will be submitted to clearing.

would be reported by platforms and registered clearing agencies pursuant to these proposed amendments would be reported through electronic means.

The Commission recognizes that some entities that would qualify as platforms or registered clearing agencies may have already spent time and resources building the infrastructure that will support their eventual reporting of security-based swaps. The Commission notes that, as a result, the burdens and costs estimated herein could be greater than those actually incurred by affected parties as a result of compliance with the proposed amendments to Rule 901(a). Nonetheless, the Commission believes that its estimates represent a reasonable upper bound of the actual burdens and costs required to comply with the paperwork burdens associated with the proposed amendments to Rule 901(a).

ii. Platforms and Reporting Sides

Proposed Rule 901(a)(3) would require a person, either the platform upon which the security-based swap was executed or the reporting side for those security-based swaps other than clearing transactions, to report, for those security-bases swaps submitted to a registered clearing agency, the transaction ID of the submitted security-based swap and the identity of the registered SDR to which the transaction will be or has been reported.

Rule 901(a)(3) would require certain information (transaction ID and the identity of the registered SDR) to be reported to a registered clearing agency only if such security-based swap has been submitted to a registered clearing agency for clearing. As a result, platforms and reporting sides required to report transaction IDs and the identity of a registered SDR will already have put into place any infrastructure needed to report these security-based swaps to a registered clearing agency.[314] However, the Commission does believe that including these items would result in additional development and maintenance burdens. Specifically, the Commission preliminarily believes that the additional one-time burden related to the development of the ability to capture the additional specific data elements required by proposed Rule 901(a)(3) would be 10 burden hours and the additional one-time burden related to the implementation of a reporting mechanism would be 6 burden hours, per platform and reporting side.[315] The Commission preliminarily believes that the additional ongoing burden related to the ability to capture the additional specific data elements required by proposed Rule 901(a)(3) would be 10 burden hours and the additional ongoing burden related to the maintenance of the reporting mechanism would be 2 burden hours, per platform and reporting side.[316]

iii. Bunched Order Executions and Allocations

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314 The required infrastructure for platforms and related burdens and costs are discussed in Section IX(B)(2)(d)(i), supra. For reporting sides, the required infrastructure and related burdens and costs are already accounted for in the Regulation SBSR Adopting Release, Section XXI(B)(4). The additional burdens discussed in this paragraph related to the ability to capture the additional specific data elements, as would be required by proposed Rule 901(a)(3), would be incremental burdens that are in addition to the previously established infrastructure burdens and costs.

315 The Commission preliminarily estimates that the additional burdens would be: [(Sr. Programmer (5 hours) + Sr. Systems Analyst (5 hours)) = 10 burden hours (development of the ability to capture transaction information); (Sr. Programmer (3 hours) + Sr. Systems Analyst (3 hours)) = 6 burden hours (implementation of reporting mechanism)]. The total one-time burden associated with the amendments to 901(a) would be 16 burden hours per platform and reporting side for a total one-time burden of 4960 hours (16 x 310 (300 reporting sides + 10 platforms)).

316 The Commission preliminarily estimates that the additional burdens would be: [(Sr. Programmer (5 hours) + Sr. Systems Analyst (5 hours)) = 10 burden hours (maintenance of transaction capture system); (Sr. Programmer (1 hour) + Sr. Systems Analyst (1 hour)) = 2 burden hours (maintenance of reporting mechanism)]. The total ongoing burden associated with the proposed amendments to Rule 901(a) would be 12 burden hours per platform and reporting side for a total ongoing burden of 3,720 hours (12 x 310 (300 reporting sides + 10 platforms)).

As explained in Section VIII of the Regulation SBSR Adopting Release and Section III, supra, bunched order executions and allocations must be reported to a registered SDR pursuant to Rule 901(a). The Regulation SBSR Adopting Release explains how Regulation SBSR applies to executed bunched orders that are reported pursuant to the reporting hierarchy in Rule 901(a)(2)(ii), as adopted. That release also explains how Regulation SBSR applies to the security-based swaps that result from allocation of an executed bunched order, if the resulting security-based swaps are uncleared. In Section III, supra, the Commission explained how Regulation SBSR, as adopted and as proposed to be amended by this release, would apply to a platform-executed bunched order that will be submitted to clearing, and the security-based swaps that result from the allocation of any bunched order execution, if the resulting security-based swaps are cleared. The Commission included in its estimates of the number of reportable events in the Regulation SBSR Adopting Release security-based swaps that result from the allocation of bunched order executions that would be submitted to clearing, if the resulting security-based swaps are cleared. Thus, there is no burden associated with bunched order executions and allocations that has not already been taken into account.

iv. Prime Brokerage Transactions

The Commission preliminarily believes that in a prime brokerage transaction the customer/executing dealer transaction is a security-based swap that must be reported pursuant to Rule 901(a)(2)(ii), as adopted. The Commission further preliminarily believes that the prime broker/customer and prime broker/executing dealer transactions also are security-based swaps that must be reported pursuant to Rule 901(a)(2)(ii). In this release, the Commission clarifies that prime brokerage transactions were included in the estimates of security-based swap transactions that are required to be reported, and as a result, do not represent any new burdens.[317]

e. Recordkeeping Requirements

Apart from the duty to report certain transaction information to a registered SDR, the Commission does not believe that Rule 901 would result in any recordkeeping requirement for platform and reporting sides. As is stated in the SDR Adopting Release, Rule 13n-5(b)(4) under the Exchange Act requires an SDR to maintain the transaction data and related identifying information that it collects for not less than five years after the applicable security-based swap expires, and historical positions for not less than five years.[318] Accordingly, security-based swap transaction reports received by a registered SDR pursuant to Rule 901 would be required to be retained by the registered SDR for not less than five years after the applicable security-based swap expires. The Commission does not believe that reporting of security-based swap transactions by platforms or registered clearing agencies—or the inclusion of two additional data elements—would have any impact on the PRA burdens of registered SDRs as detailed in the SDR Adopting Release.

f. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

g. Confidentiality of Responses to Collection of Information

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317 As is discussed in Section VIII(D)(6), supra, the Commission does not believe that the interpretive guidance would create any new duties. As a result, the Commission does not believe that there would be any burdens or any additional costs or benefits beyond those already considered in the Regulation SBSR Adopting Release. The Commission's estimates of the number of reportable events included all legs of prime brokerage transactions. See supra note 276.

318 See SDR Adopting Release, Section VI(E)(4).

A registered SDR, pursuant to Sections 13(n)(5) of the Exchange Act and Rules 13n-4(b)(8) and 13n-9 thereunder, is required to maintain the privacy of the security-based swap information it receives. For the majority of security-based swap transactions, the information collected pursuant to Rule 901(c) by a registered SDR will be publicly disseminated. However, certain security-based swaps are not subject to Rule 902's public dissemination requirement; therefore, information about these transactions will not be publicly available. In addition, for all security-based swaps, the information collected pursuant to Rule 901(d) is for regulatory purposes only and will not be widely available to the public. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.

3. Rule 901—Aggregate Total PRA Burdens and Costs

Based on the foregoing, the Commission estimates the following aggregate total PRA burdens and costs, by category of entity, resulting from Rule 901, as adopted and as proposed to be amended herein.

a. For Platforms

As discussed above, the Regulation SBSR Adopting Release, the Commission estimated burdens and costs for reporting sides under Rule 901. The Commission estimated that Rule 901, as adopted, will impose an estimated total first-year burden of approximately 1,394 hours[319] per reporting side for a total first-year burden of 418,200 hours for all reporting sides.[320] The Commission estimated that Rule 901, as adopted, will impose ongoing annualized aggregate

[319] See Regulation SBSR Adopting Release, Section XXI(B).

[320] See id.

burdens of approximately 687 hours[321] per reporting side for a total aggregate annualized cost of 206,100 hours for all reporting sides.[322] The Commission further estimated that Rule 901, as adopted, will impose initial and ongoing annualized dollar cost burdens of $201,000 per reporting side, for total aggregate initial and ongoing annualized dollar cost burdens of $60,300,000.[323]

The Commission preliminarily believes that platforms would have a first-year burden of 1,361 hours per platform, for a total first-year burden of 13,610 hours under proposed Rule 901(a)(1).[324] The Commission also preliminarily estimates that proposed Rule 901(a)(1) would impose ongoing annualized aggregate burdens of approximately 654 hours[325] per platform for a total aggregate annualized burden of 6,540 hours for all platforms.[326] The Commission further preliminarily estimates that the proposed Rule 901(a)(1) would impose initial and ongoing annualized dollar cost burdens of $201,000 per platform,[327] for total aggregate initial and ongoing annualized dollar cost burdens of $2,010,000.[328]

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321 See id.

322 See id.

323 See id.

324 The Commission derived its estimate from the following: (1,361 hours per platform x 10 platforms) = 13,610 hours.

325 See Cross-Border Proposing Release, 78 FR at 31112-15.

326 The Commission derived its estimate from the following: (654 hours per platform x 10 platforms) = 6,540 hours.

327 This figure is based on the sum of per-entity estimates for connectivity to SDRs for data reporting, as follows: [($100,000 hardware- and software-related expenses, including necessary back-up and redundancy, per SDR connection) x (2 SDR connections per platform)] + [($250/gigabyte of storage capacity) x (4 gigabytes of storage capacity)] = $201,000.

328 The Commission derived its estimate from the following: ($201,000 per platform x 10 platforms) = $2,010,000. See also Cross-Border Proposing Release, 78 FR at 31112-15.

The Commission preliminarily estimates that the proposed amendments to Rule 901(a) would result in platforms having a total burden of 600 hours attributable to the reporting of security-based swaps to registered SDRs over the course of a year, or 60 hours per platform.

The Commission preliminarily believes that the additional one-time burden related to the development of the ability to capture the relevant transaction information, required by proposed Rule 901(a)(3), would be 10 burden hours and the additional one-time burden related to the implementation of a reporting mechanism would be 6 burden hours, per platform. The Commission preliminarily believes that the additional ongoing burden related to the development of the ability to capture the relevant transaction information would be 10 burden hours and the additional ongoing burden related to the maintenance of the reporting mechanism would be 2 burden hours, per platform. As a result, the Commission estimates that the total first-year burden would be 28 hours and the ongoing annual burden would be 12 hours.

As a result of these proposed requirements, the Commission preliminarily estimates that platforms would have a total first-year burden of 14,490 hours, or 1,449 hours per platform.[329] In addition, the Commission preliminarily estimates that platforms would have an ongoing annual burden of 7,260 hours, or 726 hours per platform.[330] The Commission also preliminarily estimates that each platform would have connectivity costs of $201,000 in the first year and each year thereafter.

b. For Registered Clearing Agencies

329 The Commission derived its estimate from the following: ((1,361 hours + 60 hours + 28) per platform x 10 platforms) = 14,490 hours.

330 The Commission derived its estimate from the following: ((654 hours + 60 hours + 12 hours) per platform x 10 platforms) = 7,260 hours.

The Commission preliminarily believes that registered clearing agencies would have a first-year burden of 1,361 hours per registered clearing agency, for a total first-year burden of 5,444 hours under Rule 901 (before including the burdens related to the reporting of individual security-based swap transactions).[331] The Commission also preliminarily estimates that Rule 901 would impose ongoing annualized aggregate burdens of approximately 654 hours[332] per registered clearing agency for a total aggregate annualized burden of 2,616 hours for all registered clearing agencies.[333] The Commission further preliminarily estimates that the proposed Rule 901(a)(2)(i) would impose initial and ongoing annualized dollar cost burdens of $201,000 per registered clearing agency,[334] for total aggregate initial and ongoing annualized dollar cost burdens of $804,000.[335]

The Commission preliminarily estimates that the proposed Rule 901(a)(2)(i) would result in registered clearing agencies having a total burden of 1,250 hours attributable to the initial reporting of security-based swaps to registered SDRs over the course of a year, or 312.5 hours per registered clearing agency. The Commission preliminarily estimates that the proposed amendments to Rule 901(a) would result in registered clearing agencies having a total burden of

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331 The Commission derived its estimate from the following: (1,361 hours per registered clearing agency x 4 registered clearing agencies) = 5,444 hours.

332 See supra note 302

333 The Commission derived its estimate from the following: (654 hours per reporting entity x 4 registered clearing agencies) = 2,616 hours.

334 This figure is based on the sum of per-reporting entity estimates for connectivity to SDRs for data reporting, as follows: [($100,000 hardware- and software-related expenses, including necessary back-up and redundancy, per SDR connection) x (2 SDR connections per reporting entity)] + [($250/gigabyte of storage capacity) x (4 gigabytes of storage capacity)] = $201,000.

335 The Commission derived its estimate from the following: ($201,000 per reporting side x 4 registered clearing agencies) = $804,000. See also Cross-Border Proposing Release, 78 FR at 31112-15.

3,150 hours attributable to the reporting of life cycle events by registered clearing agencies to registered SDRs under Rule 901(e) over the course of a year, or 787.5 hours per registered clearing agency. The Commission preliminarily believes that the proposed amendments would result in a total annual burden on registered clearing agencies to report security-based swaps and life cycle events of 4,400 burden hours, or 1,100 hours per registered clearing agency.

The Commission preliminarily estimates that, as a result of these proposed requirements, registered clearing agencies would have a total first-year burden of 9,844 hours, or 2,461 hours per registered clearing agency.[336] In addition, the Commission preliminarily estimates that registered clearing agencies would have an ongoing annual burden of 7,328 hours, or 1,754 hours per registered clearing agency.[337] The Commission also preliminarily estimates that each registered clearing agency would have connectivity costs of $201,000 in the first year and each year thereafter.[338]

c. For Reporting Sides

The Commission preliminarily believes that, as a result of proposed Rule 901(a)(3), reporting sides would have a first-year burden of 1,394 hours per reporting side, for a total first-year burden of 418,200 hours.[339] The Commission also preliminarily estimates that proposed Rule 901(a)(3) would impose ongoing annualized aggregate burdens of approximately 687

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336 The Commission derived its estimate from the following: ((1,361 hours + 312.5 hours + 787.5 hours) per registered clearing agency x 4 registered clearing agencies) = 9,844 hours.

337 The Commission derived its estimate from the following: ((654 hours + 312.5 hours + 787.5 hours) per registered clearing agency x 4 registered clearing agencies) = 7,016 hours.

338 See supra note 334.

339 The Commission derived its estimate from the following: (1,394 hours per reporting side x 300 reporting sides) = 418,200 hours.

hours[340] per reporting side, for a total aggregate annualized burden of 206,100 hours for all reporting sides.[341] The Commission further preliminarily estimates that the proposed Rule 901(a)(3) would impose initial and ongoing annualized dollar cost burdens of $201,000 per registered clearing agency,[342] for total aggregate initial and ongoing annualized dollar cost burdens of $60,300,000.[343]

As discussed above, the Commission estimated that Rule 901(a), as previously adopted, will result in reporting sides having a total burden of 2,500 hours attributable to the reporting of security-based swaps to registered SDRs under Rules 901(c) and 901(d) over the course of a year, or 8.33 hours per reporting side. The Commission further estimated that Rule 901(a), as previously adopted, would result in reporting sides having a total burden of 7,500 hours attributable to the reporting of life cycle events to registered SDRs under Rule 901(e) over the course of a year, or 25 hours per reporting side. As a result, the Commission stated its belief that the total burden associated with the reporting of security-based swaps under Rules 901(c) and 901(d), along with the reporting of life cycle events under Rule 901(e), would be 10,000 hours, or 33.33 hours per reporting side.

340 See Cross-Border Proposing Release, 78 FR at 31112-15.

341 The Commission derived its estimate from the following: (687 hours per reporting side x 300 reporting sides) = 206,100 hours.

342 This figure is based on the sum of per-reporting side estimates for connectivity to SDRs for data reporting, as follows: [($100,000 hardware- and software-related expenses, including necessary back-up and redundancy, per SDR connection) x (2 SDR connections per reporting side)] + [($250/gigabyte of storage capacity) x (4 gigabytes of storage capacity)] = $201,000.

343 The Commission derived its estimate from the following: ($201,000 per reporting side x 300 reporting sides) = $60,300,000. See also Cross-Border Proposing Release, 78 FR at 31112-15.

The Commission preliminarily believes that the additional one-time burden related to the development of the ability to capture the relevant transaction information, required by proposed Rule 901(a)(3), would be 10 burden hours and the additional one-time burden related to the implementation of a reporting mechanism would be 6 burden hours, per reporting side. The Commission preliminarily believes that the additional ongoing burden related to the development of the ability to capture the relevant transaction information would be 10 burden hours and the additional ongoing burden related to the maintenance of the reporting mechanism would be 2 burden hours, per reporting side. As a result, the Commission estimates that the total first-year burden would be 28 hours and the ongoing annual burden would be 12 hours.

As a result of these proposed requirements, the Commission preliminarily estimates that reporting sides would have a total first-year burden of 436,599 hours, or 1,455.33 hours per reporting side.[344] In addition, the Commission preliminarily estimates that reporting sides would have an ongoing annual burden of 219,699 hours, or 732.33 hours per reporting side.[345] The Commission also preliminarily estimates that each reporting side would have connectivity costs of $201,000 in the first year and each year thereafter.

C. Correction of Errors in Security-Based Swap Information—Rule 905

1. Rule 905—As Adopted

Rule 905, as adopted, establishes procedures for correcting errors in reported and disseminated security-based swap information. Under Rule 905(a)(1), where a side that was not the reporting side for a security-based swap transaction discovers an error in the information

344 The Commission derived its estimate from the following: ((1,394 hours + 33.33 hours + 28) per reporting sides x 300 reporting sides) = 436,599 hours.

345 The Commission derived its estimate from the following: ((687 hours + 33.33 hours + 12 hours) per reporting side x 300 reporting sides) = 219,699 hours.

reported with respect to such security-based swap, the counterparty must promptly notify the reporting side of the error. Under Rule 905(a)(2), as adopted, where a reporting side for a security-based swap transaction 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 must promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction. The amended report must be submitted to the registered SDR in a manner consistent with the policies and procedures of the registered SDR required pursuant to Rule 907(a)(3).

Rule 905(b), as adopted, sets forth the duties of a registered SDR relating to corrections. If the registered SDR either discovers an error in a transaction on its system or receives notice of an error from a reporting side, Rule 905(b)(1) requires the registered SDR to verify the accuracy of the terms of the security-based swap and, following such verification, promptly correct the erroneous information contained in its system. Rule 905(b)(2) further requires that, if such erroneous information relates to a security-based swap that the registered SDR previously disseminated and falls into any of the categories of information enumerated in Rule 901(c), the registered SDR must 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. .

In the Regulation SBSR Adopting Release, the Commission stated its belief that, with respect to reporting sides, Rule 905(a) will impose an initial, one-time burden associated with designing and building the reporting side's reporting system to be capable of submitting amended security-based swap transactions to a registered SDR. In the Regulation SBSR Adopting Release, for reporting sides, the Commission estimated that Rule 905(a) will impose an initial (first-year) aggregate burden of 15,015 hours, which is 50.0 burden hours per reporting side,[346] and an ongoing aggregate annualized burden of 7,035 hours, which is 23.5 burden hours per reporting side.[347]

With respect to the actual submission of amended transaction reports required under Rule 905(a)(2), the Commission stated its belief that this will not result in a material burden because this will be done electronically though the reporting system that the reporting side must develop and maintain to comply with Rule 901. The overall burdens associated with such a reporting system are addressed in the Commission's analysis of Rule 901.

With regard to non-reporting-side participants, the Commission stated its belief that Rule 905(a) will impose an initial and ongoing burden associated with promptly notifying the relevant reporting entity after discovery of an error as required under Rule 905(a)(1). In the Regulation SBSR Adopting Release, the Commission estimated that the annual burden will be 998,640 hours, which corresponds to 208.05 burden hours per non-reporting-side participant.[348] This figure was based on the Commission's estimate of (1) 4,800 non-reporting-side participants; and (2) 1 transaction per day per non-reporting-side participant.[349] The burdens of Rule 905 on reporting sides and non-reporting-side participants will be reduced to the extent that complete and accurate information is reported to registered SDRs in the first instance pursuant to Rule 901.

Rule 905(b) requires a registered SDR to develop protocols regarding the reporting and correction of erroneous information. In the Regulation SBSR Adopting Release, however, the

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346 See Regulation SBSR Adopting Release, Section XXI(F).

347 See id.

348 See id.

349 See id.

Commission stated its belief that this duty would represent only a minor extension of other duties for which the Commission is estimating burdens, and consequently, will not impose substantial additional burdens on a registered SDR. The Commission noted that a registered SDR will be required to have the ability to collect and maintain security-based swap transaction reports and update relevant records under the rules adopted in the SDR Adopting Release. Likewise, the Commission noted that a registered SDR must have the capacity to disseminate additional, corrected security-based swap transaction reports under Rule 902. The Commission concluded that the burdens associated with Rule 905—including systems development, support, and maintenance—are addressed in the Commission's analysis of those other rules and, thus, the Commission stated its belief that Rule 905(b) will impose only an incremental additional burden on registered SDRs. In the Regulation SBSR Adopting Release, the Commission estimated that developing and publicly providing the necessary procedures will impose on each registered SDR an initial one-time burden on each registered SDR of approximately 730 burden hours.[350] The Commission further estimated that to review and update such procedures on an ongoing basis will impose an annual burden on each SDR of approximately 1,460 burden hours.[351]

Accordingly, in the Regulation SBSR Adopting Release, the Commission estimated that the initial (first-year) aggregate annualized burden on registered SDRs under Rule 905 will be 21,900 burden hours, which corresponds to 2,190 burden hours for each registered SDR.[352] The Commission further estimated that the ongoing aggregate annualized burden on registered SDRs

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[350] See id.

[351] See id.

[352] See id.

under Rule 905 will be 14,600 burden hours, which corresponds to 1,460 burden hours for each registered SDR.[353]

2. Rule 905—Proposed Amendments

Rule 905, as adopted, establishes a mechanism for reporting corrections of previously submitted security-based swap transaction information and assigns certain duties to the counterparties to a transaction and to the registered SDR that holds the transaction. In light of the Commission's proposed amendment to Rule 901(a) to require a platform to report a security-based swap that is executed on the platform and that will be submitted to clearing, the Commission is proposing to make conforming changes to Rule 905(a) to require the person having the duty to report the initial transaction to correct previously reported erroneous information if it discovers an error. Thus, under the proposed amendments to Rule 905(a), the person having the duty to report a security-based swap, whether a counterparty or a platform, would be required to correct previously reported erroneous information with respect to that security-based swap if it discovers an error.

Certain provisions of Rule 905 of Regulation SBSR contain "collection of information requirements" within the meaning of the PRA. The title of this collection is "Rule 905—Correction of Errors in Security-Based Swap Information."

a. Summary of Collection of Information

Rule 905 establishes duties for security-based swap counterparties and registered SDRs to correct errors in information that previously has been reported.

Duty to correct. Under the proposed amendment to Rule 905(a)(1), where a person that was not the reporting side for a security-based swap transaction discovers an error in the

353 See id.

information reported with respect to such security-based swap, that person must promptly notify the person having the duty to report the security-based swap of the error. Under the proposed amendment to Rule 905(a)(2), where a 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 must promptly submit to the entity to which the security-based swap was originally reported an amended report pertaining to the original transaction. The amended report must be submitted to the registered SDR in a manner consistent with the policies and procedures of the registered SDR required pursuant to Rule 907(a)(3), as adopted. As a result the proposed amendments to Rule 905, a platform would have the duty to report if it discovers an error.

b. Proposed Use of Information

The security-based swap transaction information required to be reported under the proposed amendments to Rule 905 would be used by registered SDRs, its participants, the Commission, and other relevant authorities. Participants will be able to use such information to evaluate and manage their own risk positions and satisfy their duties to report corrected information to a registered SDR. A registered SDR will need the required information to correct security-based swap transaction records, in order to maintain an accurate record of a participant's positions as well as to disseminate corrected information. The Commission and other relevant authorities will need the corrected information to have an accurate understanding of the market for surveillance and oversight purposes.

c. Respondents

Rule 905, as proposed to be amended, would apply to platforms. As noted above, the Commission estimates that there will be approximately 10 platforms that incur a duty to report security-based swap transactions pursuant to Rule 901.

d. Total Initial and Annual Reporting and Recordkeeping Burdens

In the Regulation SBSR Adopting Release, the Commission estimated that Rule 905(a), as adopted, will impose an initial, one-time burden associated with designing and building the reporting side's reporting system to be capable of submitting amended security-based swap transactions to a registered SDR.[354] The Commission stated its belief that designing and building appropriate reporting system functionality to comply with Rule 905(a)(2), as adopted, will be a component of, and represent an incremental "add-on" to, the cost to build a reporting system and develop a compliance function as required under Rule 901, as adopted.[355] Specifically, the Commission estimated that, based on discussions with industry participants, the incremental burden would be equal to 5% of the one-time and annual burdens associated with designing and building a reporting system that is in compliance with Rule 901, plus 10% of the corresponding one-time and annual burdens associated with developing the reporting side's overall compliance program required under Rule 901.[356]

The Commission preliminarily believes that the above methodology is applicable to error reporting by platforms under the proposed amendments to Rule 905(a). Thus, for platforms, the Commission estimates that the proposed amendments to Rule 905(a) would impose an initial

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354 See id.

355 See id.

356 See id.

(first-year) aggregate burden of 500.5 hours, which is 50.0 burden hours per platform,[357] and an ongoing aggregate annualized burden of 234.5 hours, which is 23.5 burden hours per platform.[358]

e. Recordkeeping Requirements

Security-based swap transaction reports received pursuant to Rule 905 are subject to Rule 13n-5(b)(4) under the Exchange Act. This rule requires an SDR to maintain the transaction data and related identifying information for not less than five years after the applicable security-based swap expires and historical positions for not less than five years.

With respect to corrected information that is disseminated by a registered SDR in compliance with Rule 905(b)(2), Rule 13n-7(b) under the Exchange Act requires an SDR to keep and preserve at least one copy of all documents, including all policies and procedures required by the Exchange Act and the rules or regulations thereunder, for a period of not less than five years, the first two years in a place that is immediately available. This requirement encompasses amended security-based swap transaction reports disseminated by the registered SDR. The amendments to Rule 905(a) clarify the duties of counterparties and other persons to report corrected information to a registered SDR. The requirement that a registered SDR disseminate corrected information would not change. The Commission preliminarily believes that the number of corrections reported to the registered SDR would not be impacted by the proposed

357 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [(((172 burden hours for one-time development of reporting system) x (0.05)) + ((33 burden hours annual maintenance of reporting system) x (0.05)) + ((180 burden hours one-time compliance program development) x (0.1)) + ((218 burden hours annual support of compliance program) x (0.1))) x (10 platforms)] = 500.5 burden hours, which is 50 burden hours per reporting side. See also Regulation SBSR Adopting Release, Section XXI(F).

358 See Regulation SBSR Proposing Release, 75 FR at 75254-55. This figure is calculated as follows: [(((33 burden hours annual maintenance of reporting system) x (0.05)) + ((218 burden hours annual support of compliance program) x (0.1))) x (10 platforms)] = 234.5 burden hours, which is 23.5 burden hours per platform.

amendments. As a result, the Commission preliminarily believes that the burdens under Rule 905(b)(2) would not be impacted by the proposed amendments to Rule 905(a).

f. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

g. Confidentiality of Responses to Collection of Information

Information collected pursuant to the proposed amendments to Rule 905 would be widely available to the extent that it corrects information previously reported pursuant to Rule 901(c) and incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to Rule 902. Most of the information required under Rule 902 will be widely available to the public to the extent it is incorporated into security-based swap transaction reports that are publicly disseminated by a registered SDR pursuant to Rule 902. However, Rule 902(c) prohibits public dissemination of certain kinds of transactions and certain kinds of transaction information. An SDR, pursuant to Sections 13(n)(5) of the Exchange Act and Rules 13n-4(b)(8) and Rule 13n-9 thereunder, is required to maintain the privacy of this security-based swap information. To the extent that the Commission receives confidential information pursuant to this collection of information, such information will be kept confidential, subject to the provisions of applicable law.

3. Rule 905—Aggregate Total PRA Burdens and Costs

The Commission estimates the following aggregate total PRA burdens and costs, by category of entity, resulting from the proposed amendments to Rule 905.

a. For Platforms

For platforms, the Commission estimates that the proposed amendments to Rule 905(a) would impose an initial (first-year) aggregate burden of 500.5 hours, which is 50.0 burden hours per platform,[359] and an ongoing aggregate annualized burden of 234.5 hours, which is 23.5 burden hours per platform.[360]

For reporting sides, the Commission estimates that Rule 905(a), as adopted, will impose an initial (first-year) aggregate burden of 15,015 hours, which is 50.0 burden hours per reporting side,[361] and an ongoing aggregate annualized burden of 7,035 hours, which is 23.5 burden hours per reporting side.[362]

b. For Non-Reporting Sides

For non-reporting sides, the Commission estimates that the annual burden will be 998,640 hours, which corresponds to 208.05 burden hours per non-reporting-side participant.[363]

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359 This figure is calculated as follows: [(((172 burden hours for one-time development of reporting system) x (0.05)) + ((33 burden hours annual maintenance of reporting system) x (0.05)) + ((180 burden hours one-time compliance program development) x (0.1)) + ((218 burden hours annual support of compliance program) x (0.1))) x (10 platforms)] = 500.5 burden hours, which is 50 burden hours per reporting side.

360 This figure is calculated as follows: [(((33 burden hours annual maintenance of reporting system) x (0.05)) + ((218 burden hours annual support of compliance program) x (0.1))) x (10 platforms)] = 234.5 burden hours, which is 23.5 burden hours per platform.

361 This figure is calculated as follows: [(((172 burden hours for one-time development of reporting system) x (0.05)) + ((33 burden hours annual maintenance of reporting system) x (0.05)) + ((180 burden hours one-time compliance program development) x (0.1)) + ((218 burden hours annual support of compliance program) x (0.1))) x (300 reporting sides)] = 15,015 burden hours, which is 50 burden hours per reporting side. The burden hours for annual maintenance of the reporting system has been updated to reflect new information on the number of reportable events.

362 This figure is calculated as follows: [(((33 burden hours annual maintenance of reporting system) x (0.05)) + ((218 burden hours annual support of compliance program) x (0.1))) x (300 reporting sides)] = 7,035 burden hours, which is 23.5 burden hours per reporting side. The burden hours for annual maintenance of the reporting system has been updated to reflect new information on the number of reportable events.

363 This figure is based on the following: [(1.14 error notifications per non-reporting-side participant per day) x (365 days/year) x (Compliance Clerk at 0.5 hours/report) x (4,800 non-reporting-side participants)] = 998,640 burden hours, which corresponds to 208.05 burden hours per non-reporting-side participant.

c. For Registered SDRs

For registered SDRs, the Commission estimates that the initial (first-year) aggregate annualized burden on registered SDRs under Rule 905, as adopted and as proposed to be amended herein, would be 21,900 burden hours, which corresponds to 2,190 burden hours for each registered SDR.[364] The Commission further estimates that the ongoing aggregate annualized burden on registered SDRs under Rule 905, as adopted and as proposed to be amended herein, would be 14,600 burden hours, which corresponds to 1,460 burden hours for each registered SDR.[365]

D. Other Duties of Participants—Rule 906

1. Rule 906—As Adopted

Rule 906(a), as adopted, sets forth a procedure designed to ensure that a registered SDR obtains relevant UICs for both sides of a security-based swap, not just of the reporting side. Rule 906(a) requires a registered SDR to identify any security-based swap reported to it for which the registered SDR does not have a counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID of each counterparty. Rule 906(a) further requires the registered SDR, once a day, to send a report to each participant identifying, for each security-based swap to which that participant is a counterparty, the security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID. A participant that

364 This figure is based on the following: [(730 burden hours to develop protocols) + (1,460 burden hours annual support)) x (10 registered SDRs)] = 21,900 burden hours, which corresponds to 2,190 burden hours per registered SDR.

365 This figure is based on the following: [(1,460 burden hours annual support) x (10 registered SDRs)] = 14,600 burden hours, which corresponds to 1,460 burden hours per registered SDR.

receives such a report must provide the missing ID information to the registered SDR within 24 hours.

Rule 906(b) requires each participant of a registered SDR to provide the registered SDR with information sufficient to identify the participant's ultimate parent(s) and any affiliate(s) of the participant that are also participants of the registered SDR.

Rule 906(c) requires each participant that is a registered security-based swap dealer or registered major security-based swap participant to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations in a manner consistent with Regulation SBSR. In addition, Rule 906(c) requires each such participant to review and update its policies and procedures at least annually.

For Registered SDRs. Rule 906(a) requires a registered SDR, once a day, to send a report to each of its participants identifying, for each security-based swap to which that participant is a counterparty, any security-based swap(s) for which the registered SDR lacks counterparty ID and (if applicable) broker ID, trading desk ID, and trader ID. In the Regulation SBSR Adopting Release, the Commission estimated that there will be a one-time, initial burden of 112 burden hours for a registered SDR to create a report template and develop the necessary systems and processes to produce a daily report required by Rule 906(a).[366] Further, the Commission estimated that there will be an ongoing annualized burden of 308 burden hours for a registered SDR to generate and issue the daily reports, and to enter into its systems the ID information supplied by participants in response to the daily reports.[367]

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366 See Regulation SBSR Adopting Release, Section XXI(G).

367 See id.

Accordingly, in the Regulation SBSR Adopting Release, the Commission estimated that the initial aggregate annualized burden for registered SDRs under Rule 906(a) will be 4,200 burden hours for all SDR respondents, which corresponds to 420 burden hours per registered SDR.[368] The Commission estimated that the ongoing aggregate annualized burden for registered SDRs under Rule 906(a) will be 3,080 burden hours, which corresponds to 308 burden hours per registered SDR.[369]

For Participants. Rule 906(a) requires any participant of a registered SDR that receives a report from that registered SDR to provide the missing UICs to the registered SDR within 24 hours. Because all SDR participants will likely be the non-reporting side for at least some transactions to which they are counterparties, in the Regulation SBSR Adopting Release, the Commission stated its belief that all participants will be impacted by Rule 906(a). In the Regulation SBSR Adopting Release, the Commission estimated that the initial and ongoing annualized burden under Rule 906(a) for all participants will be 199,728 burden hours, which corresponds to 41.6 burden hours per participant.[370] This figure is based on the Commission's estimates of (1) 4,800 participants; and (2) approximately 1.14 transactions per day per participant.[371]

Rule 906(b) requires every participant to provide the registered SDR an initial parent/affiliate report and subsequent reports, as needed. In the Regulation SBSR Adopting Release, the Commission estimated that there will be 4,800 participants, that each participant will connect to two registered SDRs on average, and that each participant will submit two reports

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368 See id.

369 See id.

370 See id.

371 See id.

each year.[372] Accordingly, the Commission estimated that the initial and ongoing aggregate annualized burden associated with Rule 906(b) will be 9,600 burden hours, which corresponds to 2 burden hours per participant.[373] The aggregate burden represents an upper estimate for all participants; the actual burden will likely decrease because certain larger participants are likely to have multiple affiliates, and one member of the group could report ultimate parent and affiliate information on behalf of all of its affiliates at the same time.

Rule 906(c) requires each participant that is a registered security-based swap dealer or registered major security-based swap participant (each, a "covered participant") to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with applicable security-based swap transaction reporting obligations. Rule 906(c) also requires the review and updating of such policies and procedures at least annually. In the Regulation SBSR Adopting Release, the Commission estimated that the one-time, initial burden for each covered participant to adopt written policies and procedures as required under Rule 906(c) will be approximately 216 burden hours.[374] As discussed in the Regulation SBSR Adopting Release,[375] this figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, in the Regulation SBSR Adopting Release, the Commission estimated the burden of maintaining such policies and procedures, including a full review at least annually, as required by Rule 906(c), will be

372 See id. The Commission estimates that, during the first year, each participant will submit an initial report and one update report and, in subsequent years, will submit two update reports.

373 See id.

374 See id.

375 See id.

approximately 120 burden hours for each covered participant.[376] This figure includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing. Accordingly, the Commission estimated that the initial aggregate annualized burden associated with Rule 906(c) will be 18,480 burden hours, which corresponds to 336 burden hours per covered participant.[377] In the Regulation SBSR Adopting Release, the Commission estimated that the ongoing aggregate annualized burden associated with Rule 906(c) will be 6,600 burden hours, which corresponds to 120 burden hours per covered participant.[378]

Therefore, in the Regulation SBSR Adopting Release, the Commission estimated that the total initial aggregate annualized burden associated with Rule 906 will be 230,370 burden hours,[379] and the total ongoing aggregate annualized burden will be 217,370 burden hours for all participants.[380]

2. Rule 906—Proposed Amendments

a. Rule 906(b)—Proposed Amendments

The Commission is proposing to revise Rule 906(b) to indicate that reporting obligations under Rule 906(b) would not attach to participants that are platforms or registered clearing agencies. Under the proposed amendments to Rule 901(a) and 901(e), platforms and registered clearing agencies would have the duty to report certain security-based swaps and therefore would become participants of registered SDRs. Rule 906(b), as adopted, requires each participant of a

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376 See id.

377 See id.

378 See id.

379 See id.

380 See id.

registered SDR to provide the registered SDR information sufficient to identify its ultimate parent(s) and any affiliate(s) of the participant that also are participants of the registered SDR, using ultimate parent IDs and participant IDs. The Commission does not believe that this change, which would relieve platforms and registered clearing agencies of the requirement to provide ultimate parent IDs and participant IDs, would affect the existing burdens being placed on platforms and registered clearing agencies.

b. Rule 906(c)—Proposed Amendments

i. Summary of Collection of Information

The proposed amendments to Rule 906(c) would require each participant that is a registered clearing agency or platform to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with applicable security-based swap transaction reporting obligations. Each such participant also would be required to review and update its policies and procedures at least annually.

ii. Proposed Use of Information

The policies and procedures required under the proposed amendments to Rule 906(c) would be used by participants to aid in their compliance with Regulation SBSR, and also used by the Commission as part of its ongoing efforts to monitor and enforce compliance with the federal securities laws, including Regulation SBSR, through, among other things, examinations and inspections.

iii. Respondents

The proposed amendments to Rule 906(c) would result in the rule applying to registered clearing agencies and platforms. The Commission estimates that there will be 4 registered clearing agencies and 10 platforms.

iv. Total Initial and Annual Reporting and Recordkeeping Burdens

For Registered Clearing Agencies and Platforms. The proposed amendment to Rule 906(c) would require each registered clearing agency or platform to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with applicable security-based swap transaction reporting obligations. The proposed amendment to Rule 906(c) also would require each registered clearing agency and platform to review and update such policies and procedures at least annually. The Commission estimates that the one-time, initial burden for each registered clearing agency or platform to adopt written policies and procedures as required under the proposed amendments to Rule 906(c) would be similar to the Rule 906(c) burdens discussed in the Regulation SBSR Adopting Release for covered participants, and would be approximately 216 burden hours per registered clearing agency or platform.[381] As discussed in the Regulation SBSR Proposing Release,[382] this figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, the Commission estimates the burden of maintaining such policies and procedures, including a full review at least annually will be approximately 120 burden hours for each registered clearing agency or platform.[383] This figure includes an estimate of hours

[381] See Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Sr. Programmer at 40 hours) + (Compliance Manager at 40 hours) + (Compliance Attorney at 40 hours) + (Compliance Clerk at 40 hours) + (Sr. Systems Analyst at 32 hours) + (Director of Compliance at 24 hours)] = 216 burden hours per registered clearing agency or platform.

[382] See Regulation SBSR Proposing Release, 75 FR at 75257.

[383] See id. This figure is based on the following: [(Sr. Programmer at 8 hours) + (Compliance Manager at 24 hours) + (Compliance Attorney at 24 hours) + (Compliance

related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing. Accordingly, the Commission estimates that the initial aggregate annualized burden associated with the proposed amendments to Rule 906(c) would be 4,704 burden hours, which corresponds to 336 burden hours per registered clearing agency or platform.[384] The Commission estimates that the ongoing aggregate annualized burden associated with the proposed amendments to Rule 906(c) will be 1,680 burden hours, which corresponds to 120 burden hours per registered clearing agency or platform.[385]

v. Recordkeeping Requirements

The Commission has adopted recordkeeping rules for registered clearing agencies[386] and proposed recordkeeping rules for platforms.[387]

vi. Collection of Information is Mandatory

Each collection of information discussed above is mandatory.

vii. Confidentiality of Responses to Collection of Information

The collection of information required by the proposed amendments to Rule 906 would not be widely available. To the extent that the Commission receives confidential information

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Clerk at 24 hours) + (Sr. Systems Analyst at 16 hours) + (Director of Compliance at 24 hours)] = 120 burden hours per registered clearing agency or platform.

384 This figure is based on the following: [(216 + 120 burden hours) x (14 registered clearing agencies and platforms)] = 4,704 burden hours.

385 This figure is based on the following: [(120 burden hours) x (14 registered clearing agencies and platforms)] = 1,680 burden hours.

386 See Clearing Agency Standards Adopting Release.

387 See Securities Exchange Act Release No. 63825 (February 2, 2011), 76 FR 10948 (February 29, 2011) ("SB SEF Proposing Release").

pursuant this collection of information, such information will be kept confidential, subject to applicable law.

3. Rule 906—Aggregate Total PRA Burdens and Costs

Based on the foregoing, the Commission estimates the following aggregate total PRA burdens and costs, by category of entity, resulting from Rule 906, as adopted and as proposed to be amended herein.

a. For Platforms and Registered Clearing Agencies

The Commission estimates that the one-time, initial burden for each registered clearing agency or platform to adopt written policies and procedures as required under Rule 906(c), as adopted and as proposed to be amended herein, would be similar to the Rule 906(c) burdens discussed in the Regulation SBSR Adopting Release for covered participants, and would be approximately 216 burden hours per registered clearing agency or platform.[388] This figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, the Commission estimates the burden of maintaining such policies and procedures, including a full review at least annually, as required by Rule 906(c), would be approximately 120 burden hours for each registered clearing agency or platform.[389] This figure includes an estimate of hours related to reviewing existing policies and

388 This figure is based on the following: [(Sr. Programmer at 40 hours) + (Compliance Manager at 40 hours) + (Compliance Attorney at 40 hours) + (Compliance Clerk at 40 hours) + (Sr. Systems Analyst at 32 hours) + (Director of Compliance at 24 hours)] = 216 burden hours per registered clearing agency or platform.

389 This figure is based on the following: [(Sr. Programmer at 8 hours) + (Compliance Manager at 24 hours) + (Compliance Attorney at 24 hours) + (Compliance Clerk at 24 hours) + (Sr. Systems Analyst at 16 hours) + (Director of Compliance at 24 hours)] = 120 burden hours per registered clearing agency or platform.

procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing. Accordingly, the Commission estimates that the initial aggregate annualized burden associated with Rule 906(c), as adopted and as proposed to be amended herein, would be 4,704 burden hours, which corresponds to 336 burden hours per registered clearing agency or platform.[390] The Commission estimates that the ongoing aggregate annualized burden associated with Rule 906(c), as adopted and as proposed to be amended herein, would be 1,680 burden hours, which corresponds to 120 burden hours per registered clearing agency or platform.[391]

b. For Registered SDRs

The proposed amendments to Regulation SBSR discussed in this release would not modify any requirements in Rule 906(a), as adopted. Therefore, the Commission is not modifying its analysis of the burden that Rule 906(a), as adopted, will impose on registered SDRs.

c. For Participants

The Commission estimates that the initial and ongoing annualized burden under Rule 906(a) for all participants will be 199,728 burden hours, which corresponds to 41.6 burden hours per participant.[392] This figure is based on the Commission's estimates of (1) 4,800 participants; and (2) approximately 1.14 transactions per day per participant.[393]

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390 This figure is based on the following: [(216 + 120 burden hours) x (14 registered clearing agencies and platforms)] = 4,704 burden hours.

391 This figure is based on the following: [(120 burden hours) x (14 registered clearing agencies and platforms)] = 1,680 burden hours.

392 See Regulation SBSR Adopting Release, Section XXI(G). This burden was calculated using the same methodology as was used in the Regulation SBSR Proposing Release, updated to account for new estimates of the number of missing information reports resulting from updates in the number of reportable events. See Regulation SBSR

The Commission estimates that the initial and ongoing aggregate annualized burden associated with Rule 906(b), as adopted and as proposed to be amended herein, would be 9,600 burden hours, which corresponds to 2 burden hours per participant.[394]

The Commission estimates that the one-time, initial burden for each covered participant to adopt written policies and procedures as required under Rule 906(c), as adopted and as proposed to be amended herein, would be approximately 216 burden hours.[395] This figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary testing. In addition, the Commission estimates the burden of maintaining such policies and procedures, including a full review at least annually, as required by Rule 906(c), as adopted and as proposed to be amended herein, would be approximately 120 burden hours for each covered participant.[396] This figure includes an estimate of hours related to

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Proposing Release, 75 FR at 75256-57. This figure is based on the following: [(1.14 missing information reports per participant per day) x (365 days/year) x (Compliance Clerk at 0.1 hours/report) x (4,800 participants) = 199,728 burden hours, which corresponds to 47.5 burden hours per participant.

393 This figure is based on the following: [((2,000,000 estimated annual security-based swap transactions) / 4,800 participants)) / (365 days/year)] = 1.14, or approximately 1 transaction per day.

394 See Regulation SBSR Adopting Release, Section XXI(G). See also Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Compliance Clerk at 0.5 hours per report) x (2 reports/year/SDR connection) x (2 SDR connections/participant) x (4,800 participants)] = 9,600 burden hours, which corresponds to 2 burden hours per participant.

395 See Regulation SBSR Adopting Release, Section XXI(G). See also Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Sr. Programmer at 40 hours) + (Compliance Manager at 40 hours) + (Compliance Attorney at 40 hours) + (Compliance Clerk at 40 hours) + (Sr. Systems Analyst at 32 hours) + (Director of Compliance at 24 hours)] = 216 burden hours per covered participant.

396 See Regulation SBSR Adopting Release, Section XXI(G). See also Regulation SBSR Proposing Release, 75 FR at 75257. This figure is based on the following: [(Sr.

reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining internal controls systems, and performing necessary testing. Accordingly, the Commission estimates that the initial aggregate annualized burden associated with Rule 906(c), as adopted and as proposed to be amended herein, would be 18,480 burden hours, which corresponds to 336 burden hours per covered participant.[397] The Commission estimates that the ongoing aggregate annualized burden associated with Rule 906(c), as adopted and as proposed to be amended herein, would be 6,600 burden hours, which corresponds to 120 burden hours per covered participant.[398]

Therefore, the Commission estimates that the total initial aggregate annualized burden associated with Rule 906, as adopted and as proposed to be amended herein, would be 232,008 burden hours,[399] and the total ongoing aggregate annualized burden would be 219,008 burden hours for all participants.[400]

Programmer at 8 hours) + (Compliance Manager at 24 hours) + (Compliance Attorney at 24 hours) + (Compliance Clerk at 24 hours) + (Sr. Systems Analyst at 16 hours) + (Director of Compliance at 24 hours)] = 120 burden hours per covered participant.

397 See Regulation SBSR Adopting Release, Section XXI(G). This figure is based on the following: [(216 + 120 burden hours) x (55 covered participants)] = 18,480 burden hours.

398 See Regulation SBSR Adopting Release, Section XXI(G). This figure is based on the following: [(120 burden hours) x (55 covered participants)] = 6,600 burden hours.

399 See Regulation SBSR Adopting Release, Section XXI(G). This figure is based on the following: [(4,200 burden hours for registered SDRs under Rule 906(a)) + (199,728 burden hours for participants under Rule 906(a)) + (9,600 burden hours for participants under Rule 906(b)) + (18,480 burden hours for covered participants under Rule 906(c))] = 232,008 burden hours.

400 See Regulation SBSR Adopting Release, Section XXI(G). This figure is based on the following: [(3,080 burden hours for registered SDRs under the proposed amendment to Rule 906(a)) + (199,728 burden hours for participants under the proposed amendment to Rule 906(a)) + (9,600 burden hours for participants under the proposed amendment to Rule 906(b)) + (6,600 burden hours for covered participants under the proposed amendment to Rule 906(c))] = 219,008 burden hours.

E. Policies and Procedures of Registered SDRs—Rule 907

1. Rule 907—As Adopted

Rule 907(a), as adopted, requires a registered SDR to establish and maintain written policies and procedures that detail how it will receive and publicly disseminate security-based swap transaction information. Rule 907(a)(4) requires policies and procedures for assigning "special circumstances" flags to the necessary transaction reports.

Rule 907(c), as adopted, requires a registered SDR to make its policies and procedures available on its website. Rule 907(d), as adopted, requires a registered SDR to review, and update as necessary, the policies and procedures that it is required to have by Regulation SBSR at least annually. Rule 907(e), as adopted, requires a registered SDR to have the capacity to provide to the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to it pursuant to Regulation SBSR and the registered SDR's policies and procedures established thereunder.

In the Regulation SBSR Adopting Release, the Commission estimated that the one-time, initial burden for a registered SDR to adopt written policies and procedures as required under Rule 907 will be approximately 15,000 hours.[401] In the Regulation SBSR Adopting Release, the Commission stated that, drawing on the Commission's experience with other rules that require entities to establish and maintain policies and procedures,[402] this figure is based on the estimated number of hours to develop a set of written policies and procedures, program systems, implement internal controls and oversight, train relevant employees, and perform necessary

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401 See Regulation SBSR Adopting Release, Section XXI(H). These burdens are the result of Rule 907 only and do not account for any burdens that result from the SDR Rules. Such burdens are addressed in a separate release. See SDR Adopting Release, Section VIII(D).

402 See supra note 382.

testing.[403] In addition, in the Regulation SBSR Adopting Release, the Commission estimated the annual burden of maintaining such policies and procedures, including a full review at least annually, making available its policies and procedures on the registered SDR's website, and information or reports on non-compliance, as required under Rule 907(e), will be approximately 30,000 hours for each registered SDR.[404] As discussed in the Regulation SBSR Proposing Release, this figure includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining relevant systems and internal controls systems, performing necessary testing, monitoring participants, and compiling data.

In the Regulation SBSR Adopting Release, the Commission estimated that the initial annualized burden associated with Rule 907 will be approximately 45,000 hours per registered SDR, which corresponds to an initial annualized aggregate burden of approximately 450,000 hours.[405] The Commission further estimated that the ongoing annualized burden associated with Rule 907 will be approximately 30,000 hours per registered SDR,[406] which corresponds to an ongoing annualized aggregate burden of approximately 300,000 hours.[407]

2. Rule 907—Proposed Amendments

403 See Regulation SBSR Adopting Release, Section XXI(H). This figure also includes time necessary to design and program systems and implement policies and procedures to assign certain UICs, as required by Rule 907(a)(5).

404 See Regulation SBSR Adopting Release, Section XXI(H).

405 This figure is based on the following: [((15,000 burden hours per registered SDR) + (30,000 burden hours per registered SDR)) x (10 registered SDRs)] = 450,000 initial annualized aggregate burden hours during the first year.

406 See Regulation SBSR Adopting Release, Section XXI(H).

407 See id.

The Commission is proposing to revise Rule 907(a)(6) to indicate that a registered SDR's policies and procedures need not contain provisions for obtaining ultimate parent IDs and participant IDs from participants that are platforms or registered clearing agencies. Under the proposed amendments to Rule 901(a) and 901(e), platforms and registered clearing agencies would have the duty to report certain security-based swaps and become participants of registered SDRs to which they report. Rule 907(a)(6), as adopted, requires a registered SDR to establish and maintain written policies and procedures "[f]or 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 participant IDs." The Commission preliminarily believes that requiring a platform or registered clearing agency to report parent and affiliate information to a registered SDR would not serve any regulatory purpose and, therefore, has proposed to amend Rule 907(a)(6) to indicate that the obligations under Rule 907(a)(6) do not attach to participants that are platforms or a registered clearing agencies. This proposed amendment would not result in any burdens being placed on platforms and registered clearing agencies.

3. Rule 907—Aggregate Total PRA Burdens and Costs

Based on the foregoing, the Commission estimates that the one-time, initial burden for a registered SDR to adopt written policies and procedures as required under Rule 907 will be approximately 15,000 hours. In addition, the Commission estimated the annual burden of maintaining such policies and procedures, including a full review at least annually, making available its policies and procedures on the registered SDR's website, and information or reports on non-compliance, as required under Rule 907(e), will be approximately 30,000 hours for each registered SDR. The Commission therefor estimates that the initial annualized burden associated with Rule 907 will be approximately 45,000 hours per registered SDR, which corresponds to an initial annualized aggregate burden of approximately 450,000 hours.[408] The Commission further estimated that the ongoing annualized burden associated with Rule 907 will be approximately 30,000 hours per registered SDR,[409] which corresponds to an ongoing annualized aggregate burden of approximately 300,000 hours.[410]

F. Cross-Border Matters—Rule 908

1. Rule 908—As Adopted

Rule 908(a), as adopted, defines when a security-based swap transaction is subject to regulatory reporting and/or public dissemination. Specifically, Rule 908(a)(1)(i), as adopted, provides that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]here is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction." Rule 908(a)(1)(ii), as adopted, provides that a security-based swap shall be subject to regulatory reporting and public dissemination if "[t]he security-based swap is submitted to a clearing agency having its principal place of business in the United States." Rule 908(a)(2), as adopted, provides that a security-based swap not included within the above provisions would be subject to regulatory reporting but not public dissemination "if there is a

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408 This figure is based on the following: [((15,000 burden hours per registered SDR) + (30,000 burden hours per registered SDR)) x (10 registered SDRs)] = 450,000 initial annualized aggregate burden hours during the first year.

409 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(Sr. Programmer at 3,333 hours) + (Compliance Manager at 6,667 hours) + (Compliance Attorney at 10,000 hours) + (Compliance Clerk at 5,000 hours) + (Sr. System Analyst at 3,333 hours) + (Director of Compliance at 1,667 hours)] = 30,000 burden hours per registered SDR.

410 See Regulation SBSR Proposing Release, 75 FR at 75259. This figure is based on the following: [(30,000 burden hours per registered SDR) x (10 registered SDRs)] = 300,000 ongoing, annualized aggregate burden hours.

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."

Regulation 908(b), as adopted, defines when a person might incur obligations under Regulation SBSR. Rule 908(b) provides that, notwithstanding any other provision of Regulation SBSR, a person shall not incur any obligation under Regulation SBSR unless it is a U.S. person, a registered security-based swap dealer, or a registered major security-based swap participant.

The Commission stated its belief in the Regulation SBSR Adopting Release that Rules 908(a) and 908(b) do not impose any collection of information requirements. To the extent that a security-based swap transaction or person is subject to Rule 908(a) or 908(b), respectively, the collection of information burdens are calculated as part of the underlying rule (e.g., Rule 901, which imposes the basic duty to report security-based swap transaction information).

Rule 908(c), as adopted, sets forth the requirements surrounding requests for substituted compliance. Rule 908(c)(1) sets forth the general rule that compliance with Title VII's regulatory reporting and public dissemination requirements may be satisfied by compliance with the rules of a foreign jurisdiction that is the subject of a Commission order described in Rule 908(c)(2), provided that at least one of the direct counterparties is either a non-U.S. person or a foreign branch.

Rule 908(c)(2)(ii), as adopted, applies to any person that requests a substituted compliance determination with respect to regulatory reporting and public dissemination of security-based swaps. In connection with each request, the requesting party must provide the Commission with any supporting documentation that the entity believes is necessary for the Commission to make a determination, including information demonstrating that the requirements applied in the foreign jurisdiction are comparable to the Commission's and describing the methods used by relevant foreign financial regulatory authorities to monitor compliance with those requirements. In the Regulation SBSR Adopting Release, the Commission estimated that the total paperwork burden associated with submitting a request for a substituted compliance determination with respect to regulatory reporting and public dissemination will be approximately 1,120 hours, plus $1,120,000 for 14 requests.[411] The Commission noted that this estimate includes all collection burdens associated with the request, including burdens associated with analyzing whether the regulatory requirements of the foreign jurisdiction impose a comparable, comprehensive system for the regulatory reporting and public dissemination of all security-based swaps. Furthermore, the Commission observed that this estimate assumes that each request will be prepared de novo, without any benefit of prior work on related subjects. The Commission noted, however, that as such requests are developed with respect to certain jurisdictions, the cost of preparing such requests with respect to other foreign jurisdictions could decrease.[412]

In the Regulation SBSR Adopting Release, the Commission estimated, assuming ten requests in the first year, that the aggregated burden for the first year will be 800 hours, plus $800,000 for the services of outside professionals.[413] The Commission estimated that it would

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411 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) will be approximately 80 of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400). See Cross-Border Proposing Release, 78 FR at 31110.

412 If and when the Commission grants a request for substituted compliance, subsequent applications might be able to leverage work done on the initial application. However, the Commission is unable to estimate the amount by which the cost could decrease without knowing the extent to which different jurisdictions have similar regulatory structures.

413 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 242.908(c)(2)(ii) will be up to approximately 800 hours (80 hours of in-house counsel time x 10 respondents), plus

receive 2 requests for substituted compliance determinations pursuant to Rule 908(c)(2)(ii) in each subsequent year. Assuming the same approximate time and costs, the Commission stated that the aggregate burden for each year following the first year will be up to 160 hours of company time and $160,000 for the services of outside professionals.[414]

2. Rule 908—Proposed Amendments

The Commission is proposing to amend Rule 908(b) to make it consistent with 901(a)(1) which would provide that platforms and registered clearing agencies would have the duty to report in certain circumstances. The Commission proposes to amend Rule 908(b) to provide: "Notwithstanding any other provision of [Regulation SBSR], a person shall not incur any obligation under [Regulation SBSR] unless it is: (1) A U.S. person; (2) A registered security-based swap dealer or registered major security-based swap participant; (3) A platform; or (4) A registered clearing agency." The Commission preliminarily believes that, since the proposed amendment to Rule 908(b) simply makes it clear that platforms and registered clearing agencies may have obligations under Regulation SBSR, there are no burdens associated with the amendment to Rule 908(b). In addition, to the extent that a platform or registered clearing agency does have obligations under Regulation SBSR, those burdens are discussed under the applicable rule.

3. Rule 908—Aggregate Total Burdens and Costs

$800,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x 10 respondents). See Cross-Border Proposing Release, 78 FR at 31110.

414 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) would be up to approximately 160 hours (80 hours of in-house counsel time x two respondents) + plus $160,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x two respondents). See Cross-Border Proposing Release, 78 FR at 31110.

Based on the foregoing, the Commission estimates the following aggregate total PRA burdens and costs, by category of entity, resulting from Rule 908, as adopted and as proposed to be amended herein.

The Commission has estimated that the total paperwork burden associated with submitting a request for a substituted compliance determination with respect to regulatory reporting and public dissemination will be approximately 1,120 hours, plus $1,120,000 for 14 requests.[415] The Commission further estimated that the aggregated burden for the first year will be 800 hours, plus $800,000 for the services of outside professionals.[416] The Commission estimated that it would receive 2 requests for substituted compliance determinations pursuant to Rule 908(c)(2)(ii) in each subsequent year. Assuming the same approximate time and costs, the Commission stated that the aggregate burden for each year following the first year will be up to 160 hours of company time and $160,000 for the services of outside professionals.[417]

G. Request for Comments

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

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415 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) will be approximately 80 of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400). See id. at 31110

416 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) will be up to approximately 800 hours (80 hours of in-house counsel time x 10 respondents), plus $800,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x 10 respondents). See Cross-Border Proposing Release, 78 FR at 31110.

417 The Commission staff estimates that the paperwork burden associated with making a substituted compliance request pursuant to Rule 908(c)(2)(ii) would be up to approximately 160 hours (80 hours of in-house counsel time x 2 respondents) + plus $160,000 for the services of outside professionals (based on 200 hours of outside counsel time x $400 x 2 respondents). See Cross-Border Proposing Release, 78 FR at 31110.

1. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;
2. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
4. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File Number S7-03-15. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7-03-15 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Operations, 100 F Street NE., Washington, DC 20549-2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

X. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996

("SBREFA)[418] the Commission must advise the OMB whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rules and amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

XI. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 ("RFA")[419] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rules on "small entities." Section 605(b) of the RFA[420] provides that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 605(b), the Commission hereby certifies that the proposed rules and rule amendments to Regulation SBSR would not, if adopted, have a significant economic impact on a substantial number of small entities. In developing these proposed amendments to Regulation SBSR, the Commission has considered their potential impact on small entities. For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its

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418 Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. and 15 U.S.C. and as a note to 5 U.S.C. 601).

419 5 U.S.C. 603(a).

420 5 U.S.C. 605(b).

most recent fiscal year, had total assets of $5 million or less;[421] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[422] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[423]

The Commission believes, based on input from security-based swap market participants and its own information, that the majority of security-based swap transactions have at least one counterparty that is either a security-based swap dealer or major security-based swap participant, and that these entities—whether registered broker-dealers or not—would exceed the thresholds defining "small entities" set out above. Accordingly, neither of these types of entities would likely qualify as small entities for purposes of the RFA. Moreover, even in cases where one of the counterparties to a security-based swap is not covered by these definitions, the Commission believes that any such entities would not be "small entities" as defined in Commission Rule 0-10. Feedback from industry participants and the Commission's own information about the security-based swap market indicate that only persons or entities with assets significantly in excess of $5 million participate in the security-based swap market.[424] Given the magnitude of this figure, and

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421 See 17 CFR 240.0-10(a).

422 17 CFR 240.17a-5(d).

423 See 17 CFR 240.0-10(c).

424 For example, as revealed in a current survey conducted by Office of the Comptroller of the Currency, 99.9% of CDS positions by U.S. commercial banks are held by those with assets over $80 billion. See Office of the Comptroller of the Currency, "Quarterly Report on Bank Trading and Derivatives Activities First Quarter 2014" (2014).

the fact that it so far exceeds $5 million, the Commission continues to believe that the vast majority of, if not all, security-based swap transactions are between large entities for purposes of the RFA.

In addition, the Commission believes that persons that are likely to register as SDRs would not be small entities. Based on input from security-based swap market participants and its own information, the Commission continues to believe that most if not all registered SDRs would be part of large business entities, and that all registered SDRs would have assets exceeding $5 million and total capital exceeding $500,000. Therefore, the Commission continues to believe that no registered SDRs would be small entities.

The proposed rules and rule amendments would apply to all platforms on which security-based swaps are executed and registered clearing agencies that clear security-based swaps. Based on the Commission's existing information about the security-based swap market and the entities likely to be platforms and registered clearing agencies, the Commission preliminarily believes that these entities would not be small entities. The Commission preliminarily believes that most, if not all, of the platforms and registered clearing agencies would be large business entities or subsidiaries of large business entities, and that all platforms would have assets in excess of $5 million and annual receipts in excess of $7,000,000. Therefore, the Commission preliminarily believes that no platforms or registered clearing agencies would be small entities.

The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed rules and amendments to Regulation SBSR could have an effect on small entities that has not been considered. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

XII. Statutory Basis and Text of Proposed Rules

Pursuant to the Exchange Act, 15 U.S.C. 78a et seq., and particularly Sections 3C(e), 11A(b), 13(m)(1), 13A(a), 23(a)(1), 30(c), and 36(a), 15 U.S.C. §§ 78c-3(e), 78k-1(b), 78m(m)(1), 78m-1(a), 78w(a)(1), 78dd(c), and 78mm(a) thereof, the Commission is proposing to amend Rules 900, 901, 905, 906, 907, and 908 of Regulation SBSR under the Exchange Act, 17 CFR 242.900, 242.901, 242.905, 242.906, 242.907, and 242.908.

List of Subjects in 17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, the Commission proposes to revise Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-l(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37, unless otherwise noted.

2. Amend § 242.900 to revise paragraph (u) and add paragraph (tt) to read as follows:

Regulation SBSR-Regulatory Reporting and Public Dissemination of Security-Based Swap Information

§ 242.900 Definitions

(a)-(t) No change.

(u) Participant, with respect to a registered security-based swap data repository, means (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).

* * * * *

(tt) Widely accessible, as used in § 242.900(cc), means widely available to users of the information on a non-fee basis.

3. Amend § 242.901 to add paragraphs (a)(1), (a)(2)(i), (a)(3), and (e)(1)(ii) and to revise paragraphs (e)(2) and (h) to read as follows:

§ 242.901 Reporting obligations.

(a) * * * * *

(1) 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) * * * * *

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

(ii) * * * * *

(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) * * * * *

(c) * * * * *

(d) * * * * *

(e) Reporting of life cycle events.

(1) (i) * * * * *

(ii) 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 will be reported or has been reported and shall include the transaction ID of the original transaction.

(f) * * * * *

(g) * * * * *

(h) Format of reported information. 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.

* * * * *

4. Amend § 242.905 to revise paragraph (a) to read as follows:

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

(a) Duty to correct. 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 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 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).

* * * * *

5. Amend § 242.906 by revising paragraphs (b) and (c) to read as follows:

§ 242.906 Other duties of participants.

(a) * * * * *

(b) Duty to provide ultimate parent and affiliate information. Each participant of a registered security-based swap data repository that is not a platform or a registered clearing agency 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 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, 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.

6. Amend § 242.907 to revise paragraph (a)(6) to read as follows:

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

(a) * * * * *

(6) For periodically obtaining from each participant other than a platform or a registered clearing agency 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.

* * * * *

7. Amend § 242.908 to revise paragraphs (b)(1) and (b)(2) and by adding paragraphs (b)(3) and (b)(4) to read as follows:

§ 242.908 Cross-border matters

(a) * * * * *

(b) * * * * *

(1) A U.S. person;

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

(3) A platform; or

(4) A registered clearing agency.

* * * * *

By the Commission.

Brent J. Fields
Secretary

Dated: February 11, 2015

Appendix A

Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Action [Release No. 34-69491; File No. S7-34-10]

http://www.sec.gov/comments/s7-34-10/s73410.shtml

- E-mail message from Christopher Young, Director, U.S. Public Policy, ISDA, to Thomas Eady, SEC, dated March 27, 2014 ("ISDA III").
- E-mail message from Marisol Collazo, Chief Executive Officer, DTCC Data Repository US LLC, to Thomas Eady and Michael J. Gaw, SEC, dated March 24, 2014 (with attached letters submitted to the CFTC regarding CME Rule 1001) ("DTCC VIII").
- Letter from Kim Taylor, President, Clearing, CME Group, and Kara L. Dutta, General Counsel, ICE Trade Vault ("ICE"), LLC, to Elizabeth M. Murphy, Secretary, Commission, dated November 19, 2013 ("CME/ICE Letter").
- Letter from Kara L. Dutta, General Counsel, ICE Trade Vault, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated September 23, 2013 ("ICE Letter").
- Letter from Larry E. Thompson, General Counsel, Depository Trust & Clearing Corporation ("DTCC"), to Elizabeth M. Murphy, Secretary, SEC, dated August 21, 2013 ("DTCC VI").
- Letter from Jeff Gooch, Head of Processing, Markit, Chair and CEO, MarkitSERV, to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("MarkitSERV IV").
- Letter from Kathleen Cronin, Senior Managing Director, General Counsel, CME Group Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 21, 2013 ("CME II").

Comments on Proposed Rule: Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information [Release No. 34-63346; File No. S7-34-10]

http://www.sec.gov/comments/s7-34-10/s73410.shtml

- Letter from Larry E. Thompson, General Counsel, the Depository Trust & Clearing Corporation ("DTCC"), to the Honorable Mary L. Schapiro, Chairman, Commission, and the Honorable Gary Gensler, Chairman, CFTC, dated June 3, 2011 ("DTCC IV").

- Letter from John R. Gidman, Association of Institutional Investors, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated June 2, 2011 ("Institutional Investors Letter"). [Note: This comment letter is in fact dated "June 2, 2010," but the Commission deems the true date to be June 2, 2011. The comment letter references proposed Regulation SBSR, which the Commission issued in November 2010, and thus the comment could not have been submitted in June 2010.]

- Letter from Richard M. Whiting, Executive Director and General Counsel, FSR, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated May 12, 2011 ("Roundtable Letter").

- MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act ("MFA Recommended Timeline"), attached to letter from Richard H. Baker, President and Chief Executive Officer, MFA, to the Honorable Mary L. Schapiro, Chairman, Commission, dated March 24, 2011.

- Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of Bank of America Merrill Lynch, BNP Paribas, Citi, Credit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, Morgan Stanley, Nomura Securities International, Inc., PNC Bank, Société General, UBS Securities LLC, and Wells Fargo & Company, to Elizabeth M. Murphy, Secretary, Commission, and David A. Stawick, Secretary, CFTC, dated February 14, 2011 ("Cleary I").

- Letter from Andrew Downes, Managing Director, UBS Investment Bank, and James B. Fuqua, Managing Director, UBS Securities LLC, to Elizabeth M. Murphy, Secretary, Commission, dated February 7, 2011 ("UBS Letter").

- Letter from Richard G. Ketchum, Chairman and Chief Executive Officer, Financial Industry Regulatory Authority ("FINRA"), to Elizabeth M. Murphy, Secretary, Commission, dated January 27, 2011 ("FINRA Letter").

- Letter from Dennis M. Kelleher, President and Chief Executive Officer, Stephen W. Hall, Securities Specialist, and Wallace C. Turbeville, Derivatives Specialist, Better Markets, Inc. ("Better Markets"), to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("Better Markets II").

- Letter from Kevin Gould, President, Markit North America, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("Markit I").

- Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("MarkitSERV I").

- Letter from Larry E. Thompson, General Counsel, DTCC, dated January 18, 2011 ("DTCC II").

- Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("ICI I").

- Letter from Robert Pickel, Executive Vice Chairman, ISDA, and Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("ISDA/SIFMA I"), and accompanying study, "Block trade reporting for over-the-counter derivatives markets" ("ISDA/SIFMA Block Trade Study").

- Letter from Stuart J. Kaswell, Executive Vice President, Managing Director, and General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("MFA I").

- Letter from Lee H. Olesky, Chief Executive Officer, and Douglas L. Friedman, General Counsel, Tradeweb Markets LLC, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Tradeweb Letter").

- Letter from Gus Sauter, Managing Director and Chief Investment Officer, and John Hollyer, Principal and Head of Risk Management and Strategy Analysis, Vanguard, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("Vanguard Letter").

- Letter from Julian Harding, Chairman, WMBAA, to Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("WMBAA II").

- Letter from R. Glenn Hubbard, Co-Chair, John L. Thornton, Co-Chair, and Hal S. Scott, Director, Committee on Capital Markets Regulation, David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated January 18, 2011 ("CCMR I").

- Letter from Spencer Bachus, Ranking Member, Committee on Financial Services, and Frank Lucas, Ranking Member, Committee on Agriculture, U.S. House of Representatives, to The Honorable Timothy Geithner, Secretary, Department of Treasury, the Honorable Gary Gensler, Chairman, CFTC, the Honorable Mary Schapiro, Chairman, Commission, and the Honorable Ben Bernanke, Chairman, Federal Reserve, dated December 16, 2010 ("Bachus/Lucas Letter").

- Letter from Chris Barnard, dated December 3, 2010 ("Barnard I").

Re-Opening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities
Comments on Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act
[Release No. 34-67177; File No. S7-05-12]

- Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated August 13, 2012 ("SIFMA II").

Comments on 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 (Release No. 34-69490; File No. S7-02-13)

http://www.sec.gov/comments/s7-02-13/s70213.shtml

- Letter from Karel Engelen, Senior Director, Head of Data, Reporting & FpML, ISDA, to Elizabeth M. Murphy, Secretary, Commission, dated November 14, 2014 ("ISDA IV").

Real-Time Reporting: Title VII Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act

http://www.sec.gov/comments/df-title-vii/real-time-reporting/real-time-reporting.shtml

- Letter from Gerald Donini, Barclays Capital, Inc., to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated February 3, 2011 ("Barclays I").

- Letter from James Hill, Managing Director, Morgan Stanley, to David A Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, SEC, dated November 1, 2010 ("Morgan Stanley Letter").

Comments on Reporting of Security-Based Swap Transaction Data [Release No. 34-63094; File No. S7-28-10]

http://www.sec.gov/comments/s7-28-10/s72810.shtml

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, Commission, dated December 20, 2010 ("DTCC I").

- Letter from Robert Pickel, Executive Vice Chairman, ISDA, to Elizabeth Murphy, Secretary, Commission, dated December 10, 2010 ("ISDA I").

Comments on Proposed Rule: Security-Based Swap Data Repository Registration, Duties, and Core Principles [Release No. 34-63347; File No. S7-35-10]

http://www.sec.gov/comments/s7-35-10/s73510.shtml

- Letter from Larry E. Thompson, General Counsel, DTCC, to Elizabeth M. Murphy, Secretary, Commission, dated January 24, 2011 ("DTCC III").

Comments on Joint Public Roundtable on International Issues relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act
[Release No. 34-64939; File No. 4-636]

http://www.sec.gov/comments/4-636/4-636.shtml

- Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV, to David A. Stawick, Secretary, CFTC, and Elizabeth M. Murphy, Secretary, Commission, dated September 19, 2011 ("MarkitSERV III").

Roundtable Transcripts

- Joint CFTC-SEC Staff Roundtable On Implementation, May 2, 2011. Available at: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/csjac_transcript050211.pdf ("Implementation Roundtable, Day 1").

- Joint CFTC-SEC Staff Roundtable on Implementation, May 3, 2011. Available at: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/csjac_transcript050311.pdf ("Implementation Roundtable, Day 2").

Commissioner Gallagher
Commissioner Piwowar
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 200, 232, 240, and 249

Release No. 34-74246; File No. S7-35-10

RIN 3235–AK79

Security-Based Swap Data Repository Registration, Duties, and Core Principles

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: Pursuant to Section 763(i) of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is adopting new rules under the Securities Exchange Act of 1934 ("Exchange Act") governing the security-based swap data repository ("SDR") registration process, duties, and core principles. The Commission is also adopting a new registration form. Additionally, the Commission is amending several of its existing rules and regulations in order to accommodate SDRs. First, the Commission is amending Regulation S-T and Exchange Act Rule 24b-2 to clarify that all filings by SDRs, including any confidential portion, and their requests for confidential treatment must be filed electronically. Second, the Commission is amending Regulation S-T by, among other things, adding a new rule that specifically applies to the electronic filing of SDRs' financial reports.

DATES: **Effective Date:** [insert date that is 60 days from publication in the Federal Register]

Compliance Date: [insert date that is 365 days from publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Paula Jenson, Acting Chief Counsel; Jo Anne Swindler, Assistant Director; Richard Vorosmarti, Branch Chief; Angie Le, Special

Counsel; or Kevin Schopp, Special Counsel, Division of Trading and Markets, at (202) 551-5750, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549. For questions regarding the SDR registration process, please contact Jeffrey Mooney, Assistant Director, Stephanie Park, Senior Special Counsel, Andrew Shanbrom, Special Counsel, or Elizabeth Fitzgerald, Special Counsel, Division of Trading and Markets, at (202) 551-5710.

SUPPLEMENTARY INFORMATION: The Commission is taking several actions. First, the Commission is adopting Rules 13n-1 to 13n-12 ("SDR Rules") under the Exchange Act governing SDRs and a new form for registration as a security-based swap data repository ("Form SDR"). Second, the Commission is adopting technical amendments to Regulation S-T and Exchange Act Rule 24b-2 to clarify that all filings by SDRs, including any confidential portion, and their requests for confidential treatment must be filed electronically. Third, the Commission is amending Regulation S-T, including adopting new Rule 407, as a technical amendment related to Rule 13n-11, which is applicable to the electronic filing of SDRs' financial reports.

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I. Introduction

A. Proposed Rules Governing the SDR Registration Process, Duties, and Core Principles, and Form SDR

Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for security-based swaps ("SBSs"), including the regulation of SDRs.[1] SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations, thereby putting them in a better position to monitor for potential market abuse and risks to financial stability. On November 19, 2010, the Commission proposed new Rules 13n-1 to 13n-11 under the Exchange Act governing the SDR registration process, duties, and core principles, and new Form SDR, through which applicants would seek to register as SDRs.[2]

Subsequently, on May 1, 2013, the Commission issued a proposing release discussing

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1 Pub. L. No. 111-203, § 761(a) (adding Exchange Act Section 3(a)(75) (defining SDR)) and § 763(i) (adding Exchange Act Section 13(n) (establishing a regulatory regime for SDRs)).

2 See Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010), corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) ("Proposing Release").

cross-border SBS activities, including activities involving SDRs.[3] In that release, the Commission proposed guidance regarding the application of certain SDR requirements in the cross-border context;[4] new Rule 13n-12 under the Exchange Act, which would provide certain SDRs with an exemption from Exchange Act Section 13(n) and the rules and regulations thereunder;[5] and guidance to specify how SDRs may comply with the notification requirement in the Exchange Act and how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving SBS data from an SDR.[6] In addition, the Commission proposed an exemption from the indemnification requirement in the Exchange Act.[7]

B. Related Commission Actions

In conjunction with issuing the Proposing Release on November 19, 2010, the Commission also proposed Regulation SBSR to implement the Dodd-Frank Act's provisions relating to reporting SBS information to SDRs, including standards for the data elements that must be provided to SDRs.[8] Subsequently, on June 15, 2011, the Commission issued an exemptive order, which provided guidance and certain exemptions with respect to the requirements under Title VII, including requirements governing SDRs, which would have had to

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3 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, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) ("Cross-Border Proposing Release").

4 Cross-Border Proposing Release, 78 FR at 31041-44, supra note 3.

5 Cross-Border Proposing Release, 78 FR at 31209, supra note 3.

6 Cross-Border Proposing Release, 78 FR at 31046-48, supra note 3.

7 Cross-Border Proposing Release, 78 FR at 31209, supra note 3 (proposing Rule 13n-4(d)).

8 Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) ("Regulation SBSR Proposing Release").

be complied with as of July 16, 2011 (i.e., the effective date of Title VII).[9] Later, on June 11, 2012, the Commission issued a statement of general policy on the anticipated sequencing of compliance dates of final rules to be adopted under Title VII.[10] On May 1, 2013, the Commission re-proposed Regulation SBSR in the Cross-Border Proposing Release.[11] At the same time, the Commission reopened the comment period for certain rules proposed under Title

9 See Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) ("Effective Date Order"). The Effective Date Order included temporary exemptions from Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C), each of which will expire on the earlier of (1) the date the Commission grants registration to the SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs. Id. at 36306. In addition, the Commission granted temporary exemptions from Exchange Act Section 29(b) in connection with the above listed provisions of the Exchange Act until such date as the Commission specifies. Id. at 36307. Section 29(b) generally provides that contracts made in violation of any provision of the Exchange Act, or the rules thereunder, shall be void "(1) as regards the rights of any person who, in violation of any such provision . . . shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision . . . ." 15 U.S.C. 78cc(b).

10 See Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012) ("Implementation Policy Statement").

11 Cross-Border Proposing Release, 78 FR at 31210-31216, supra note 3. The Commission subsequently adopted certain aspects of the Cross-Border Proposing Release, which, as discussed below, has implications on this release. See Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities, Exchange Act Release No. 72472 (June 25, 2014), 79 FR 39068 (July 9, 2014) republished at 79 FR 47278 (Aug. 12, 2014) ("Cross-Border Adopting Release").

VII, including the SDR Rules and Form SDR, and the Implementation Policy Statement.[12]

The Commission is concurrently adopting Regulation SBSR in a separate release.[13] The Dodd-Frank Act requires the Commission to engage in rulemaking for the public dissemination of SBS transaction, volume, and pricing data,[14] and provides the Commission with discretion to determine an appropriate approach to implement this important function. Regulation SBSR requires SDRs to undertake this role.[15]

As discussed in the Proposing Release, when considered in conjunction with Regulation SBSR, the rules that the Commission adopts in this release seek to provide improved transparency to regulators and the markets through comprehensive regulations for SBS transaction data and SDRs.[16] In combination, these rules represent a significant step forward in providing a regulatory framework that promotes transparency and efficiency in the OTC

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12 Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 69491 (May 1, 2013), 78 FR 30800 (May 23, 2013) ("Reopening Release").

13 Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244 (Feb. 11, 2015) ("Regulation SBSR Adopting Release"). The Commission is also concurrently proposing certain new rules and amendments to Regulation SBSR. See Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74245 (Feb. 11, 2015) ("Regulation SBSR Proposed Amendments Release").

14 Exchange Act Section 13(m)(1), 15 U.S.C. 78m(m)(1), as added by Dodd-Frank Act Section 763(i).

15 See Regulation SBSR Adopting Release, supra note 13. In a separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E)), the Commission proposed rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. See End-User Exception to Mandatory Clearing of Security-Based Swaps, Exchange Act Release No. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) ("End-User Exception Proposing Release").

16 Proposing Release, 75 FR at 77307, supra note 2.

derivatives markets and creates important infrastructure to assist relevant authorities in performing their market oversight functions.

C. Public Comment

In each of the releases discussed above, the Commission requested comment on a number of issues related to the proposed SDR Rules. In addition, Commission staff and Commodity Futures Trading Commission ("CFTC") staff conducted joint public roundtables, including, for example, a joint public roundtable on implementation issues raised by Title VII ("Implementation Joint Roundtable")[17] and a joint public roundtable on international issues relating to the implementation of Title VII ("International Joint Roundtable").[18]

The Commission received twenty comment letters in response to the Proposing Release and the Reopening Release[19] as well as six letters submitted with respect to SDRs prior to the

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17 See Joint Public Roundtable on Issues Related to the Schedule for Implementing Final Rules for Swaps and Security-Based Swaps Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64314 (Apr. 20, 2011), 76 FR 23221 (Apr. 26, 2011). Transcripts for the public roundtable are available on the Commission's website at http://www.sec.gov/news/press/2011/2011-90-transcript.pdf.

18 See Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011); 76 FR 44507 (July 26, 2011). The transcript for the public roundtable is available on the Commission's website at: http://www.sec.gov/news/press/2011/2011-151-transcript.pdf.

19 See letters from The Bank of New York Mellon Corporation ("BNY Mellon"); Better Markets, Inc. dated January 24, 2011 ("Better Markets 1"); Better Markets, Inc. dated July 22, 2013 ("Better Markets 2"); Better Markets, Inc. dated October 18, 2013 ("Better Markets 3"); Chris Barnard ("Barnard"); Depository Trust & Clearing Corporation dated January 24, 2011 ("DTCC 2"); Depository Trust & Clearing Corporation dated June 3, 2011 ("DTCC 3"); Depository Trust & Clearing Corporation dated July 21, 2011 ("DTCC 4"); Depository Trust & Clearing Corporation dated July 22, 2013 ("DTCC 5"); Ethics Metrics ("Ethics Metrics"); European Securities and Markets Authority ("ESMA"); International Swaps and Derivatives Association dated June 28, 2013 ("ISDA"); Managed Funds Association dated January 24, 2011 ("MFA 1"); Managed Funds Association dated March 24, 2011 ("MFA 2"); Markit North America Inc.

Proposing Release.[20] The Commission also received three comment letters that address issues related to SDRs, among others, after the Proposing Release through the Commission's solicitation for comments,[21] which will be addressed in this release. In addition, the Commission received one letter in response to the Implementation Policy Statement,[22] two letters in response to the Implementation Joint Roundtable[23] and a letter in response to the International Joint

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("Markit"); MarkitSERV LLC ("MarkitSERV"); Ralph S. Saul ("Saul"); and TriOptima AB ("TriOptima"). Two of these comment letters did not raise issues relating to the SDR Rules. See letters from the Chicago Mercantile Exchange, Inc. and ICE Trade Vault, LLC dated November 19, 2013 (relating to Regulation SBSR) and Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association dated May 21, 2013 (requesting 90-day extension of the comment period for the Cross-Border Proposing Release). The comments that the Commission received on the Proposing Release and the Reopening Release are available on the Commission's website at http://www.sec.gov/comments/s7-35-10/s73510.shtml.

20 See letters from Benchmark Solutions ("Benchmark*"); Coalition for Derivatives End-Users ("CDEU*"); Depository Trust & Clearing Corporation dated November 15, 2010 ("DTCC 1*"); Morgan Stanley ("Morgan Stanley*"); Robin McLeish ("McLeish*"); and Securities Industry and Financial Markets Association ("SIFMA*"), available on the Commission's website at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml. To facilitate public input on the Dodd-Frank Act, the Commission provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml.

21 See letters from Barclays Capital Inc. ("Barclays*"); Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association ("FSF*"); and Futures Industry Association, The Financial Services Roundtable, Institute of International Bankers, Insured Retirement Institute, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce ("FIA*"), available on the Commission's website at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml.

22 See letter from Securities Industry and Financial Markets Association ("SIFMA Implementation"), available on the Commission's website at http://www.sec.gov/comments/s7-05-12/s70512-11.pdf.

23 See letters from The Financial Services Roundtable ("FSR Implementation"), available on the Commission's website at http://www.sec.gov/comments/4-625/4625-1.pdf; and

Roundtable,[24] all of which are relevant to the Proposing Release and are addressed in this release.[25] The Commission also received four comment letters in response to the Cross-Border Proposing Release relating directly to the proposed SDR Rules.[26]

The Commission also considered relevant comments submitted with respect to proposed Regulation SBSR,[27] the interim temporary final rule for reporting of SBS transaction data,[28] and

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Association of Institutional Investors ("AII Implementation"), available on the Commission's website at http://www.sec.gov/comments/4-625/4625-5.pdf.

24 See letter from Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, and UBS Securities LLC ("US & Foreign Banks"), available on the Commission's website at http://www.sec.gov/comments/4-636/4636-4.pdf; Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011); 76 FR 44507 (July 26, 2011).

25 One commenter recommended that the Commission "encourage the formation of a planning group composed of market participants" to address the questions in the Proposing Release. Saul, supra note 19. The Commission believes that market participants have had sufficient opportunities to comment on the Proposing Release and market participants have taken advantage of these opportunities. Therefore, the Commission does not believe that a planning group composed of market participants is necessary.

26 See letters from Better Markets, Inc. dated August 21, 2013 ("Better Markets CB"); Depository Trust & Clearing Corporation dated August 21, 2013 ("DTCC CB"); ICE Trade Vault, LLC ("ICE CB"); and Institute of International Bankers ("IIB CB"). The comments that the Commission received on the Cross-Border Proposing Release are available on the Commission's website at http://sec.gov/comments/s7-02-13/s70213.shtml. The Commission addressed comment letters in response to the Cross-Border Proposing Release that address Title VII generally and do not relate directly to the proposed SDR Rules in the Cross-Border Adopting Release. See Cross-Border Adopting Release, 79 FR at 47281-2, supra note 11.

27 Regulation SBSR Proposing Release, supra note 8. See letters from Bank of America, Merrill Lynch et al. ("BofA SBSR"); Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, and UBS AG ("Foreign Banks SBSR"); Depository Trust & Clearing Corporation ("DTCC SBSR"); Financial Industry Regulatory Authority ("FINRA SBSR"); International Swaps and Derivatives Association & Securities Industry and

proposed rules for the registration and regulation of security-based swap execution facilities ("SB SEFs").[29]

While commenters generally supported the Commission's approach set forth in the Proposing Release and the Cross-Border Proposing Release with respect to the proposed SDR Rules,[30] they set forth a range of opinions addressing issues raised by the proposed rules and

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Financial Markets Association ("ISDA SIFMA SBSR"); Managed Funds Association ("MFA SBSR"); Société Générale ("Société Générale SBSR"); The Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corporation ("Bank of Tokyo SBSR"); Tradeweb ("Tradeweb SBSR"); and Wholesale Markets Brokers' Association, Americas ("WMBAA SBSR"). The comments that the Commission received on the Regulation SBSR Proposing Release are available on the Commission's website at http://www.sec.gov/comments/s7-34-10/s73410.shtml. See also Cross-Border Proposing Release, 78 FR at 31210-6, supra note 3 (re-proposing Regulation SBSR).

28 Reporting of Security-Based Swap Transaction Data, Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010) ("Temporary Rule Release"). See letters from International Swaps and Derivatives Association ("ISDA Temp Rule") and Deutsche Bank AG ("Deutsche Temp Rule"). The comments that the Commission received on the Temporary Rule Release are available on the Commission's website at http://www.sec.gov/comments/s7-28-10/s72810.shtml.

29 Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) ("SB SEF Proposing Release"). See letter from Tradeweb Markets LLC ("Tradeweb SB SEF"). The comments that the Commission received on the SB SEF Proposing Release are available on the Commission's website at http://www.sec.gov/comments/s7-06-11/s70611.shtml.

30 See, e.g., Barnard, supra note 19 (generally supporting the proposed SDR Rules and agreeing that establishing SDRs will enhance transparency and promote standardization in the SBS market); MFA 1, supra note 19 (fully supporting the objectives of the Dodd-Frank Act and the proposed rules to enhance transparency in the SBS market); Markit, supra note 19 (supporting the Commission's objectives of increasing transparency and efficiency in the OTC derivatives markets and of reducing both systemic and counterparty risk); DTCC 2, supra note 19 (supporting the Commission's efforts to establish a comprehensive new framework for the regulation of SDRs and noting that "[i]mposing requirements on [SDRs] would promote safety and soundness for all U.S. markets by bringing increased transparency and oversight to [the SBS market]"); IIB CB, supra note 26 (believing that "the Commission has appropriately sought to take into account the greater extent to which the SBS markets are globally interconnected, as well

provided information regarding industry practices. In particular, commenters discussed SDRs' registration, enumerated duties, market access to services and data, governance arrangements, conflicts of interest, data collection and maintenance, privacy and disclosure requirements, and chief compliance officers ("CCOs"). The Commission has carefully reviewed and considered all of the comments that it received relating to the proposed rules.[31] As adopted, the SDR Rules and new Form SDR have been modified from the proposal, in part to respond to these comments.[32] The revisions to each proposed rule are described in more detail throughout this release. The following are among the most significant changes from the Commission's proposed rules:

- **Form SDR:** In the Proposing Release, the Commission asked whether it should combine Form SDR and Form SIP such that an SDR would register as an SDR and a securities information processer ("SIP") using only one form.[33] After further consideration and in response to comments received, the Commission has determined that Form SDR should be modified from the proposal to allow an SDR to register as both an SDR and SIP on one form.[34]
- **Access by Relevant Authorities:** The Commission proposed Rules 13n-4(b)(9) and (10) and Rule 13n-4(d) relating to relevant authorities' access to SBS data

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as the role that foreign regulators therefore must play as the primary supervisors of SBS market participants based abroad").

31 The Commission also considered certain comments submitted with respect to other proposed Commission rulemakings, related CFTC rulemakings, and international initiatives. See Sections I.C and I.D discussing other comments and initiatives considered in this rulemaking.

32 As discussed below, comments relating to relevant authorities' access to SBS data will be addressed in a separate release.

33 Proposing Release, 75 FR at 77313, supra note 2.

34 See Section VI.A.1.c of this release discussing the combination of Form SDR and Form SIP.

maintained by SDRs. The Commission has determined not to adopt these rules at this time and anticipates soliciting additional public comment regarding such relevant authorities' access.

- **Automated Systems:** The Commission proposed Rule 13n-6 to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security. After further consideration, and as explained more fully below, the Commission has determined to adopt an abbreviated version of proposed Rule 13n-6.[35]

- **CCO:** In the Proposing Release, the Commission asked whether it should prohibit officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities. The Commission has decided to adopt new Rule 13n-11(h).

D. Other Initiatives Considered in this Rulemaking

The Commission also recognizes the CFTC's companion efforts in promulgating rules governing swap data repositories pursuant to Dodd-Frank Act Section 728. The CFTC adopted final rules on swap data repositories on August 4, 2011.[36] The CFTC also adopted rules regarding swap data recordkeeping and reporting requirements, some of which pertain to

35 See Section VI.F of this release discussing Rule 13n-6.

36 See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011) ("CFTC Part 49 Adopting Release"). See also Swap Data Repositories – Access to SDR Data by Market Participants, 79 FR 16672 (Mar. 26, 2014) (CFTC adopting interim final rule regarding access to swap data repositories' data).

subjects covered in this release.[37] Commission staff consulted with CFTC staff with respect to the rules applicable to swap data repositories and SDRs, as well as with prudential regulators,[38] and the Commission has taken into consideration comments received supporting harmonization of the CFTC's rules for swap data repositories with the SDR Rules.[39] The Commission believes that the final SDR Rules are largely consistent with the rules adopted by the CFTC.[40] While one

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37 See Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012) ("CFTC Part 45 Adopting Release"). See also Review of Swap Data Recordkeeping and Reporting Requirements, 79 FR 16689 (Mar. 26, 2014) (CFTC requesting comment on specific swap data reporting and recordkeeping rules).

38 See Dodd-Frank Act Section 712(a)(2) (requiring the Commission to consult and coordinate to the extent possible with the CFTC and prudential regulators for "the purposes of assuring regulatory consistency and comparability, to the extent possible").

39 See DTCC 2, supra note 19 (recommending that to the extent that there are any differences, "the Commission and the CFTC should harmonize the regimes that oversee SDRs" and noting that "harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards"); DTCC 5, supra note 19 (urging the Commission to harmonize its rules with the CFTC's rules by working, to the extent possible, with the CFTC to minimize the number of regulatory inconsistencies between the two agencies); DTCC CB, supra note 26 ("Given the significant number of registered entities (execution platforms, clearinghouses, SDRs, dealers, and major swap participants) that will face dual oversight, unnecessary distinctions in the registration and regulation of these entities risk jeopardizing regulatory compliance, add confusion to Dodd-Frank Act implementation, and ultimately impose unnecessary costs."); Better Markets CB, supra note 26 (recommending that the Commission "promote harmony with the CFTC's cross-border guidance, subject to its primary duty and recognizing that its statutory authority and jurisdiction is distinct from that of the CFTC" and that the Commission "adopt rules that are at least as strong as the CFTC's guidance, consistent with its statutory authority, but should go further than the CFTC wherever necessary, and again consistent with its statutory authority, to better fulfill the goals of the Dodd-Frank Act"). But see Better Markets 2, supra note 19 (recommending that "all of the substantive rule provisions proposed [as of July 22, 2013] must remain as strong as possible, irrespective of . . . the CFTC's approach to the implementation of Title VII").

40 See DTCC 2, supra note 19 (observing that, with respect to the Commission's proposed rules and the CFTC's proposed rules for swap data repositories, "[t]here appear to be relatively narrow differences between the Commission's and the CFTC's approaches to the regulation of SDRs").

commenter recommended adopting joint rules with the CFTC,[41] the Commission has not done so. Congress did not require the two agencies to engage in joint rulemakings on this topic.[42] In addition, the CFTC has already adopted its final rules for swap data repositories.[43] The Commission does not believe that the differences between the rules adopted herein and the CFTC's rules regarding swap data repositories will place undue burdens on persons that register as both SDRs and swap data repositories.[44]

Finally, Commission staff has consulted and coordinated with foreign regulators through bilateral and multilateral discussions, including in groups that have prepared reports related to SDRs.[45] For example, the Committee on Payments and Market Infrastructures ("CPMI"), formerly known as the Committee on Payment and Settlement Systems ("CPSS"),[46] and the

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41 FSR Implementation, supra note 23 (supporting a Title VII-wide harmonization process and recommending adopting joint SEC-CFTC rules in areas, such as SDRs, where they are not required to do so). The commenter stated that the "process of jointly adopting final rules would ensure consistency on the most critical points. It would also ensure that final rules are adopted at the same time, so that market participants do not have to bear the cost of complying with one set of rules before they know whether their actions will be consistent with the other rules to which they will be subject." Id.

42 Cf., e.g., Dodd-Frank Act Section 712(d) (requiring joint rulemaking regarding certain definitions).

43 CFTC Part 49 Adopting Release, supra note 36; CFTC Part 45 Adopting Release, supra note 37.

44 See Section VIII of this release discussing economic analysis.

45 See Dodd-Frank Act Section 752 (relating to international harmonization); DTCC 3, supra note 19 ("The global SDR framework emerging from the Dodd-Frank Act and European regulatory processes must provide comprehensive data for all derivatives markets globally. If the global regulatory process is not harmonized, both the published and regulator-only accessible data will be fragmented, resulting in misleading reporting of exposures, uncertain risk concentration reports and a decreased ability to identify systemic risk.").

46 CPMI is an international standard setting body for payment, clearing, and securities settlement systems. It serves as a forum for central banks to monitor and analyze

International Organization of Securities Commissions ("IOSCO,"[47] jointly, "CPSS-IOSCO") have issued several reports applicable to SDRs. First, in May 2010, CPSS and the Technical Committee of IOSCO issued a consultative report that presented a set of factors for trade repositories in the OTC derivatives markets to consider in designing and operating their services and for relevant authorities to consider in regulating and overseeing trade repositories ("CPSS-IOSCO Trade Repository Report").[48] Second, in January 2012, CPSS and the Technical Committee of IOSCO issued a final report on OTC derivatives data reporting and aggregation requirements.[49] Third, in April 2012, CPSS-IOSCO issued a final report that sets forth risk management and related standards applicable to financial market infrastructures, including trade repositories ("PFMI Report").[50] Fourth, in August 2013, CPSS and the Board of IOSCO issued a report on authorities' access to trade repository data ("CPSS-IOSCO Access Report").[51] The

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developments in domestic payment, clearing, and settlement systems as well as in cross-border and multicurrency settlement schemes. See http://www.bis.org/cpmi/.

47 IOSCO is an international standard setting body for securities regulation. It serves as a forum to review regulatory issues related to international securities and futures transactions. See http://www.iosco.org.

48 See Considerations for Trade Repositories in OTC Derivatives Markets, CPSS-IOSCO (May 2010), available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD321.pdf.

49 See Report on OTC Derivatives Data Reporting and Aggregation Requirements, CPSS-IOSCO (Jan. 2012), available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf.

50 See Principles for Financial Market Infrastructures, CPSS-IOSCO (Apr. 2012), available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf. The PFMI Report incorporated feedback received on the CPSS-IOSCO Trade Repository Report. Commission representatives participated in the development and drafting of the PFMI Report. In particular, Commission staff co-chaired the Editorial Team, a working group within CPSS-IOSCO that drafted both the consultative and final versions of the PFMI Report. The Commission believes that the standards applicable to trade repositories set forth in the PFMI Report are generally consistent with the final SDR Rules.

51 See Authorities' Access to Trade Repository Data, CPSS-IOSCO (Aug. 2013), available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD417.pdf.

Commission has taken these discussions and reports into consideration in developing the final SDR Rules and Form SDR.[52]

II. Broad Economic Considerations and Baseline

This section describes the most significant economic considerations that the Commission has taken into account in adopting Form SDR and the SDR Rules, as well as the baseline for evaluating the economic effects of the final SDR Rules. The Commission is sensitive to the economic consequences and effects, including the costs and benefits, of Form SDR and the SDR Rules. A detailed analysis of the particular economic effects – including the costs and benefits and the impact on efficiency, competition, and capital formation – that may result from Form SDR and the final SDR Rules is discussed in Section VIII of this release.

A. Broad Economic Considerations

The SBS market prior to the passage of the Dodd-Frank Act has been described as being opaque,[53] in part because price and volume data for SBS transactions were not publicly available.

52 If any provision of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

53 With respect to one type of SBS, credit default swaps ("CDSs"), the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," "authoritative information about the actual size of the [CDS] market is generally not available," and regulators currently are unable "to monitor activities across the market." Government Accountability Office, GAO-09-397T, Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps, at 2, 5, 27, (2009) available at http://www.gao.gov/new.items/d09397t.pdf; see also Robert E. Litan, The Derivatives Dealers' Club and Derivatives Market Reform: A Guide for Policy Makers, Citizens and Other Interested Parties, Brookings Institution (Apr. 7, 2010), http://www.brookings.edu/~/media/research/files/papers/2010/4/07%20derivatives%20litan/0407_derivatives_litan.pdf; Michael Mackenzie, Era of an Opaque Swaps Market Ends, Financial Times, June 25, 2010, http://www.ft.com/intl/cms/s/0/f49f635c-8081-11df-be5a-00144feabdc0.html#axzz3HLUjYNI7.

In opaque markets, price and volume information is difficult or impossible to obtain, and access to price and volume information confers a competitive advantage on market participants with such access. In the SBS market, for example, SBS dealers currently gain access to proprietary transaction-level price and volume information by observing order flow. Large SBS dealers and other large market participants with a large share of order flow have an informational advantage over smaller SBS dealers and non-dealers who, in the absence of pre-trade transparency, observe a smaller subset of the market. As the Commission highlights in Section II.B below, the majority of SBS market activity, and therefore information about market activity, is concentrated in a small number of SBS dealers and widely dispersed among other market participants. Greater access by SBS dealers to non-public information about order flow enables better assessment of current market values by SBS dealers, permitting them to extract economic rents from counterparties who are less informed.[54] Non-dealers are aware of this information asymmetry, and certain non-dealers – particularly larger entities who transact with many dealers – may be able to obtain access to competitive pricing or otherwise demand a price discount that reflects the information asymmetry. Typically, however, the market participants with an information advantage will earn economic rents from their non-public information. In the SBS market, it is predominantly SBS dealers who observe the greatest order flow and benefit from market opacity.

The Commission expects that SDRs will play a critical role in enhancing transparency and competitive access to information in the SBS market. In order to increase the transparency

54 In this situation, economic rents are the profits that SBS dealers earn by trading with counterparties who are less informed. In a market with competitive access to information, there is no informational premium; SBS dealers only earn a liquidity premium. The difference between the competitive liquidity premium and the actual profits that SBS dealers earn is the economic rent.

of the OTC derivatives market, Title VII requires the Commission to undertake a number of rulemakings, including the SDR Rules and Regulation SBSR,[55] to establish a framework for the regulatory reporting of SBS transaction information to SDRs, public dissemination of transaction-level information, and a framework for SDRs to provide access to the information to the Commission. Persons that meet the definition of an SDR will be required, absent an exemption, to comply with all SDR obligations, including the SDR Rules requiring SDRs to collect and maintain accurate data and the requirements under Regulation SBSR to publicly disseminate transaction-level information. Reporting of SBS transaction information and public dissemination of accurate transaction price and volume information should promote price discovery and lessen the informational advantage enjoyed by SBS dealers with access to order flow.[56] By requiring SDRs to collect SBS transaction, volume, and pricing information and publicly disseminate information, the SDR Rules and Regulation SBSR may promote transparency in the SBS market.[57]

In addition to lessening the informational advantage currently available to SBS dealers, increased transparency of the SBS market could have other widespread benefits. Public

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55 See Regulation SBSR Adopting Release, supra note 13.

56 Price discovery refers to the process by which buyers seek the lowest available prices and sellers seek the highest available prices. This process reveals the prices that best match buyers to sellers. See Larry Harris, Trading & Exchanges: Market Microstructure for Practitioners 94 (2003). Price discovery may be hindered by such things as a scarcity of buyers or sellers or an asymmetry of information between potential buyers and sellers. For example, when traders are asymmetrically informed, liquidity suppliers set their prices far from the market to recover from uninformed traders what they lose to well-informed traders. See id. at 312.

57 Regulation SBSR requires that the economic terms of the transaction, with the exception of the identities of the counterparties, be publicly disseminated. These terms include the product ID, date and time of execution, price, and notional amount of an SBS. See Regulation SBSR Adopting Release, supra note 13 (Rules 901(c) and 902).

availability of SBS price and volume information could lower the costs of SBS trading by reducing implicit trading costs.[58] To the extent that implicit costs of SBS trading are reduced and the availability of the data necessary to evaluate the performance of a market participant's SBS dealer using transaction cost analysis, more market participants may be inclined to trade in the SBS market.[59]

Allowing competitive, impartial access to the most recent transaction price and volume information may promote the efficiency of SBS trading and increase opportunities for risk-sharing in other ways. In particular, as in other securities markets, quoted bids and offers should form and adjust according to the reporting of executed trades, attracting liquidity from hedgers and other market participants that do not observe customer order flow and do not benefit from opacity.

Separately, the SDR Rules are designed to, among other things, make available to the Commission SBS data that will provide a broad view of the SBS market and help monitor for

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58 Implicit trading cost is the difference between the price at which a market participant can enter into an SBS and the theoretical fundamental value of that SBS. Post-trade transparency has been shown to lower implicit trading costs in US corporate bond markets, which, prior to the introduction of FINRA's Trade Reporting and Compliance Engine (TRACE), was a dealer-centric over-the-counter ("OTC") market characterized by limited transparency, similar to the SBS market. See, e.g., Amy K. Edwards, Lawrence Harris, & Michael S. Piwowar, Corporate Bond Market Transparency and Transaction Costs, 62 Journal of Finance 1421 (2007); Hendrik Bessembinder, William F. Maxwell, & Kumar Venkataraman, Market Transparency, Liquidity, Externalities and Institutional Trading Costs in Corporate Bonds, 82 Journal of Financial Economics 251 (2006).

59 Transaction cost analysis refers to an evaluation of the price received by a market participant relative to prevailing market prices at the time the decision to transact was made as well as transaction prices received by other market participants just before and just after the transaction.

pockets of risk that might not otherwise be observed by financial market regulators.[60] Unlike most other securities transactions, SBSs involve ongoing financial obligations between counterparties during the life of transactions that typically span several years. Counterparties to an SBS rely on each other's creditworthiness and bear this credit risk and market risk until the SBS terminates or expires. This can lead to market instability when a large market participant, such as an SBS dealer, major SBS market participant, or central counterparty ("CCP"), becomes financially distressed. The default of a large market participant could introduce the potential for sequential counterparty failure; the resulting uncertainty could reduce the willingness of market participants to extend credit, and substantially reduce liquidity and valuations for particular types of financial instruments.[61] A broad view of the SBS market, including aggregate market exposures to referenced entities (instruments), positions taken by individual entities or groups, and data elements necessary for a person to determine the market value of the transaction could provide the Commission with a better understanding of the actual and potential risks in the SBS market and promote better risk monitoring efforts. The information provided by SDRs could also help the Commission detect market manipulation, fraud, and other market abuses.

60 See Exchange Act Section 13(n)(5)(D), 15 U.S.C. 78m(n)(5)(D), and Rule 13n-4(b)(5) (requiring SDRs to provide direct electronic access to the Commission). See also 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.").

61 See, e.g., Markus K. Brunnermeier and Lasse Heje Pedersen, Market Liquidity and Funding Liquidity, 22 Review of Financial Studies 2201 (2009); Denis Gromb and Dimitri Vayanos, A Model of Financial Market Liquidity Based on Intermediary Capital, 8 Journal of the European Economic Association 456 (2010).

The extent of the benefits discussed above may be limited by the inaccuracy or incompleteness of SBS data maintained by SDRs.[62] The Commission believes, however, that the SDR Rules relating to data accuracy[63] and maintenance[64] will help minimize the inaccuracy or incompleteness of SBS data maintained by SDRs. The benefits discussed above may have associated costs for compliance with the SDR Rules and Regulation SBSR. Persons that meet the definition of an SDR will be required to invest in infrastructure necessary to comply with rules for collecting, maintaining, and disseminating accurate data. Such infrastructure costs may ultimately be reflected in the prices that SBS dealers charge to customers, mitigating the reduction in indirect trading costs that may accrue from reducing SBS dealers' information advantage.

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62 The CFTC's experience with collecting swap data suggests that the benefits of receiving information from trade repositories may be reduced by inaccuracies or inconsistencies in information maintained by trade repositories. See, e.g., Andrew Ackerman, CFTC Seeks Comment on Improving Swaps Data Stream; Data Problems Have Hobbled Efforts to See More Clearly Into Swaps Market, Wall Street Journal Mar. 19, 2014, http://online.wsj.com/news/articles/SB10001424052702304026304579449552899867592 (noting that "a series of data problems . . . have hobbled efforts to see more clearly into the multitrillion-dollar swaps market"). The CFTC has published a request for comment on specific swap data reporting and recordkeeping rules to determine how these rules were being applied and whether or what clarifications, enhancements, or guidance may be appropriate. See Review of Swap Data Recordkeeping and Reporting Requirements, 79 FR 16689 (Mar. 26, 2014).

63 See, e.g., Rule 13n-5(b)(3) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate).

64 See, e.g., Rule 13n-5(b)(4) (requiring an SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years); Rule 13n-5(b)(5) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR).

The SDR Rules permit the possibility of multiple SDRs within an asset class.[65] If there are multiple SDRs in any given asset class, then differences in how each SDR accepts, stores, and disseminates SBS data may cause fragmentation in the SBS data, thereby making it more difficult for the Commission and the public to compile, compare, and analyze market information. As discussed below, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission.[66] The Commission believes that these specifications may help reduce any difficulties resulting from the fragmentation of data among multiple SDRs by facilitating the clear, uniform reporting of SBS data to the Commission.

B. Baseline

To assess the economic impact of the SDR Rules described in this release, the Commission is using as a baseline the SBS market as it exists today, including applicable rules that have already been adopted and excluding rules that have been proposed, but not yet finalized. The Commission acknowledges limitations in the degree to which the Commission can quantitatively characterize the current state of the SBS market. As described in more detail below, because the available data on SBS transactions do not cover the entire market, the Commission has developed an understanding of market activity using a sample that includes only certain portions of the market.

65 See Section IV of this release discussing number of SDRs and consolidation of SBS data.

66 See Section VI.D.2.c.ii of this release.

1. Transparency in the SBS Market

There currently is no robust, widely accessible source of information about individual SBS transactions. Nevertheless, market participants can gather certain limited information for the single-name CDS market from a variety of sources. For example, some vendors provide indicative quotes. Indicative quotes are not based on actual transactions and, as such, they may not reflect the true value. Moreover, these quotes do not represent firm commitments to buy or sell protection on particular reference entities. However, market participants can gather information from indicative quotes that may inform their trading. In addition, one entity as part of its single-name CDS clearing, makes its daily settlement prices on 5 year single-name CDSs available to the public on its website.[67] A more complete database of current and historical settlement prices is available by subscription.

In addition to the pricing data discussed above, there is limited, publicly-disseminated information about aggregate SBS market activity. The Depository Trust and Clearing Corporation – Trade Information Warehouse ("DTCC-TIW") publishes weekly transaction and position reports for single-name CDSs. ICE Clear Credit also provides aggregated volumes of clearing activity. Additionally, large multilateral organizations periodically report measures of market activity. For example, the Bank for International Settlements ("BIS") reports gross notional outstanding for single-name CDSs and equity forwards and swaps semiannually.

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67 See https://www.theice.com/cds/MarkitSingleNames.shtml. End-of-Day ("EOD") prices are established for all cleared CDS single name and index instruments using a price discovery process developed for the CDS market. Clearing participants are required to submit prices every business day, and the clearing house conducts a daily auction-like process resulting in periodic trade executions among clearing participants. This process determines the clearing house EOD prices, which are used for daily mark-to-market purposes.

Market participants that are SBS dealers can also draw inferences about SBS market activity by observing order flow. This source of proprietary information is most useful for SBS dealers with large market shares.

Finally, DTCC-TIW voluntarily provides to the Commission data on individual CDS transactions. This information is made available to the Commission in accordance with an agreement between the DTCC-TIW and the OTC Derivatives Regulators' Forum ("ODRF"), of which the Commission is a member. While DTCC-TIW generally provides this information to regulators that are members of the ODRF, DTCC-TIW does not make the information available to the public.

2. Current Security-Based Swap Market

The Commission's analysis of the current state of the SBS market is based on data obtained from DTCC-TIW, particularly data regarding the activity of market participants for single-name CDSs from 2008 to 2013. While other repositories may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for these products (or other products that are SBSs). Although the Commission has previously noted that the definition of SBS is not limited to single-name CDSs, the Commission believes that the single-name CDS data is sufficiently representative of the SBS market and therefore can directly inform the analysis of the state of the current SBS market.[68] The

[68] According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of December 2013 was $2.28 trillion. The notional amount outstanding was approximately $11.32 trillion for single-name CDSs, approximately $9.70 trillion for multi-name index CDSs, and approximately $0.95 trillion for multi-name, non-index CDSs. See Bank of International Settlement, BIS Quarterly Review, Statistical Annex, Table 19 (June 2014), available at http://www.bis.org/publ/qtrpdf/r_qt1406.htm. For purposes of this analysis, the Commission assumes that multi-name index CDSs are not narrow-based index CDSs, and

Commission believes that DTCC-TIW's data for single-name CDSs is reasonably comprehensive because it includes data on almost all single-name CDS transactions and market participants trading in single-name CDSs.[69] The Commission notes that the data that it receives from DTCC-TIW does not encompass CDS transactions that both: (i) do not involve any U.S. counterparty,[70] and (ii) are not based on a U.S. reference entity. Notwithstanding this limitation, the Commission believes that DTCC-TIW data provides sufficient information to identify the types of market participants active in the SBS market and the general pattern of dealing within that market.[71]

therefore do not fall within the definition of SBS. See Exchange Act Section 3(a)(68)(A), 15 U.S.C. 78c(a)(68)(A); see also Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012). The Commission also assumes that instruments reported as equity forwards and swaps include instruments such as total return swaps on individual equities that fall with the definition of SBS, potentially resulting in underestimation of the proportion of the SBS market represented by single-name CDSs. Although the BIS data reflects the global OTC derivatives market, and not only the U.S. market, the Commission is not aware of any reason to believe that these ratios differ significantly in the U.S. market.

69 See ISDA, CDS Marketplace, Exposures & Activity, http://www.isdacdsmarketplace.com/exposures_and_activity ("DTCC Deriv/SERV's Trade Information Warehouse is the only comprehensive trade repository and post-trade processing infrastructure for OTC credit derivatives in the world. Its Deriv/SERV matching and confirmation service electronically matches and confirms more than 98% of credit default swaps transactions globally.").

70 The Commission notes that DTCC-TIW's entity domicile determinations may not reflect the Commission's definition of "U.S. person" in all cases.

71 In 2013, DTCC-TIW reported on its website new trades in single-name CDSs with gross notional of $12.0 trillion. DTCC-TIW provided to the Commission data that included only transactions with a U.S. counterparty or a U.S. reference entity. During the same period, this data included new trades with gross notional equaling $9.3 trillion, or 77% of the total reported by DTCC-TIW.

a. Security-Based Swap Market Participants

A key characteristic of SBS activity is that it is concentrated among a relatively small number of entities that engage in dealing activities.[72] Based on DTCC-TIW data that the Commission has received, thousands of other market participants appear as counterparties to SBS transactions, including, but not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies. The Commission observes that most end users of SBSs do not directly trade SBSs, but instead use dealers, banks, or investment advisers as agents to establish the end users' positions. Based on the Commission's analysis of DTCC-TIW data, there were 1,800 entities engaged directly in trading CDSs between November 2006 and December 2013.[73] Table 1 below highlights that of these entities, there were 17, or approximately 0.9%, that were ISDA-recognized dealers.[74] The vast majority of transactions (84.1%) measured by the number of counterparties (each transaction has two counterparties or transaction sides) were executed by ISDA-recognized dealers. Thus, a small set of dealers observe the largest share of the market and potentially benefit the most from opacity.

72 See Cross-Border Adopting Release, 79 FR at 47293, supra note 11. All data in this section cites updated data from this release and the accompanying discussion.

73 These 1,800 transacting agents represent over 10,000 accounts representing principal risk holders. See Regulation SBSR Adopting Release, supra note 13 and Cross Border Adopting Release, 79 FR at 47293-4, supra note 11 (discussing the number of transacting agents and accounts of principal risk holders).

74 For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as a recognized dealer in any year during the relevant period. Dealers are only included in the ISDA-recognized dealer category during the calendar year in which they are so identified. The complete list of ISDA recognized dealers is: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo, and Nomura. See ISDA, Operations Benchmarking Surveys, available at http://www2.isda.org/functional-areas/research/surveys/operations-benchmarking-surveys.

Table 1. The number of transacting agents in the CDS market by counterparty type and the fraction of total trading activity, from November 2006 through December 2013, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment Advisers	1,347	74.8%	9.7%
- SEC registered	*529*	*29.4%*	*5.9%*
Banks	256	14.2%	5.0%
Pension Funds	29	1.6%	0.1%
Insurance Companies	36	2.0%	0.2%
ISDA-Recognized Dealers	17	0.9%	84.1%
Other	115	6.4%	1.0%
Total	1,800	100.0%	100.0%

Principal holders of CDS risk exposure are represented by accounts in DTCC-TIW.[75] As highlighted in Table 2 below, Commission staff's analysis of these accounts in DTCC-TIW shows that the 1,800 transacting agents (entities directly engaged in trading) described above represented 10,054 principal risk holders (entities bearing the risk of the CDS). In some cases, the principal risk holder may have been represented by an investment adviser that served as the transacting agent. In other cases, the principal risk holder may have participated directly as the transacting agent. Each account does not necessarily represent a separate legal person; one legal person may allocate transactions across multiple accounts. For example, the 17 ISDA-recognized dealers described above allocated transactions across 69 accounts.

[75] "Accounts" as defined in the DTCC-TIW context are not equivalent to "accounts" in the definition of "U.S. person" provided by Exchange Act Rule 3a71-3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person may have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

Among the accounts, there are 1,086 Dodd-Frank Act-defined special entities and 636 investment companies registered under the Investment Company Act of 1940.[76] Private funds comprise the largest type of account holders that the Commission was able to classify, and although not verified through a recognized database, most of the funds the Commission was not able to classify appear to be private funds.[77] While the Commission anticipates that some of these accounts may prefer to operate in an opaque market (if, for example, they are relying on a proprietary trading strategy and wish to keep their transactions anonymous), the data suggest that the vast majority of principal risk holders in CDS may benefit from the Dodd-Frank Act's transparency requirements. As discussed above and in Section VIII below, dealers are the category of market participants most likely to benefit from opaqueness. As shown in Table 1, of the 1,800 transacting agents in the 2006-2013 sample, 17 (or 0.9%) are ISDA-recognized dealers. Similarly, as shown in Table 2, of the 10,054 accounts with CDS transactions, 69 (or 0.7%) are accounts held by ISDA-recognized dealers. As many as 99% of market participants may benefit from increasing transparency.

76 There remain over 4,600 DTCC "accounts" unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

77 "Private funds" encompass various unregistered pooled investment vehicles, including hedge funds, private equity funds, and venture capital funds.

Table 2. The number and percentage of account holders—by type—who participate in the CDS market through a registered investment adviser, an unregistered investment adviser, or directly as a transacting agent from November 2006 through December 2013.

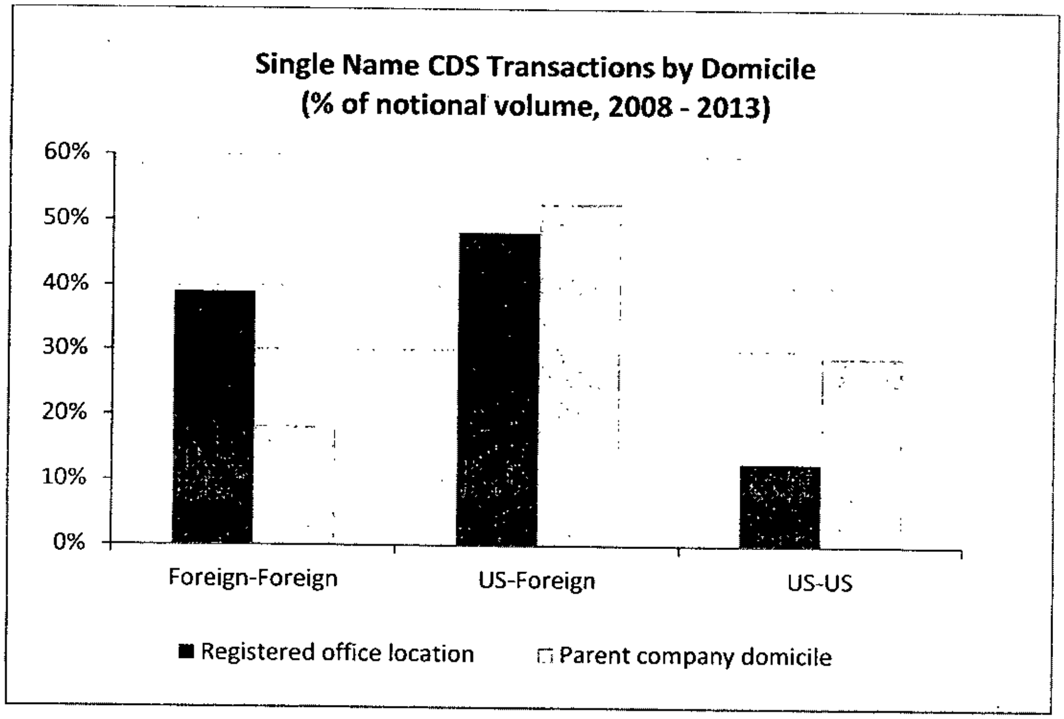
Account Holders by Type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent[78]	
Private Funds	2,914	1,395	48%	1,496	51%	23	1%
Dodd-Frank Act Special Entities	1,086	1,050	97%	12	1%	24	2%
Registered Investment Companies	636	620	97%	14	2%	2	0%
Banks (non-ISDA-recognized dealers)	369	25	7%	5	1%	339	92%
Insurance Companies	224	144	64%	21	9%	59	26%
ISDA-Recognized Dealers	69	0	0%	0	0%	69	100%
Foreign Sovereigns	63	45	71%	2	3%	16	25%
Non-Financial Corporations	57	39	68%	3	5%	15	26%
Finance Companies	10	5	50%	0	0%	5	50%
Other/Unclassified	4,626	3,131	68%	1,295	28%	200	4%
All	10,054	6,454	64%	2,848	28%	752	7%

Although the SBS market is global in nature, 61% of the transaction volume in the 2008-2013 period included at least one U.S.-domiciled entity (see Figure 1). Moreover, 18% of the CDS transactions reflected in DTCC-TIW data that include at least one U.S.-domiciled

78 This column reflects the number of participants who are also trading for their own accounts.

counterparty or a U.S. reference entity were between U.S.-domiciled entities and foreign-domiciled counterparties.

Figure 1: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2013.



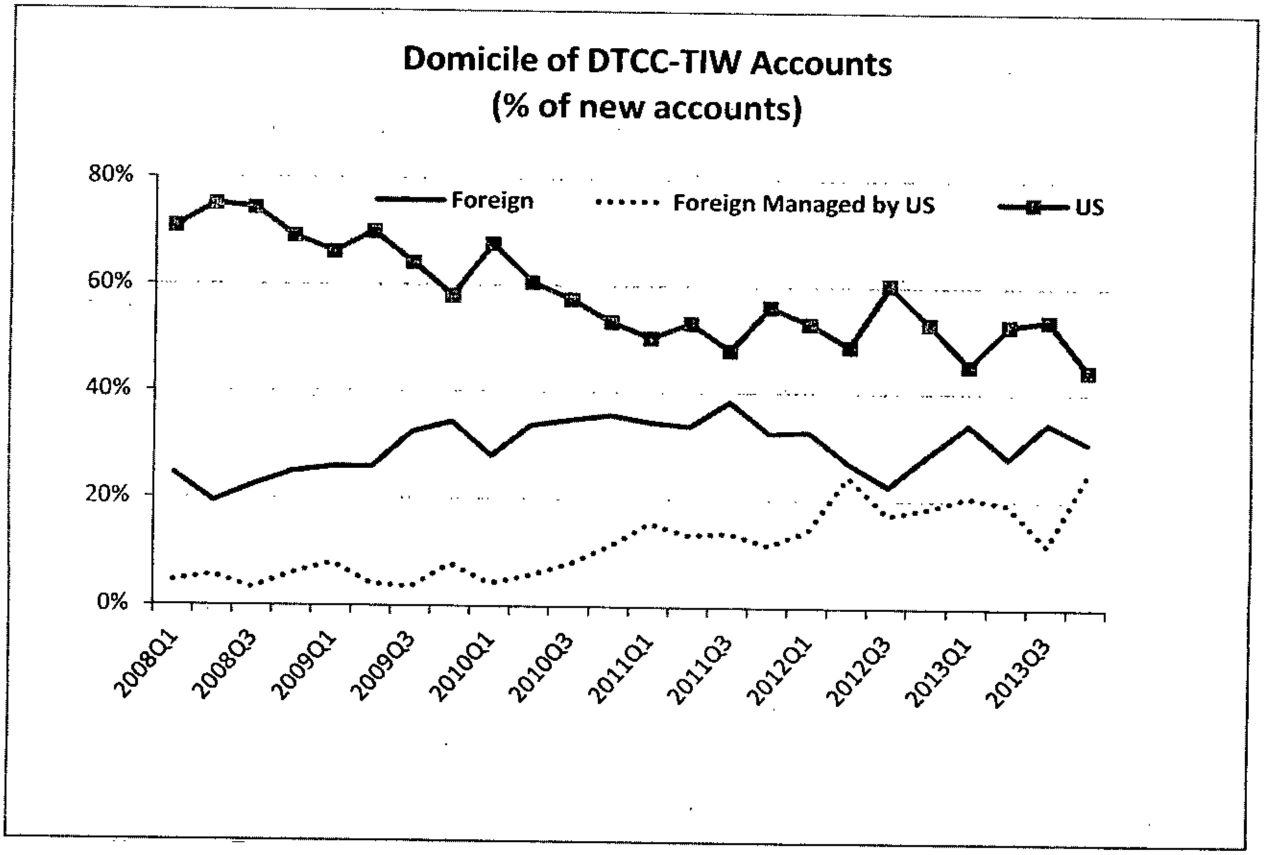
The cross-border nature of the SBS market is growing over time. Figure 2 below is a chart of (1) the percentage of new accounts with a domicile in the United States,[79] (2) the

[79] The domicile classifications in DTCC-TIW are based on the market participants' own reporting and have not been verified by Commission staff. Prior to enactment of the Dodd-Frank Act, account holders did not formally report their domicile to DTCC-TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC-TIW has collected the registered office location of the account. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC-TIW do not assign a unique legal entity identifier to each separate entity. It is also possible that the domicile classifications may not correspond precisely to the definition of U.S. person under the rules defined in Exchange Act Rule 3a71-3(a)(4), 17 CFR 240.3a71-

percentage of new accounts with a domicile outside the United States, and (3) the percentage of new accounts outside the United States, but managed by a U.S. entity, foreign accounts that include new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity. Over time, a greater share of accounts entering the DTCC-TIW data either have a foreign domicile or have a foreign domicile while being managed by a U.S. person. The increase in foreign accounts may reflect an increase in participation by foreign accountholders and the increase in foreign accounts managed by U.S. persons may reflect the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other factors. There are, however, alternative explanations for the shifts in new account domicile in Figure 2. Changes in the domicile of new accounts through time may reflect improvements in reporting by market participants to DTCC-TIW. Additionally, because the data includes only accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties, or transact in single-name CDSs with U.S. reference entities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

3(a)(4). Notwithstanding these limitations, the Commission believes that the cross-border and foreign activity demonstrates the nature of the single-name CDS market.

Figure 2: The percentage of (1) new accounts with a domicile in the United States (referred to below as "US"), (2) new accounts with a domicile outside the United States (referred to below as "Foreign"), and (3) new accounts outside the United States, but managed by a U.S. entity, new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity (collectively referred to below as "Foreign managed by US"). Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2013. The sample includes accounts that are domiciled in the United States, transact with U.S.-domiciled accounts, or transact in CDSs that reference U.S. entities. (Source: DTCC-TIW)



b. Security-Based Swap Data Repositories

No SDRs are currently registered with the Commission. The Commission is aware of one entity in the market (i.e., the DTCC-TIW) that has been accepting voluntary reporting of single-name and index CDS transactions. In 2013, DTCC-TIW received approximately 3.1 million records of CDS transactions, of which approximately 800,000 were price forming.[80]

The CFTC has provisionally registered four swap data repositories.[81] These swap data repositories are: BSDR LLC, Chicago Mercantile Exchange Inc., DTCC Data Repository LLC, and ICE Trade Vault, LLC. The Commission believes that most of these entities will likely register with the Commission as SDRs and that other persons may seek to register with both the CFTC and the Commission as swap data repositories and SDRs, respectively. As stated above, the Commission believes that the final SDR Rules are largely consistent with the CFTC's rules governing swap data repositories

Efforts to regulate the swap and SBS market are underway not only in the United States, but also abroad. In 2009, leaders of the G20—whose members include the United States, 18 other countries, and the European Union—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets and agreed, among other things, that OTC derivatives contracts should be reported to trade repositories.[82] Substantial progress has been made in establishing the trade repository infrastructure to support the reporting

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80 Price-forming CDS transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated or entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades.

81 CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

82 See Leaders' Statement, The Pittsburgh Summit, September 24-25, 2009, available at http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

of all contracts.[83] Currently, multiple trade repositories operate, or are undergoing approval processes to do so, in a number of different jurisdictions.[84] The requirements for trade reporting differ across jurisdictions. The result is that trade repository data is fragmented across many locations, stored in a variety of formats, and subject to many different rules for authorities' access. The data in these trade repositories will need to be aggregated in various ways if authorities are to obtain a comprehensive and accurate view of the global OTC derivatives markets and to meet the original financial stability objectives of the G20 in calling for comprehensive use of trade repositories.

III. Definition, Scope of Registration, Services, and Business Models of SDRs

The Proposing Release generally discussed the role, regulation, and business models of SDRs,[85] but it did not specifically address the applicability of the statutory definition of an SDR.[86] The Commission received several comments that addressed broad issues regarding what persons fall within the statutory definition of an SDR, what services can or must be provided by SDRs, and what business models are appropriate for SDRs. In light of these comments, the Commission believes that it is useful to provide clarity on the definition of an SDR and the services that are required or permitted to be provided by SDRs. For purposes of this release, the Commission will refer to services that are specifically included in the statutory definition of an

83 See OTC Derivatives Market Reforms Eighth Progress Report on Implementation (Nov. 2014), available at http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf.

84 Id.

85 See Proposing Release, 75 FR at 77307-77308, supra note 2.

86 In the Cross-Border Proposing Release, the Commission discussed several examples of circumstances in which a person would be performing the functions of an SDR in the cross-border context. 78 FR at 31041-31043, supra note 3. The Commission did not receive any comments on this aspect of the Cross-Border Proposing Release.

SDR[87] as "core" services. All other services – both those required by the Dodd-Frank Act and the rules and regulations thereunder, and those not required, but which the Commission believes are permissible for SDRs to perform – will be referred to as "ancillary" services.

A. Definition of SDR: Core Services

Exchange Act Section 3(a)(75), enacted by Dodd-Frank Act Section 761, defines a "security-based swap data repository" to mean "any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps."[88]

One commenter requested that "the Commission provide clear guidance as to the scope of the entities covered within the [statutory] definition of SDR in the Dodd-Frank Act."[89] The commenter stated as follows: "The statutory duties required of an SDR are extensive and can form a business in their own right. The requirements of an SDR should not be imposed upon service providers looking to provide targeted solutions to specific processes, as opposed to providers looking more broadly to fulfill the role of an SDR. All third party service providers have to perform a level of recordkeeping and often retain data previously submitted by customers to offer services efficiently. This should not transform them into an SDR unless there is a corresponding policy reason for doing so. In fact, there is a strong policy reason to exclude them, the goal of countering the risk of fragmentation in data collection and dissemination on a

87 Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

88 Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

89 DTCC 2, supra note 19.

global basis."[90] Another commenter described an SDR's core functions as "basic receipt and storage of [SBS] data."[91]

The Commission believes that the statutory definition in Exchange Act Section 3(a)(75) describes the core services or functions of an SDR. Whether a person falls within the statutory definition of an SDR is fact-specific. An example of a person that would likely meet the statutory definition of an SDR is a person that provides the service of maintaining a centralized repository of records of SBSs for counterparties to SBS transactions that are intended to be relied on by counterparties for legal purposes. Providing this service would cause the person to meet the statutory definition of an SDR because the person is "collect[ing] and maintain[ing] information or records with respect to transactions or positions in, or the terms and conditions of, [SBSs] entered into by third parties for the purpose of providing a centralized recordkeeping facility for [SBSs]."[92] In contrast, a law firm, trustee, custodian, or broker-dealer that holds SBS records likely would not meet the statutory definition of an SDR because those persons would not be doing so "for the purpose of providing a centralized recordkeeping facility for [SBSs]."[93]

One commenter identified countering the risk of fragmentation in data collection and dissemination as a policy reason to exclude certain persons, such as certain third party service providers, from the definition of an SDR.[94] The Commission believes that while third party service providers may collect and maintain SBS data, they generally do not do so "for the purpose of providing a centralized recordkeeping facility." As such, third party service providers

90 DTCC 2, supra note 19.

91 MarkitSERV, supra note 19.

92 See Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

93 See Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

94 See DTCC 2, supra note 19.

generally would not fall within the statutory definition of an SDR. Thus, they do not need to be excluded from the definition of an SDR, as the commenter suggested. If, however, the third party service provider collects and maintains the SBS data "for the purpose of providing a centralized recordkeeping facility,"[95] it would likely fall within the definition of an SDR. The Commission does not believe that there are any policy reasons, including countering the risk of fragmentation, to warrant a broad-based exemption from registration for third party service providers that collect and maintain SBS data "for the purpose of providing a centralized recordkeeping facility."

B. SDRs Required to Register With The Commission

To the extent that a person falls within the statutory definition of an SDR, and makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, then that person is required to register with the Commission,[96] absent an exemption.[97] As discussed in the Cross-Border Proposing Release,[98] the Commission believes that U.S. persons[99] that perform the functions of an SDR are required to register with the Commission and

95 Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

96 See Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1).

97 See Section VI.K of this release discussing Rule 13n-12.

98 Cross-Border Proposing Release, 78 FR at 31042, supra note 3.

99 The term "U.S. person" is defined in Rule 13n-12(a), as discussed in Section VI.K.3 of this release, and cross-references to the definition of "U.S. person" in Exchange Act Rule 3a71-3(a)(4)(i), 17 CFR 240.3a71-3(a)(4)(i). See Cross-Border Adopting Release, 79 FR at 47371, supra note 11. Rule 3a71-3(a)(4)(i) defines "U.S. person" to mean "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." Id. at 47371. As the Commission noted in the Cross-Border Adopting Release, the definition of "U.S. person" in Rule 3a71-3(a)(4)(i) "reflect[s] a territorial approach to the

comply with Exchange Act Section 13(n)[100] and the rules and regulations thereunder, as well as other requirements applicable to SDRs registered with the Commission.[101] Requiring U.S. persons that perform the functions of an SDR to be operated in a manner consistent with the Title VII regulatory framework and subject to the Commission's oversight, among other things, helps ensure that relevant authorities are able to monitor the build-up and concentration of risk exposure in the SBS market, reduce operational risk in that market, and increase operational efficiency.[102] SDRs themselves are subject to certain operational risks that may impede the ability of SDRs to meet these goals,[103] and the Title VII regulatory framework is intended to address these risks.

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application of Title VII." Cross-Border Adopting Release, 79 FR at 47306, supra note 11. The Commission believes that the territorial focus of the definition is appropriate in the context of the SDR Rules because it will enable the Commission to identify those SDRs that should be required to register with the Commission by virtue of the location of a significant portion of their commercial and legal relationships within the United States. Cf. Cross-Border Adopting Release, 79 FR at 47337, supra note 11.

100 15 U.S.C. 78m(n).

101 In addition to the SDR Rules, the Commission is adopting Regulation SBSR, which imposes certain obligations on SDRs registered with the Commission. See Regulation SBSR Adopting Release, supra note 13. In a separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E), 15 U.S.C. 78m(n)(5)(E)), the Commission proposed rules that would require SDRs registered with the Commission to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. See End-User Exception Proposing Release, supra note 15.

102 See Proposing Release, 75 FR at 77307, supra note 2 ("The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market . . . . In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the SBS market.").

103 See Proposing Release, 75 FR at 77307, supra note 2 ("The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.").

Also, as stated in the Cross-Border Proposing Release, the Commission believes that a non-U.S. person[104] that performs the functions of an SDR within the United States would be required to register with the Commission, absent an exemption.[105] The Commission's interpretation of the scope of SDR registration is consistent with the Commission's territorial approach to the application of Title VII, as discussed in the Cross-Border Adopting Release.[106] As noted in that release, the Commission takes the view that a territorial approach to the application of Title VII is grounded in the text of the relevant statutory provisions and is designed to help ensure that the Commission's application of the relevant provisions is consistent with the goals that the statute was intended to achieve.[107] Once the focus of the statute has been identified using this analysis, determining whether a particular application of the statute is territorial turns on whether any relevant conduct that is the focus of the statute has a sufficient territorial nexus with the United States.[108]

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104 Under this interpretation, the term "non-U.S. person" would have the same meaning as set forth in Rule 13n-12(a), as discussed in Section VI.K.3 of this release.

105 Cross-Border Proposing Release, 78 FR at 31042, supra note 3. See also Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1) (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, are not required to register with the Commission. See Cross-Border Proposing Release, 78 FR at 31042 n.721, supra note 3.

106 Cross-Border Adopting Release, 79 FR at 47287, supra note 11. Accord IIB CB, supra note 26 (believing that the Commission's territorial approach to registration is appropriate for market infrastructures, including SDRs, and stating that "[t]his approach will help [ ] achieve the Commission's market oversight objectives while avoiding conflicts with foreign regulators, and it is consistent with the CFTC's approach").

107 Cross-Border Adopting Release, 79 FR at 47287, supra note 11.

108 See Cross-Border Adopting Release, 79 FR at 47287, supra note 11.

As stated in the Cross-Border Proposing Release, the Commission believes that "a non-U.S. person would be performing 'the functions of a security-based swap data repository within the United States' if, for example, it enters into contracts, such as user or technical agreements, with a U.S. person to enable the U.S. person to report [SBS] data to such non-U.S. person."[109] As another example, "a non-U.S. person would be performing 'the functions of a security-based swap data repository within the United States' if it has operations in the United States, such as maintaining [SBS] data on servers physically located in the United States, even if its principal place of business is not in the United States."[110]

One commenter submitted a comment relating to the Commission's guidance on SDR registration in the cross-border context.[111] This commenter suggested that "[t]he SDR registration requirement should apply to any entity, regardless of physical location of servers, that receives [SBS] transaction data from reporting sides who are U.S. persons for the purpose of complying with the Commission's reporting regulations."[112] The commenter also suggested that if an SDR "collects and maintains [SBS] transaction information or records in furtherance of these obligations, then it should be deemed to 'function' as an SDR in the United States and face

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109 Cross-Border Proposing Release, 78 FR at 31042, supra note 3.

110 Cross-Border Proposing Release, 78 FR at 31042, supra note 3. The Commission notes that if a person performing the functions of an SDR has operations in the United States to the extent that such operations constitute a principal place of business, then the person would fall within the definition of "U.S. person" in Rule 13n-12, which cross-references to Exchange Act Rule 3a71-3(a)(4)(i), 17 CFR 240.3a71-3(a)(4)(i). As adopted, the term "U.S. person" includes a partnership, corporation, trust, investment vehicle, or other legal person having its principal place of business in the United States. See Cross-Border Adopting Release, 79 FR at 47371, supra note 11. As a result of being a "U.S. person," the person with its principal place of business in the United States would be required to register as an SDR with the Commission.

111 See DTCC CB, supra note 26.

112 DTCC CB, supra note 26.

the registration requirements."[113] The Commission agrees generally with the commenter, but notes that determination of whether or not an SDR is required to register with the Commission is based on relevant facts and circumstances, including, for example, whether the SDR performs the functions of an SDR within the United States, such as having operations within the United States, as discussed above. Thus, an SDR's registration requirements should be analyzed separately from the reporting requirements of Title VII and Regulation SBSR.

The commenter stated that "an entity that (i) collects and maintains [non-SBS] transaction information, (ii) collects and maintains [SBS] transaction information from activity between non-U.S. persons, or (iii) collects and maintains [SBS] transaction information reported to the entity pursuant to regulatory requirements or commitments unrelated to those imposed by the Commission . . . should not be considered to function in the United States," and "[a]ccordingly, such an entity would not be required to register with the Commission as an SDR."[114] The Commission believes that this position is overly broad. The Commission agrees that a person that collects and maintains only non-SBS transaction information would not have to register with the Commission because it would not fall within the statutory definition of an SDR.[115] However, consistent with the Commission's territorial approach to the application of Title VII, an SDR that collects and maintains data relating to SBS transactions between non-U.S. persons may still be required to register with the Commission if the SDR makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR – for example by maintaining SBS data on servers physically located in the United States. Similarly,

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113 DTCC CB, supra note 26.

114 DTCC CB, supra note 26.

115 See Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

an SDR that collects and maintains SBS transaction information reported to the SDR pursuant to requirements or commitments unrelated to those imposed by the Commission may still be required to register with the Commission if the SDR makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR.

Determination of whether or not an SDR is required to register with the Commission is fact-specific. As stated in the Cross-Border Proposing Release, given the constant innovation in the market and the fact-specific nature of the determination, it is not possible to provide a comprehensive discussion of every activity that would constitute a non-U.S. person performing "the functions of a security-based swap data repository within the United States."[116] In order to provide legal certainty to market participants and to address commenters' concerns regarding the potential for duplicative regulatory requirements, the Commission is adopting Rule 13n-12, which exempts certain non-U.S. persons performing "the functions of a security-based swap data repository within the United States" from the registration and other requirements set forth in Exchange Act Section 13(n) and the rules and regulations thereunder. Rule 13n-12 is discussed in Section VI.K of this release.

C. Ancillary Services

As stated above, the Commission believes that the statutory definition of an SDR describes the core services or functions of an SDR. This release will refer to all other services or functions provided by an SDR as "ancillary services." SDRs are required to provide some ancillary services under the Exchange Act and the rules and regulations thereunder ("required ancillary services"). These required ancillary services include certain duties of SDRs that are set

116 Cross-Border Proposing Release, 78 FR at 31042-3, supra note 3.

forth in Exchange Act Section 13(n)(5)[117] and the duties imposed by the SDR Rules. SDRs also may voluntarily choose to provide other ancillary services ("voluntary ancillary services").

Five commenters submitted comments relating to "ancillary services."[118] Three commenters recommended that SDRs be allowed (but not be required) to offer ancillary services to SBS counterparties.[119] One of these commenters recommended that SDRs be allowed (but not be required) to offer "ancillary services," which, according to that commenter, "may include: asset servicing, confirmation, verification and affirmation facilities, collateral management, settlement, trade compression and netting services, valuation, pricing and reconciliation functionalities, position limits management, dispute resolution, counterparty identity verification and others."[120] The commenter noted that allowing SDRs to offer such services would "promote greater efficiencies and greater accuracy of data."[121] The commenter also recommended allowing an SDR's affiliates, which may not be registered with the Commission, to perform such "ancillary services."[122] The second commenter recommended that life cycle event processing

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117 15 U.S.C. 78m(n)(5).

118 See Barnard, supra note 19; BNY Mellon, supra note 19; DTCC 2, supra note 19; MarkitSERV, supra note 19; TriOptima, supra note 19; see also DTCC 1*, supra note 20; DTCC 3, supra note 19. These commenters generally did not define "ancillary services." But see MarkitSERV, supra note 19 (referring to "an array of services that are ancillary . . . to those narrowly outlined in the [SDR Rules] (i.e., basic receipt and storage of [SBS] data.)").

119 See MarkitSERV, supra note 19; DTCC 2, supra note 19; Barnard, supra note 19; see also TriOptima, supra note 19 (contemplating that an SDR would provide ancillary services and stressing the importance of equal access to SDR data when such services are provided).

120 MarkitSERV, supra note 19.

121 MarkitSERV, supra note 19.

122 MarkitSERV, supra note 19.

and legal recordkeeping services be treated as "ancillary" services.[123] The second commenter also recommended allowing SDRs to offer "an asset servicing function," which would allow SDRs to "assist in systemic risk monitoring by providing regulators with regular reports analyzing the data (such as position limit violations or certain identified manipulative trading practices)."[124] With respect to bundling, both commenters agreed that an SDR should not be allowed to require counterparties to use "ancillary services" in order to gain access to the SDR.[125] The third commenter believed that SDRs should be able to offer "ancillary services," but did not support the bundling of such services with mandatory or regulatory services.[126] The fourth commenter believed that if SDRs provide "ancillary services," then the SDRs should not have advantages in providing these services over competitors offering the same services.[127] This commenter noted, for example, that SDRs will maintain granular trade data that is valuable in providing post-trade services, and that other post-trade service providers should have the same access to the granular trade data as the SDR and its affiliates when providing post-trade services.[128] The fifth commenter suggested that certain functions that an SDR may perform (e.g., confirmation of trades, reconciliation, valuation of transactions, life-cycle management, collateral management) should not be considered as "processing of [SBSs]" for the purposes of

123 DTCC 2, supra note 19.

124 DTCC 1*, supra note 20.

125 MarkitSERV, supra note 19; DTCC 3, supra note 19; see also DTCC 4, supra note 19 (stating that providers offering services for one asset class should not be permitted to bundle or tie these services with services for other asset classes); TriOptima, supra note 19 (agreeing that "it is important that market participants have the ability to access specific services separately"). See Section VI.D.3.a of this release discussing bundling of services.

126 Barnard, supra note 19.

127 TriOptima, supra note 19.

128 TriOptima, supra note 19.

SB SEF registration.[129]

It appears that the commenters generally used the term "ancillary services" to mean voluntary ancillary services. The Commission, however, notes that at least two services identified by a commenter as "ancillary services" are considered by the Commission to be required ancillary services for an SDR. This commenter suggested that "confirmation" and "dispute resolution" are ancillary to "those [services] narrowly outlined in the SBS SDR Regulation (i.e., basic receipt and storage of swaps data)."[130] The Commission agrees with the commenter's suggestion that these two services are not "core" SDR services, which would cause a person providing such core services to meet the definition of an SDR, and thus, require the person to register with the Commission as an SDR. However, SDRs are required to perform these two services or functions, and thus, they are required ancillary services; as discussed in Sections VI.E.1.c and VI.E.6.c of this release, the Exchange Act requires SDRs to "confirm" the accuracy of the data submitted,[131] and the final SDR Rules include a dispute resolution

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129 BNY Mellon, supra note 19. See also Exchange Act Section 3D(a)(1), 15 U.S.C. 78c-4(a)(1) (stating that "[n]o person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section"). Subsequent to receiving this comment, the Commission issued a proposing release on the registration and regulation of SB SEFs, interpreting the Dodd-Frank Act to key the SB SEF registration obligation on the definition of an SB SEF in Exchange Act Section 3(a)(77). See 15 U.S.C. 78c(a)(77), as added by Dodd-Frank Act Section 761(a). See SB SEF Proposing Release, 76 FR at 10959 n.62; supra note 29. The Commission expects to address the scope of SB SEF registration when it adopts final rules relating to the registration and regulation of SB SEFs.

130 See MarkitSERV, supra note 19.

131 See Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B); Rule 13n-4(b)(3) (requiring an SDR to "[c]onfirm, as prescribed in Rule 13n-5, with both counterparties to the [SBS] the accuracy of the data that was submitted"); Rule 13n-5(b)(1)(iii) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably

requirement.[132]

An SDR may delegate some of these required ancillary services to third party service providers, who do not need to register as SDRs to provide such services. The SDR will remain legally responsible for the third party service providers' activities relating to the required ancillary services and their compliance with applicable rules under the Exchange Act. For example, as discussed above, the Exchange Act requires SDRs to "confirm" the accuracy of the data submitted.[133] If an SDR delegates its confirmation obligation to a third party service provider, then the third party service provider that provides this required ancillary service would not need to register as an SDR, unless it otherwise falls within the definition of an SDR; however, the SDR that delegates its obligation to the third party service provider would remain responsible for compliance with the statutory requirement.[134]

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designed to satisfy the SDR that the transaction data that has been submitted to the SDR is complete and accurate).

132 See Section VI.E.6.c of this release discussing Rule 13n-5(b)(6).

133 See Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B). In a separate release, the Commission proposed rules under Exchange Act Section 15F(i)(1), which provides that SBS dealers and major SBS participants must "conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation . . . of all security-based swaps." See Trade Acknowledgment and Verification of Security-Based Swap Transactions, Exchange Act Release No. 63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) ("Trade Acknowledgment Release"). SDRs are not required to perform confirmations under Exchange Act Section 15F(i)(1) and the rules and regulations thereunder, but, in certain circumstances, SDRs may be able to rely on confirmations that are provided pursuant to Exchange Act Section 15F(i)(1). See Section VI.E.1.c of this release discussing the circumstances where a single confirmation could fulfill both requirements.

134 An SDR that delegates required ancillary services to a third party service provider must have a reasonable basis for relying on the third party service provider. See Section VI.E.1.c of this release discussing reasonable reliance in the context of confirmations. Cf. Exchange Act Rule 17a-4(i), 71 CFR 240.17a-4(i) (stating that an agreement with an outside entity to maintain and preserve records for a member, broker, or dealer will not

The Commission agrees with the commenters' view that SDRs should be allowed to offer voluntary ancillary services.[135] The Commission believes that use of such services by market participants and market infrastructures will likely improve the quality of the data held by the SDRs.[136] The Commission believes that when the data held at an SDR is used by counterparties for their own business purposes, rather than solely for regulatory purposes, the counterparties will have additional opportunities to identify errors in the data and will likely have incentives to ensure the accuracy of the data held by the SDR.[137] Such voluntary ancillary services that an SDR could provide include, for example, collateral management, clearing and settlement, trade compression and netting services, and pricing and reconciliation functionalities. These services could also be provided by persons that are not SDRs and would not, in and of themselves, require the providers to register as SDRs.[138]

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relieve the member, broker, or dealer from its responsibilities under Exchange Act Rules 17a-3 or 17a-4).

135 See MarkitSERV, supra note 19; DTCC 2, supra note 19; Barnard, supra note 19.

136 See MarkitSERV, supra note 19 (recommending allowing SDRs to offer "ancillary services" because it would "promote greater efficiencies and greater accuracy of data").

137 For example, counterparties might use the data maintained by the SDR as part of their risk management activities. See MarkitSERV, supra note 19 ("[O]ne of the critical components in ensuring the accuracy of swaps data is the degree to which such data is utilized by industry participants in other processes. The existence of a number of feedback loops and distribution channels through which data will flow will enable participants to identify, test and correct inaccuracies and errors.").

138 The performance of some of these services, such as clearing and settlement and netting services, may cause a person to be a "clearing agency," as defined in Exchange Act Section 3(a)(23), 15 U.S.C. 78c(a)(23); see also Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220, 66227–28 (Nov. 2, 2012) ("Clearing Agency Standards Release") ([T]he definition of clearing agency in Section 3(a)(23)(A) of the Exchange Act covers any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities and provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or

The Commission also agrees with the commenters' view that market participants should not be required to use voluntary ancillary services offered by an SDR as a condition to use the SDR's repository services,[139] and that SDRs should not be permitted to use their repository function to gain advantages in providing voluntary ancillary services over competitors offering the same services.[140] As discussed further below, the Commission is adopting Rule 13n-4(c)(1), which should address commenters' concerns.[141]

D. Business Models of SDRs

The Commission understands that SDRs might operate under a number of business models and did not intend for the proposed SDR Rules to mandate any particular business model.[142] In the Proposing Release, the Commission solicited comments on whether the SDR Rules should favor or discourage one business model over another.[143] Three commenters, including one comment submitted prior to the Proposing Release, suggested that SDRs should be required to operate on an at-cost utility model.[144]

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for the allocation of securities settlement responsibilities. . . . The determination of whether particular activities meet the definition of a clearing agency depends on the totality of the facts and circumstances involved."). It is unlawful for a clearing agency to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than exempted securities) unless it is registered with the Commission, or exempted from registration, pursuant to Exchange Act Sections 17A(b) and 19(a), and the rules and regulations thereunder.

139 See MarkitSERV, supra note 19; DTCC 2, supra note 19; Barnard, supra note 19.

140 See TriOptima, supra note 19.

141 See Section VI.D.3.a of this release discussing Rule 13n-4(c)(1).

142 See Proposing Release, 75 FR at 77308, supra note 2.

143 Proposing Release, 75 FR at 77308, supra note 2.

144 See DTCC 2, supra note 19 (stating that "there is a significant advantage to the market if SDRs are required to provide basic services on an at-cost or utility model basis, as it avoids the potential abuse or conflict of interest related to a relatively small number of

Consistent with commenters' views, the Commission understands that an SDR operating on a for-profit, non-utility model, or commercial basis, may be presented with more conflicts of interest, including economic self-interest in pricing or bundling its services, than an SDR operating on an at-cost utility model, or non-profit basis.[145] The Commission believes, however, that if an SDR operating on an at-cost utility model has an affiliate that provides ancillary services for SBSs for profit, then that SDR may be presented with conflicts of interest similar to conflicts at an SDR operating on a for-profit, non-utility model.[146] For example, an SDR that has an affiliate that provides asset servicing for profit would most likely face similar conflicts as a for-profit SDR that provides asset servicing itself.

The Commission believes that the final SDR Rules, including rules pertaining to conflicts of interest, are sufficiently broad to address the range of conflicts of interest inherent in different SDR business models. For instance, under Rule 13n-4(c)(3), each SDR is required to identify conflicts of interest applicable to it and establish, maintain, and enforce written policies and procedures to mitigate these conflicts.[147] In addition, the Commission believes that allowing SDRs to pursue different business models will increase competition, efficiency, and innovation among SDRs. For example, by not prescribing one particular business model, new entrants may

service providers in the SDR industry" and that "SDR fee structures should reflect an at-cost operating budget"); Benchmark*, supra note 20 (stating that a non-profit utility structure "helps promote innovative uses" of SBS data "to maximize its value to market participants"); Saul, supra note 19 (stating that SDRs should "serve the entire industry as a utility" and that "[t]reating an SDR as a utility would also make it easier for the industry to provide the manpower and the capital to form an SDR"); see also DTCC 3, supra note 19 ("SDRs should serve an impartial, utility function.").

145 See Section VIII of this release discussing the costs and benefits of different business models.

146 See Section VIII of this release for further discussion.

147 See Section VI.D.3.c.iii of this release discussing Rule 13n-4(c)(3).

have an incentive to develop business models for SDRs that efficiently provide core services to the industry and effectively mitigate conflicts.[148] Therefore, after considering the comments, the Commission continues to believe that it is not necessary to mandate any particular business model for SDRs.

IV. Number of SDRs and Consolidation of SBS Data

The Commission received several comments relating to the issue of data fragmentation among SDRs. The Commission believes that if there are multiple SDRs in any given asset class, then it may be more difficult for regulators to monitor the SBS market because of the challenges in aggregating SBS data from multiple SDRs.[149] Some commenters suggested limiting the number of SDRs to one per asset class in order to address these concerns.[150] While such a limitation would resolve many of the challenges involved in aggregating SBS data, the Commission believes that imposing such a limitation would stymie competition among SDRs,

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148 See Section VIII of this release discussing the costs and benefits of different business models.

149 See FINRA SBSR, supra note 27 (recognizing "the Commission's acknowledgement of 'the possibility that there could emerge multiple registered SDRs in an asset class,' and, in the event this should occur that 'the Commission and the markets would be confronted with the possibility that different registered SDRs could adopt different dissemination protocols, potentially creating fragmentation in SBS market data'") (citations omitted); DTCC 3, supra note 19 ("When there are multiple SDRs in any particular asset class, the [Commission] should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs.").

150 See ISDA Temp Rule, supra note 28 ("[T]he designation of a single [SDR] per class of security-based swap would provide the Commission and market participants with valuable efficiencies. In particular, there would be no redundancy of platforms, no need for additional levels of data aggregation for each asset class and reduced risk of errors and greater transparency (because a single [SDR] per asset class would avoid the risk of errors associated with transmitting, aggregating and analyzing multiple sources of potentially incompatible and duplicative trade data)."); see also Saul, supra note 19 (suggesting that the Commission should seek to have only one or two SDRs to service the SBS market).

and, consequently, may lead to increased costs to market participants.[151] The Commission believes that the better avenue at this point is to refrain from regulating the number of SDRs in an asset class to permit market forces to determine an efficient outcome. Therefore, the Commission is not adopting the commenters' suggestions to limit the number of SDRs in each asset class.

In the Proposing Release, the Commission requested comment on whether the Commission should designate one SDR as the recipient of the information from all other SDRs in order to provide the Commission and relevant authorities with a consolidated location from which to access SBS data for regulatory monitoring and oversight purposes.[152] Some commenters suggested that an SDR's duties should include reporting SBS data to a single SDR that would consolidate the data for relevant authorities or otherwise mandating the consolidation of SBS data.[153] Specifically, one commenter recommended that the Commission "designate one SDR as the recipient of the information of other SDRs to ensure the efficient consolidation of data."[154] The commenter further stated that the designated SDR would need to have "the

151 See Section VIII.C.3.b of this release discussing the SDR Rules' potential effects on competition ("The Commission believes that by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the SDR Rules should promote competition among SDRs . . . . Increased competition may lower costs for users of SDR services."). Accord PFMI Report, supra note 50("Competition can be an important mechanism for promoting efficiency. Where there is effective competition and participants have meaningful choices among FMIs[, including SDRs], such competition may help to ensure that FMIs are efficient.").

152 Proposing Release, 75 FR at 77309, supra note 2.

153 See DTCC 1*, supra note 20; Better Markets 1, supra note 19; see also FINRA SBSR, supra note 27 (urging the Commission to mandate the consolidation of disseminated SBS data to the public).

154 DTCC 1*, supra note 20; see also Better Markets 1, supra note 19 (making similar comments); see also DTCC 2, supra note 19 ("The role of an aggregating SDR is

organization and governance structure that is consistent with being a financial market utility serving a vital function to the entire marketplace."[155]

The Commission does not dispute the commenter's assertion that fragmentation of data among SDRs would "leave to regulators the time consuming, complicated and expensive task of rebuilding complex data aggregation and reporting mechanisms."[156] However, if the Commission were to designate one SDR as the data consolidator, such an action could be deemed as the Commission's endorsement of one regulated person over another, discourage new market entrants, and interfere with competition, resulting in a perceived government-sponsored monopoly.[157] In addition, such a requirement would likely impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator.

In addition, any consolidation required by the Commission would be limited to SBS data and may not necessarily include data not required to be reported under Title VII and Regulation SBSR, such as swap data. For example, consolidated SBS data may show that a person entered into several SBSs based on individual equity securities. If the person also entered into swaps based on a broad-based security index made up of the individual equity securities, then the consolidated data would not necessarily include that information. Therefore, commenters' suggestion to designate one SDR as the data consolidator may not fully address their data fragmentation concerns unless the same SDR also consolidates swap data, which the CFTC regulates.

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significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources.").

155 DTCC 1*, supra note 20.

156 DTCC 3, supra note 19.

157 See Section VIII of this release for further discussion.

Therefore, after considering the comments, the Commission is not designating, at this time, one SDR as the recipient of information from other SDRs in order to provide relevant authorities with consolidated data. The Commission may revisit this issue if there is data fragmentation among SDRs that is creating substantial difficulties for relevant authorities to get a complete and accurate view of the market.[158]

V. Implementation of the SDR Rules

A. Prior Commission Action

The Commission solicited comment in the Proposing Release on whether it should adopt an incremental, phase-in approach with respect to Exchange Act Section 13(n) and the rules thereunder.[159] The Commission further sought and received comments on similar implementation issues relating to Title VII in other rulemakings and through solicitations for comments.[160]

1. Effective Date Order

In addition, as discussed above, on June 15, 2011, the Commission issued the Effective Date Order, which provided guidance on the provisions of the Exchange Act added by Title VII with which compliance would have been required as of July 16, 2011 (i.e., the effective date of the provisions of Title VII). The Effective Date Order provided exemptions to SDRs from Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C), each of which will expire on the earlier of (1) the date the

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158 See Section VI.D.2.c.ii of this release discussing aggregation of data across multiple registered SDRs by the Commission.

159 Proposing Release, 75 FR at 77314, supra note 2.

160 See Sections I.C and I.D of this release discussing other comments and regulatory initiatives considered in this rulemaking.

Commission grants registration to the SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs.[161] Absent further Commission action, these exemptions will expire as of the Compliance Date (as defined below), unless the Commission has granted an SDR's registration before the Compliance Date, in which case these exemptions will expire, with respect to that SDR, as of the date the Commission grants the SDR's registration.

In addition, the Effective Date Order also provided exemptive relief from the rescission provisions of Exchange Act Section 29(b) in connection with Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C).[162] That relief does not expire automatically, but rather when the Commission specifies.[163] The Commission is now specifying that this exemption from Section 29(b) will expire on the Compliance Date, or for those SDRs that are registered prior to the Compliance Date, the date that the Commission grants each SDR's registration.

2. Implementation Policy Statement

As discussed above, on June 11, 2012, the Commission issued a statement of general policy on the anticipated sequencing of compliance dates of final rules to be adopted under Title VII. The Implementation Policy Statement stated that compliance with the SDR Rules "earlier in the implementation process should facilitate the development and utilization of SDRs in a regulated manner."[164] Among other things, the Implementation Policy Statement requested comment on whether the Commission should adopt a phase-in of the SDR Rules and whether

161 Effective Date Order, 76 FR at 36306, supra note 9.

162 Effective Date Order, 76 FR at 36307, supra note 9.

163 Effective Date Order, 76 FR at 36307, supra note 9.

164 Implementation Policy Statement, 77 FR at 35631, supra note 10.

SDRs should be able to secure a grace period to defer compliance with some or all of the requirements of Exchange Act Section 13(n) and the SDR Rules.[165]

B. Summary of Comments

While only two commenters on implementation referred specifically to the SDR Rules, the Commission believes that other comments, particularly those related to timing with respect to implementing rules on SBS reporting, are relevant to the implementation of the SDR Rules as well. Eight commenters suggested that a phase-in approach to the SDR Rules or SBS reporting generally may be appropriate.[166] The commenters generally indicated that a phase-in would be necessary to enable existing SDRs and other market participants to make the necessary changes

165 Implementation Policy Statement, 77 FR at 35634, supra note 10.

166 See Barclays*, supra note 21; DTCC 2, supra note 19 ("[T]he Commission [should] ensure that the registration process does not interrupt current operation of existing trade repositories who intend to register as SDRs. This can be achieved as a phase-in for existing SDRs where services will need to be amended to conform with the final rules given the compressed time period between the publication of the final rules and the effective date of the Dodd-Frank Act."); FIA*, supra note 21("[P]hase-in is critical for a smooth implementation of the changes required under the Dodd-Frank Act."); FSF*, supra note 21; FSR Implementation, supra note 23; MFA 2, supra note 19; Morgan Stanley*, supra note 20 ("[G]iven the market disruption that could result from the simultaneous application of these requirements across products and markets, and the potentially severe consequences to the markets and the larger economy, we believe that a phase in approach is both permitted and contemplated by Dodd-Frank, and desirable in order to maintain orderly, efficient, liquid and inclusive markets."); SIFMA Implementation, supra note 22 ("Once SDRs are registered and [SBS dealers] and [major SBS participants] have connected to them, data reporting can begin. [SBS dealers] and [major SBS participants] will not be able to provide, and [SDRs] will not be able to accept, all data on Dodd-Frank Act-compliant timelines on the first day of operation. Instead, there should be a phased process to develop the procedures and connections needed to ultimately report all Dodd-Frank Act-required data in the appropriate time frame."); see also DTCC 3, supra note 19; DTCC 5, supra note 19 ("[T]he final rules should include implementation and compliance dates that are unambiguous . . . . Appropriate time must be afforded to ensure that implementation can take place smoothly for all market participants.").

to their operations to comply with the new regulatory requirements.[167] One of the commenters who advocated a phase-in approach also recognized the importance of reporting SBS data to SDRs as an early part of the Dodd-Frank Act implementation process.[168]

Six commenters supported a phase-in approach based on asset class.[169] Some

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167 See, e.g., Barclays*, supra note 21 ("Changes envisioned by Title VII require very significant investment into operational, IT and other infrastructure - infrastructure that will take time and resources to build, test and optimize. The ability to fund and execute the necessary infrastructure build, as well as put in place the risk management and operational processes needed to conduct business under the new regulatory regime, will vary significantly by asset class and type of market participant."); DTCC 2, supra note 19 (stating that "the final rules [should] be subject to a phase-in period to allow an adequate period for existing service providers . . . to make necessary changes to their service offerings," requesting that the Commission alternatively "provide specific transitional arrangements for existing infrastructures," and noting that the continuation of counterparty reporting and the ability of SDRs to receive and maintain current trade information on an ongoing basis is "imperative for effective oversight of systemic risk and the continuance of the operational services to market participants"); FSF*, supra note 21 ("New market infrastructure and technologies, including central clearing services, data reporting services and trading platforms, will be required to give effect to the new Swap regulatory regime. Unless sufficient time is allotted for these components of market infrastructure and technologies to adequately develop, all market participants (and particularly end users) will face interruptions in their ability to enter into Swaps to hedge their business risks or manage investments to meet client objectives.").

168 See MFA 2, supra note 19 ("[W]e believe the first two priorities should be: (i) expanding the use of central clearing for liquid ('clearable') contracts; and (ii) having trade repositories receive data on both cleared and bilateral swaps. These changes would provide substantial benefits to the markets by enhancing price transparency and competition for the most liquid swap transactions . . . . Comprehensive reporting to SDRs and regulators . . . will allow regulators to monitor systemic risk and individual risk concentrations much more effectively, and intervene specifically as necessary."); see also FSF*, supra note 21 (The Commission "should prioritize implementation of data reporting, including registration of [SDRs], to regulators ahead of real-time reporting and other requirements, including public reporting. The [Commission] will learn much about the full range of Swap markets from the data collected by SDRs. This knowledge will be essential in developing rules that meet Dodd-Frank's requirements while still allowing for active and liquid Swap markets.").

169 See Barclays*, supra note 21 ("[W]e recommend that the [Commission] phase in the clearing, execution and reporting requirements gradually over time, staggered by asset class."); DTCC 3, supra note 19 ("[P]hasing should focus first on the products with the

commenters supported a phase-in based on other criteria.[170] Some commenters indicated that a phase-in period, which could be based on asset class or other SBS or market participant attributes, is important in order to avoid market disruption.[171] While one commenter indicated

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greatest automation and then on products with less automation. The more widespread the automated processing, the higher quality the data reported to SDRs. As automated processing is most widely prevalent in credit derivatives . . . it should be the first asset class implemented. Interest rate derivatives, being the next most widely automated asset class, would be next, followed by FX derivatives, then commodity and equity derivatives last."); FSF*, supra note 21 ("The [Commission] should phase in requirements based on the state of readiness of each particular asset class (including, where applicable, by specific products within an asset class) and market participant type."); FSR Implementation, supra note 23 ("[I]mplementing regulations on a product-by-product basis would reduce the risk of significant market dislocation during a transition period. For example, certain credit default swaps that are already reported to a trade information warehouse, are highly standardized, and are being regularly submitted for central clearing . . . may be a natural choice with which to confirm that systems are operating appropriately before expanding regulatory requirements to other [asset] classes."); AII Implementation, supra note 23 ("[C]learing and other requirements should come first for highly liquid, standardized instruments, such as credit default swaps" and "[l]ess liquid products, such as certain physical commodity instruments, should come afterward."); SIFMA Implementation, supra note 22 ("Reporting should also be phased in by asset class, based on whether reporting infrastructure and data exist.").

170 See Morgan Stanley*, supra note 20 ("In addition to phase in based on asset class and reporting times, reporting could also be phased in based on how a product trades [e.g., whether the SBS is cleared]."); FSR Implementation, supra note 23 (stating that "it may be prudent to have different portions of a single rulemaking proposal take effect at different times and with due consideration of steps that are preconditions to other steps"; suggesting, as an example, that a requirement to designate a CCO should be implemented quickly, but that the CCO be given time to design, implement, and test the compliance system before any requirement to certify as to the compliance system becomes effective; and supporting a phase-in approach "that recognizes the varying levels of sophistication, resources and scale of operations within a particular category of market participant"). But see Barclays*, supra note 21 ("Phasing by type of market participant would not be useful for reporting obligations, in [the commenter's] view, as the reported information needs to reflect the entirety of the market to be useful for the market participants and regulators.").

171 See, e.g., DTCC 2, supra note 19 ("[A]ppropriate transitional arrangements [should] be made to avoid market disruption by the implementation of the Proposed Rule . . . . Restrictions to [the commenter's SDR] operation could introduce significant operational risks to market participants."); Barclays*, supra note 21 (Phase-in by asset class would

that connectivity concerns should not delay implementation because it is easy for an SDR and other market infrastructures to establish connectivity,[172] another commenter cautioned that market connectivity will take time to establish and test.[173] None of the commenters provided specific timeframes for a phase-in approach.[174]

In addition to the comments received above, participants in the Implementation Joint Roundtable provided input regarding the appropriateness of a phase-in period for Title VII rulemakings. Many of the participants in the Implementation Joint Roundtable advocated for a phase-in period for the SDR Rules or SBS reporting generally; however, the participants' specific approaches varied. While some participants at the Implementation Joint Roundtable advocated a phase-in by asset class,[175] other participants suggested that a phase-in should be

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help "ensure that both the industry and SDRs have sufficient time to build and test the needed infrastructure in order to prevent any potential market disruptions that could result from the implementation of new rules."); see also FSR Implementation, supra note 23 (recommending that the Commission consider resource constraints in evaluating transition deadlines and stating that "if there are a dozen rules that would each take about a month to implement in isolation under normal circumstances, it is unrealistic to expect all twelve rules to be implemented one month from passage of final rules").

172 DTCC 3, supra note 19 ("Connectivity between clearinghouses and [SB SEFs], as well as SDRs, is easy to establish (and, in many instances, already exists) and should not be the reason for delaying the implementation of real-time reporting rules.").

173 FSR Implementation, supra note 23 ("Although we recognize that central clearing, exchange trading and transparent reporting are core aspects of the new regulatory system, they require a web of interconnections that will take time to establish and test, and their use should not become obligatory until such establishment and testing is complete.").

174 But see Bank of Tokyo SBSR, supra note 27 (requesting "that the [Commission] . . . defer compliance requirements under Title VII until December 31, 2012" to "facilitate coordination among national authorities in the United States, Japan and other relevant jurisdictions in order to avoid overlapping and inconsistent regulatory regimes"). Because the timeframe suggested by this commenter has passed, this aspect of the comment is now moot.

175 See, e.g., statement of Ronald Levi, GFI Group, Inc., at Implementation Joint Roundtable ("[D]epending on which asset classes go first or which asset classes are amongst the first

based on other product attributes, such as the liquidity of the product,[176] or based on the development of other market infrastructures.[177] Another participant suggested that SDRs' obligations to provide reports of SBS transactions to regulators – which the Commission believes are relevant to the direct electronic access requirement in Rule 13n-4(b)(5)[178] – should be implemented in a prioritized manner, with daily batch snapshots provided until more real-time solutions are developed.[179] None of the Implementation Joint Roundtable participants provided specific timeframes for a phase-in approach.

C. Sequenced Effective Date and Compliance Date for the SDR Rules

After considering the issues raised by the commenters and Implementation Joint Roundtable participants, the Commission has determined to adopt, in lieu of a phase-in approach,

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phase will determine how long it takes us."); statement of Larry Thompson, The Depository Trust & Clearing Corporation, at Implementation Joint Roundtable ("And right now, at least for a couple of classes, they're in a much better position to be able to see transparent into the marketplace, especially the credit default swap [marketplace] . . . ."); statement of Jamie Cawley, Javelin Capital Markets, LLC, at Implementation Joint Roundtable ("Certainly from where we sit . . . interest rate swaps, vanilla swaps clearly qualify for a day one [implementation and] index [swaps] right behind that or on the same day. And the constituents of the indices certainly as well. And then it trails off from there over time . . . .").

176 See, e.g., statement of Chris Edmonds, ICE Trust, at Implementation Joint Roundtable ("[I]nstead of looking at it necessarily by asset class, the commissions may want to look at it by the instruments that have the greatest amount of liquidity.").

177 See, e.g., statement of Sunil Cutinho, CME Group, at Implementation Joint Roundtable ("[W]e don't believe that . . . data should be in an SDR before clearing has to be done.").

178 See Section VI.D.2.c.ii of this release discussing direct electronic access.

179 Statement of Raf Pritchard, TriOptima – triResolve, at Implementation Joint Roundtable ("[W]e would observe obviously that building real-time solutions is a lot more critical and sensitive than building daily batch solutions. And so in terms of getting that first cut, it might make sense to prioritize a daily batch snapshot of the market . . . . [T]hen you could sequence the real-time -- the more real-time sensitive parts of the reporting requirements subsequent to that.").

a sequenced effective date and compliance date for the SDR Rules[180] that recognizes the practical constraints arising from the time necessary for persons to analyze and understand the final rules adopted by the Commission, to develop and test new systems required as a result of the Dodd-Frank Act's regulation of SDRs and the SDR Rules, to prepare and file a completed Form SDR, to be in a position to demonstrate their ability to meet the criteria for registration set forth in Rule 13n-1(c)(3),[181] and to register with the Commission. The Commission agrees with commenters who have suggested that the Commission require the reporting of SBS transaction information to registered SDRs early in the implementation process because the Commission will then be able to utilize the information reported to registered SDRs to inform other aspects of its Title VII rulemaking.[182] Adopting and implementing a regulatory framework for SDRs will facilitate access by the Commission and market participants to SBS information collected by

180 Title VII provides the Commission with the flexibility to establish effective dates beyond the minimum 60 days specified therein for Title VII provisions that require a rulemaking. See Dodd-Frank Act Section 774 (specifying that the effective date for a provision requiring a rulemaking is "not less than 60 days after publication of the final rule or regulation implementing such provision"). Furthermore, as with other rulemakings under the Exchange Act, the Commission may set compliance dates (which may be later than the effective dates) for rulemakings under the Title VII amendments to the Exchange Act. Together, this provides the Commission with the ability to sequence the implementation of the various Title VII requirements in a way that effectuates the policy goals of Title VII while minimizing unnecessary disruption or costs. See Effective Date Order, 76 FR at 36289, supra note 9.

181 See Section VI.A.2.c of this release discussing Rule 13n-1(c), which requires that the Commission make a finding that a "security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder."

182 See, e.g., FSF*, supra note 21 (noting that the Commission "will be in a better position to adopt rules that achieve Dodd-Frank's goals while maintaining active and viable [SBS] markets" if SDRs are required to register and data reporting is enabled).

SDRs.[183]

All of the SDR Rules will become effective 60 days following publication of the rules in the Federal Register ("Effective Date"). However, the exemptions to provisions in Exchange Act Section 13(n) that the Commission provided in the Effective Date Order will continue to be in effect following the adoption of the SDR Rules. Consistent with the Effective Date Order, the exemptive relief remains in place and will expire: (1) upon the compliance date for the SDR Rules, or (2) for those SDRs that are registered prior to such compliance date, the date that the Commission grants each SDR's registration.[184]

SDRs must be in compliance with the SDR Rules by 365 days after publication of the rules in the Federal Register ("Compliance Date").[185] Absent an exemption, SDRs must be registered with the Commission and in compliance with the federal securities laws and the rules and regulations thereunder (including the applicable Dodd-Frank Act provisions and all of the SDR Rules) by the Compliance Date, and all exemptions that the Commission provided in the Effective Date Order will expire on the Compliance Date.[186] After the Compliance Date,

183 See, e.g., FSF*, supra note 21 ("The [Commission] should prioritize implementation of data reporting, including registration of Swap data repositories ('SDRs'), to regulators ahead of real-time reporting and other requirements, including public reporting. The [Commission] will learn much about the full range of Swap markets from the data collected by SDRs. This knowledge will be essential in developing rules that meet Dodd-Frank's requirements while still allowing for active and liquid Swap markets.").

184 See Effective Date Order, 76 FR at 36306, supra note 9.

185 In a separate release, the Commission is proposing a compliance schedule for portions of Regulation SBSR in which the timeframes for compliance with the reporting and public dissemination requirements would key off of the registration of SDRs. See Regulation SBSR Proposed Amendments Release, supra note 13.

186 Any SDR that is registered with the Commission before the Compliance Date will be required, absent an exemption, to comply with Exchange Act Section 13(n); the SDR Rules; and Regulation SBSR, as applicable to registered SDRs, as of the date the Commission grants registration to the SDR. See Effective Date Order, 76 FR at 36306,

pursuant to Exchange Act Section 13(n)(1), it will be unlawful, absent exemptive relief,[187] (1) for a person, unless registered with the Commission as an SDR, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR or (2) for an SDR to fail to comply with all applicable statutory provisions and the SDR Rules.

The Commission believes that setting the Compliance Date for the SDR Rules at 365 days after publication of the rules in the Federal Register adequately addresses commenters' concerns[188] by providing SDRs with sufficient time to become compliant with the Dodd-Frank Act and the SDR Rules and for the Commission to act on SDRs' applications for registration, while also allowing SDRs to continue performing the functions of an SDR without interruption.

The Commission notes that if an SDR files its Form SDR close to the Compliance Date, it is possible that the Commission will not have sufficient time to consider the Form SDR and the SDR may not be registered with the Commission by the Compliance Date. In this case, the SDR must cease any operations that cause it to meet the statutory definition of an SDR as of the Compliance Date and not begin or resume such operations until (and unless) the Commission grants the SDR's registration or provides the SDR with an exemption. As discussed below, Rule 13n-1(c), as adopted, provides that the Commission will grant registration to an SDR or institute proceedings to determine whether registration should be granted or denied within 90 days of the

supra note 9 (granting exemptions to certain provisions in Exchange Act Section 13(n) and indicated that the exemptions will expire on the earlier of (1) the date the Commission grants registration to an SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs).

187 See Section VI.K of this release discussing Rule 13n-12, which provides an exemption for certain non-U.S. persons from the SDR requirements.

188 See, e.g., DTCC 2, supra note 19.

date of the publication of notice of the filing of an application for registration. Accordingly, SDRs should consider that the Commission may take several months following the publication of notice of the filing of an application for registration[189] to review an SDR's application for registration and assess whether the SDR meets the criteria for registration set forth in Rule 13n-1(c)(3).[190]

After weighing the practical considerations with respect to SDRs' preparations for compliance with the Dodd-Frank Act and the SDR Rules, as well as the benefits to investors and regulators of adopting the SDR Rules in order to facilitate the establishment and utilization of registered SDRs, the Commission has determined not to adopt a phase-in approach, as suggested

189 The Commission's review of the application for registration could extend beyond 90 days. Rule 13n-1(c) provides that the Commission will grant registration or institute proceedings to determine whether registration should be granted or denied within 90 days of the publication of notice of the filing of an application for registration "or within such longer period as to which the applicant consents."

190 As provided in Rule 13n-1(c)(3), in order to grant the registration of an SDR, the Commission must make a finding that "such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder." In addition to the application for registration on Form SDR, Rule 13n-1(b) provides that, "[a]s part of the application process, each [SDR] shall provide additional information to any representative of the Commission upon request." In determining whether an applicant meets the criteria set forth in Rule 13n-1(c), the Commission will consider the application and any additional information obtained from the SDR, which may include information obtained in connection with an inspection or examination of the SDR. If the Commission is unable to determine that the applicant meets the criteria for registration set forth in Rule 13n-1(c)(3), then the Commission may not grant registration to the applicant. See also Section VI.A.1 of this release discussing Form SDR and information required for registration as an SDR.

by some commenters and Implementation Joint Roundtable participants.[191] Specifically, the Commission does not believe that it is necessary or appropriate to tailor a phase-in period for the SDR Rules based on specific asset classes, type of market participant, or other SBS attributes. While a phase-in approach based on asset class, type of market participant, or other attributes may have been appropriate had the Commission adopted rules prior to the July 16, 2011 effective date of the Dodd-Frank Act,[192] the Commission believes that the passage of time has afforded ample time for the development of SDR infrastructure. This belief is based, in part, on the existence of four swap data repositories already provisionally registered with the CFTC.[193] These swap data repositories, most of which will likely register as SDRs with the Commission, have had approximately three years to implement the final swap data repository rules adopted by the CFTC on August 4, 2011 (Part 49 swap data repository rules)[194] and December 20, 2011 (Part 45 swap data recordkeeping and reporting rules).[195] The Commission believes that the CFTC's Part 49 rules[196] and Part 45 rules[197] applicable to swap data repositories are substantially similar to the final SDR Rules. Because of the substantial similarity between the Commissions' rules, to the extent that the SDRs are in compliance with the CFTC's rules, they are likely already in substantial compliance with the Commission's SDR Rules.

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191 See Section V.B of this release discussing commenters' and Implementation Joint Roundtable participants' views with respect to phase-in approaches.

192 See Section V.A.1 of this release discussing the Effective Date Order.

193 CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

194 See CFTC Part 49 Adopting Release, supra note 36.

195 See CFTC Part 45 Adopting Release, supra note 37.

196 See CFTC Part 49 Adopting Release, supra note 36.

197 See CFTC Part 45 Adopting Release, supra note 37.

VI. Discussion of Rules Governing SDRs

Exchange Act Section 13(n), enacted in Dodd-Frank Act Section 763(i), makes it "unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository."[198] To be registered and maintain such registration, each SDR is required (absent an exemption) to comply with the requirements and core principles described in Exchange Act Section 13(n), as well as with any requirements that the Commission adopts by rule or regulation.[199] The Exchange Act also requires each SDR to designate an individual to serve as a CCO and specifies the CCO's duties.[200] In addition, the Exchange Act grants the Commission authority to inspect and examine any registered SDR and to prescribe data standards for SDRs.[201]

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198 15 U.S.C. 78m(n)(1); see also Section III.A of this release discussing definition of "security-based swap data repository." Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission (absent an exemption), regardless of whether that person is also registered under the Commodity Exchange Act ("CEA") as a swap data repository. Exchange Act Section 13(n)(8), 15 U.S.C. 78m(n)(8); see also CEA Section 21, 7 U.S.C. 24a (regarding swap data repositories). Under the Exchange Act, a clearing agency may register as an SDR. Exchange Act Section 13(m)(1)(H), 15 U.S.C. 78m(m)(1)(H). In addition, any person that is required to register as an SDR pursuant to this section must register with the Commission (absent an exemption) regardless of whether that person is also registered as an SB SEF. See SB SEF Proposing Release, supra note 29.

199 See Exchange Act Section 13(n)(3), 15 U.S.C. 78m(n)(3).

200 See Exchange Act Section 13(n)(6), 15 U.S.C. 78m(n)(6).

201 See Exchange Act Sections 13(n)(2) and 13(n)(4), 15 U.S.C. 78m(n)(2) and 78m(n)(4). In a separate release, the Commission proposed rules prescribing the data elements that an SDR would be required to accept for each SBS in association with requirements under Dodd-Frank Act Section 763(i), adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification. See Regulation SBSR Proposing Release, 75 FR at 75284-5, supra note 8 (proposed Rule 901); see also Cross-Border Proposing Release, 78 FR at 31212-3, supra note 3 (re-proposing Rule 901). The Commission is concurrently adopting Regulation SBSR, including rules prescribing the data elements

A. Registration of SDRs (Rule 13n-1 and Form SDR)

Proposed Rule 13n-1 and proposed Form SDR would establish the procedures by which a person may apply to the Commission for registration as an SDR. After considering the comments, the Commission is adopting Rule 13n-1 and Form SDR substantially as proposed, with certain modifications.[202]

1. New Form SDR; Electronic Filing

a. Proposed Form SDR

As proposed, Form SDR would require an applicant seeking to register as an SDR and a registered SDR filing an amendment (including an annual amendment) to indicate the purpose for which it is filing the form and then to provide several categories of information. As part of the application process, each SDR would be required to provide additional information to the Commission upon request. Applicants would be required to file Form SDR electronically in a tagged data format. As proposed, Form SDR would require all SDRs to provide the same information, with two related limited exceptions applicable to non-resident SDRs. First, if the applicant is a non-resident SDR, then Form SDR would require the applicant to attach as an exhibit to the form an opinion of counsel stating that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. Second, Form

that an SDR is required to accept. See Regulation SBSR Adopting Release, supra note 13 (Rule 901).

202 The Commission did not receive any comments on the definitions in proposed Rule 13n-1(a) and is adopting each of them as proposed, other than revising the definition of "tag" to have the same meaning as set forth in Rule 11 of Regulation S-T and deleting the definition of "EDGAR Filer Manual," which is no longer referenced in the revised definition of "tag." See Rule 13n-1(a)(2). The Commission is also revising the heading of paragraph (a) of the rule by changing "Definition" to "Definitions" to reflect that there is more than one definition in the paragraph.

SDR would require an applicant that is a non-resident SDR to certify to this (i.e., the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission).[203]

b. Comments on Proposed Form SDR

Two commenters submitted comments relating to this proposal.[204] One commenter urged the Commission to ensure that the registration process does not interfere with the ongoing operation of existing SDRs.[205] This commenter also addressed the items to be provided on Form SDR and stressed the importance of gathering information regarding an applicant's information technology systems, including its ability to provide direct electronic access to the Commission.[206] In addition, the commenter supported combining new Form SDR with Form

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203 See Items 12 and 46 of proposed Form SDR; see also Sections VI.A.1 and VI.A.5 of this release discussing legal opinion of counsel and certification by non-resident SDRs on Form SDR.

204 See DTCC 2, supra note 19; ESMA, supra note 19; see also DTCC 3, supra note 19. Five commenters submitted comments to the Commission regarding registration of non-resident SDRs. See ESMA, supra note 19; DTCC 2, supra note 19; Foreign Banks SBSR, supra note 27; BofA SBSR, supra note 27; US & Foreign Banks, supra note 24. With the exception of the certification and legal opinion requirements discussed later in this section, the Commission discussed cross-border issues applicable to SDRs that were raised by Title VII in the Cross-Border Proposing Release, and is adopting an exemption from the SDR requirements for certain non-U.S. persons, as discussed in Section VI.K of this release.

205 DTCC 2, supra note 19.

206 DTCC 2, supra note 19 ("[I]t is essential that proposed Form SDR request information related to the SDR's operating schedule, real-time processing, existence of multiple redundant infrastructures for continuity, strong information security controls, and robust reporting operations (including direct electronic access by the Commission). Because an SDR provides important utility services to regulators and market participants, such resiliency and redundancy should be evaluated in light of the significant policies and procedures for establishing such redundancy, including several backup locations in different geographic regions.").

SIP and further suggested that the Commission and the CFTC publish a joint form for registration with the Commission as an SDR and SIP and with the CFTC as a swap data repository.[207] The commenter also suggested that the Commission require applicants to submit their rulebooks as part of the registration process on Form SDR.[208]

One commenter expressed concern that non-resident SDRs would be subject to a stricter regulatory regime than that applicable to resident SDRs due to the proposed opinion of counsel requirement, which is applicable only to non-resident SDRs.[209]

c. Final Form SDR

After considering the comments, the Commission is adopting Form SDR substantially as proposed with certain modifications. Form SDR includes a set of instructions for its completion and submission. These instructions are included in this release, together with Form SDR. The instructions require an SDR to indicate the purpose for which it is filing the form (i.e., application for registration, interim or annual amendment to an application or to an effective

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207 DTCC 2, supra note 19; DTCC 3, supra note 19 ("Harmonization in the registration process for SDRs is necessary. Requiring one SDR to complete three sets of registration forms – an SDR application to the CFTC, an SDR application to the SEC and Form SIP to the SEC – demonstrates a specific instance where the regulatory agencies should come together, determine the information necessary for registration and jointly publish a common registration application.").

208 DTCC 3, supra note 19 ("The [Commission] should require rulebooks for SDRs prior to operation and as part of the registration process. SDRs will need to complete legal agreements with clearing-houses and among the users of an SDR. These agreements generally constitute the agreement of the user to abide by published rules and/or procedures of the SDR and generally have a notice of change to permit amendments without having to re-execute with all users. These agreements should be in place before SDRs operate under the new regulatory regime.").

209 ESMA, supra note 19 ("[N]on-resident SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the SEC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the SEC.").

registration,[210] or withdrawal from registration[211]) and to provide information in seven categories: (1) general information, (2) business organization, (3) financial information, (4) operational capability, (5) access to services and data, (6) other policies and procedures, and (7) legal opinion. As part of the application process, each SDR will be required to provide additional information to any representative of the Commission upon request.[212]

As noted in the Proposing Release, the Commission believes that permitting an SDR to provide information in narrative form in Form SDR will allow the SDR greater flexibility and opportunity for meaningful disclosure of relevant information.[213] The Commission believes that it is necessary to obtain the information requested in Form SDR to enable the Commission to determine whether to grant or deny an application for registration. Specifically, the information will assist the Commission in understanding the basis for registration as well as an SDR's overall business structure, financial condition, track record in providing access to its services and data, technological reliability, and policies and procedures to comply with its statutory and regulatory obligations. The information will also be useful to the Commission in tailoring any requests for additional information that it may ask an SDR to provide. Furthermore, the required information will assist Commission representatives in the preparation of their inspection and examination of

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210 See Section VI.A.4 of this release discussing amendments on Form SDR.

211 See Section VI.B of this release discussing withdrawal from registration as an SDR.

212 See Rule 13n-1(b). The Commission is revising the last sentence of proposed Rule 13n-1(b) to use the statutorily defined term "security-based swap data repository" rather than "SDR" to be consistent with the rest of the SDR Rules. The Commission is also revising the last sentence of proposed Rule 13n-1(b) to require SDRs to provide additional information upon request to "any representative of the Commission," rather than "the Commission." This revision is intended to clarify that such requests will be made by Commission staff.

213 Proposing Release, 75 FR at 77310, supra note 2.

an SDR.[214]

Form SIP.[215] In the Proposing Release, the Commission noted that proposed Regulation SBSR would require each registered SDR to register with the Commission as a SIP on Form SIP, and requested comment on whether the Commission should combine Form SDR and Form SIP, such that an SDR would register as an SDR and SIP using only one form.[216] One commenter supported combining Form SDR with Form SIP.[217] Taking into consideration this commenter's view and in an effort to minimize the burden of filing multiple registration forms, the Commission has decided to amend proposed Form SDR to accommodate SIP registration; thus, an SDR will register and amend such registration as an SDR and as a SIP using one combined form.[218] An amendment or withdrawal on Form SDR will also constitute an amendment or withdrawal of SIP registration pursuant to Exchange Act Section 11A and the rules and regulations thereunder.[219] The Commission has made certain changes to proposed Form SDR to incorporate the additional information requested on Form SIP of applicants for registration as a

214 The Commission is revising Form SDR from proposed Form SDR to include disclosure relating to the Paperwork Reduction Act. See Section VII of this release regarding the Paperwork Reduction Act.

215 Today, the Commission is adopting Regulation SBSR, which includes a requirement for each registered SDR to register as a SIP, as defined in Exchange Act Section 3(a)(22), 15 U.S.C. 78c(a)(22). See Regulation SBSR Adopting Release, supra note 13 (Rule 909).

216 Proposing Release, 75 FR at 77313, supra note 2. See also Regulation SBSR Proposing Release, 75 FR at 75287, supra note 8 (proposed Rule 909); Cross-Border Proposing Release, 78 FR at 31215-6, supra note 3 (re-proposing Rule 909).

217 DTCC 2, supra note 19; see also DTCC 3, supra note 19.

218 Form SDR will be used only by SIPs that also register as SDRs; Form SIP will continue to be used by applicants for registration as SIPs not seeking to become dually-registered as an SDR and SIP, and for interim amendments or annual amendments by registered SIPs that are not dually-registered as an SDR and SIP. In discussing Form SDR as adopted in this release, references to SDRs may, where applicable, refer to SDRs and SIPs, collectively.

219 See General Instruction 2 to Form SDR.

SIP.[220] However, there are some disclosures required in Form SIP that have not been incorporated into Form SDR because they do not appear to be relevant to SDRs.[221] The Commission notes that by requiring a registered SDR to register as a SIP, the requirements of SIP registration provided in Exchange Act Section 11A, including publication of notice of the filing of an application for registration, will apply to applications filed on Form SDR[222] and, accordingly, the Commission will publish notice of the filing of applications for registration on Form SDR in the Federal Register.[223] In addition, the Commission expects that it will make the filed applications available on its website, except for information where confidential treatment is

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220 See Item 32(a)(1) (adding "(or disseminate for display or other use)" and "(e.g., number of inquiries from remote terminals)"), Item 32(a)(2) (adding "(or disseminate for display or other use)"), new Item 33(c) (With respect to each of an applicant's "services that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, [the applicant must] state the total number of devices to which information is, or will be supplied ('serviced') and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant. In addition, [an applicant must] define the data elements for each service."); and Item 36 of Form SDR (adding "processing, preparing for distribution, and publication"); see also new General Instructions 2 and 3 and conforming revisions to General Instructions 7 and 9 to Form SDR and Items 16, 19, 20, 23, 25 - 35, and 39 of Form SDR.

221 See, e.g., Item 31 of Form SIP, 17 CFR 249.1001 (requiring applicant to state whether certain specifications or qualifications are imposed at the direction of a national securities exchange or a registered securities association).

222 15 U.S.C. 78k-1(b).

223 As discussed below, the Commission is revising Rule 13n-1(c) from the proposal to reflect this publication requirement with respect to the registration process for Form SDR. See Section VI.A.2.c of this release discussing revision to Rule 13n-1(c) to provide that: (1) within 90 days of the date of the publication of notice of the filing of an application for registration (or within such longer period as to which the SDR consents), the Commission shall either grant the registration by order or institute proceedings to determine whether registration should be granted or denied and (2) proceedings instituted pursuant to Rule 13n-1(c) shall be concluded not later than 180 days after the date of the publication of notice of the filing of the application for registration, absent an extension.

requested by the applicant[224] and granted by the Commission.[225]

The Commission has determined not to adopt a joint form for registration with the Commission as an SDR and SIP and with the CFTC as a swap data repository, as suggested by one commenter.[226] First, the CFTC has already adopted the final registration rules and form for swap data repositories to use.[227] Adopting a joint form for registration would require the CFTC to amend its adopted Form SDR while the industry is still in the implementation phase and swap data repositories are already provisionally registered with the CFTC.[228] Second, the CFTC's registration form for swap data repositories is substantially similar to the Commission's Form SDR. Thus, the Commission does not anticipate that filing with each Commission separately will entail a significant cost for dual registrants even though the Commission and the CFTC have

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224 As discussed below, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

225 The instructions to Form SDR have been modified from the proposal to clarify that information supplied on the form may be made available on the Commission's website. See General Instruction 7 to Form SDR (stating that "[e]xcept in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form may be made available on the Commission's website, will be included routinely in the public files of the Commission, and will be available for inspection by any interested person"). The Commission expects that non-confidential information supplied on an SDR's completed application for registration will be made available on the Commission's website; other filings on Form SDR may be made available on the Commission's website.

226 See DTCC 3, supra note 19.

227 See CFTC Part 49 Adopting Release, supra note 36.

228 As noted above, CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

tailored their respective forms in order to meet the specific needs of each agency and their respective statutory mandates. For example, the Commission is revising proposed Form SDR to require an SDR to provide certain information to address Exchange Act requirements applicable to SIPs. The CFTC's Form SDR does not require information to address some of these requirements.

General Information.[229] Form SDR requires an applicant to provide contact information, information concerning any predecessor SDR (if applicable), a list of asset classes of SBSs for which the applicant is collecting and maintaining data or for which it proposes to collect and maintain data,[230] a description of the functions that it performs or proposes to perform, and general information regarding its business organization.[231] This information will assist the Commission and its staff in evaluating applications for registration and overseeing registered SDRs for purposes of determining whether the SDRs are able to comply with the federal

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229 In the General Information section of Form SDR, the Commission is adding a new item (Item 12) to implement the requirement in Rule 13n-2(b) for a registered SDR seeking to withdraw from registration to identify a custodian of its books and records, and the address(es) where the books and records will be located. See Section VI.B of this release discussing Rule 13n-2(b).

230 As proposed, Item 6 of Form SDR implicitly pertained to the data that an applicant is collecting and maintaining or proposes to collect and maintain. The Commission is revising Item 6 of Form SDR from the proposal to make this explicit by adding references to "data."

231 See Items 1 – 10 of Form SDR. The Commission is revising Form SDR from the proposal to remove the heading "Business Organization" in the "General Information" section because the heading is superfluous and may lead to confusion with another section entitled "Exhibits – Business Organization." General information regarding business organization is requested in the "General Information" section, whereas detailed information regarding business organization is requested in the "Exhibits – Business Organization" section. As proposed, Item 10 of Form SDR requested information regarding the filing date of "partnership articles" and "place where partnership agreement was filed." For consistency, the Commission is revising Item 10 of Form SDR from the proposal to request the filing date of the "partnership agreement" rather than "partnership articles."

securities laws and the rules and regulations thereunder.

An applicant is required to acknowledge and consent that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to an officer or person specified by the SDR at a given U.S. address.[232] The Commission believes that such consent is important to minimize any logistical obstacles (e.g., locating defendants or respondents abroad) that the Commission may encounter when attempting to provide notice to an applicant or to effect service, including service overseas.

Form SDR must be signed by a person who is duly authorized to act on behalf of the applicant.[233] The signer is required to certify that all information contained in the application, including the required items and exhibits, is true, current, and complete.[234] The Commission

232 See Item 11 of Form SDR.

233 See Item 13 of Form SDR.

234 See Item 13 of Form SDR. The Commission is revising the signature block from the proposal to be consistent with an SDR's filing requirements for interim amendments on Form SDR. See note infra 356 (discussing amendment of signature block). The Commission is also revising the signature block to state that "[i]ntentional misstatements or omissions of fact constitute federal criminal violations (see 18 U.S.C. 1001 and 15 U.S.C. 78ff(a))." This statement was included in Instruction 5 of proposed Form SDR, and is included in Instruction 7 of Form SDR, as adopted. This statement has been added to the signature block to remind the signer of the consequences of intentional misstatements or omissions of fact. See 18 U.S.C. 1001 (applying to "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully — (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry"); 15 U.S.C. 78ff(a) (applying to, among other persons, "any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of [Title 15 of the U.S. Code], or by any self-

believes that this certification requirement will serve as an effective means to assure that the information filed on Form SDR with the Commission is reliable.[235] The Commission notes that this certification is consistent with the certification provisions in the registration forms for SIPs, broker-dealers, and investment advisers (i.e., Forms SIP, BD, and ADV).[236]

If an applicant is a non-resident SDR, then the signer of Form SDR is also required to certify that the applicant can, as a matter of law, and will provide the Commission with prompt access to the applicant's books and records and that the applicant can, as a matter of law, and will submit to onsite inspection and examination by the Commission.[237] For purposes of the certification, Form SDR defines "non-resident security-based swap data repository" as (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal

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regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact").

235 Accord Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67568 (Nov. 12, 2013) (stating that the certification requirement in Form MA-W pertaining to the accuracy and completeness of information previously submitted in Form MA should serve as an effective means to assure that the information supplied is correct).

236 See Form SIP, 17 CFR 249.1001, available at http://www.sec.gov/about/forms/formsip.pdf; Form BD, 17 CFR 249.501, available at http://www.sec.gov/about/forms/formbd.pdf; Form ADV, 17 CFR 279.1, available at http://www.sec.gov/about/forms/formadv.pdf.

237 See Item 13 of Form SDR. Under Exchange Act Section 13(n)(2), an SDR is subject to inspection and examination by any representative of the Commission. See 15 U.S.C. 78m(n)(2); see also Section VI.D.2 of this release discussing Rule 13n-4(b)(1). The Commission is revising "can, as a matter of law" (referring to the certification regarding access to the SDR's books and records) and "can" (referring to the certification regarding inspection and examination) in the signature block of proposed Form SDR to "can, as a matter of law, and will" to track the language of Rule 13n-1(f), as discussed in Section VI.A.5 of this release.

place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.[238] Certain foreign jurisdictions may have laws that complicate the ability of regulated persons such as SDRs located in their jurisdictions from sharing certain information, including personal information of individuals that the regulated persons come to possess from third persons (e.g., personal data relating to the identity of market participants or their customers), with the Commission.[239] In order for the Commission to fulfill its oversight responsibilities with respect to registered SDRs, it is important that Commission representatives have prompt access to the SDRs' books and records and have the ability to conduct onsite inspections and examinations.[240] As noted above, one commenter was concerned that non-resident SDRs are subject to a stricter regime than resident SDRs.[241] To the extent that

238 See Item 13 of Form SDR; see also Rule 13n-1(a)(1) (defining "non-resident security-based swap data repository"). This definition is substantially similar to the definition of "non-resident broker or dealer" in Exchange Act Rule 17a-7(d)(3). See 17 CFR 240.17a-7(d)(3). Although there may be instances in which a non-resident SDR can fall within the definition of a "U.S. person," the Commission believes that, as a practical matter, all non-resident SDRs would likely be non-U.S. persons given the similar distinguishing factors in the definitions of "non-resident security-based swap data repository" and "non-U.S. person." See supra note 99(discussing definition of "U.S. person") and Section VI.A.5 of this release discussing non-resident SDRs.

239 See, e.g., Dagong Global Credit Rating Agency, Exchange Act Release No. 62968 (Sept. 22, 2010) (denying application as an NRSRO due to applicant's inability to comply with U.S. securities laws, in part because records requests would have to be approved by a Chinese regulator); Dominick & Dominick, Inc., Exchange Act Release No. 29243 (May 29, 1991) (settled administrative proceeding involving a broker-dealer's failure to furnish promptly to the Commission copies of certain records required to be kept pursuant to Exchange Act Section 17(a)(1) and Rule 17a-3 thereunder where the broker-dealer initially asserted that Swiss law prevented it from producing the required records).

240 See Section VI.D.2 of this release discussing inspection and examination by Commission representatives.

241 ESMA, supra note 19.

the commenter's concerns pertain to the certification requirement, the Commission notes that it continues to believe that if a non-resident SDR is registered with the Commission, the SDR's certification is important to confirm that it has taken the necessary steps to be in the position to provide the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission. Failure to make this certification may be a basis for the Commission to institute proceedings to consider denying an application for registration. If a registered non-resident SDR becomes unable to provide this certification, then this may be a basis for the Commission to institute proceedings to consider revoking the SDR's registration.

Business Organization. Form SDR requires each applicant to provide as exhibits detailed information regarding its business organization, including information about (1) any person that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the applicant's management or policies;[242] (2) the business experience, qualifications, and disciplinary history of its designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees;[243] (3) its governance

242 See Item 14 of Form SDR.

243 See Items 15 and 16 of Form SDR. More specifically, Form SDR requires an applicant to disclose the following information regarding its designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees: (a) name; (b) title; (c) date of commencement and, if appropriate, termination of present term of position; (d) length of time such person has held the same position; (e) brief account of the business experience of such person over the last five years; (f) any other business affiliations in the securities industry or derivatives industry; and (g) details of: (1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act, (2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years, (3) any action of an

arrangements;[244] (4) the applicant's constitution, articles of incorporation or association with all amendments to them, existing by-laws, rules, procedures, and instruments corresponding to them;[245] (5) the applicant's organizational structure;[246] (6) its affiliates;[247] (7) any material

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SRO with respect to such person imposing a final disciplinary sanction pursuant to Exchange Act Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G), (4) any final action by an SRO with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof, and (5) any final action by another federal regulatory agency, including the CFTC, any state regulatory agency, or any foreign financial regulatory authority resulting in: (i) a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical; (ii) a finding that such person has been involved in a violation of any securities-related regulations or statutes; (iii) a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted; (iv) an order entered, in the past ten years, against such person in connection with a securities-related activity; or (v) any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related or a restriction of such person's activities. The Commission is correcting a typographical error in proposed Items 14(g)(4) and 15(g)(4). As proposed, the items stated ". . . such organization of a member thereof." As adopted, Items 15(g)(4) and 16(g)(4) state ". . . such organization or a member thereof."

244 See Item 17 of Form SDR. The Commission has made minor revisions to Form SDR from the proposal with regard to the disclosure of governance arrangements for the sake of clarity. Compare Item 16 of Form SDR, as proposed (requiring disclosure of the responsibilities "of each of the board and such committee" and the composition "of each board and such committee"), with Item 17 of Form SDR, as adopted (requiring disclosure of the responsibilities and composition "of the board and each such committee").

245 See Item 18 of Form SDR.

246 See Item 19 of Form SDR.

247 See Item 20 of Form SDR. For purposes of Form SDR, an "affiliate" of an SDR is defined as a person that, directly or indirectly, controls, is controlled by, or is under common control with the SDR. See also Rule 13n-4(a)(1); Rule 13n-9(a)(1). This definition of "affiliate" is designed to allow the Commission to collect comprehensive identifying information relating to an SDR. This definition is substantially similar to the definition of "affiliate" in Exchange Act Rule 12b-2. See 17 CFR 240.12b-2. See also infra note 621 (defining "control" (including the terms "controlled by" and "under common control with")). The Commission notes that it received a comment letter after the Proposing Release through the Commission's general solicitation for comments that addressed the definition of "affiliate" for all of Title VII. See letter from ABA Securities

pending legal proceedings to which the applicant or its affiliate(s) is a party or to which any of its property is the subject;[248] (8) the applicant's material contracts with any SB SEF, clearing agency, central counterparty, and third party service provider;[249] and (9) the applicant's policies and procedures to minimize conflicts of interest in its decision-making process and to resolve any such conflicts of interest.[250] Obtaining this information will assist the Commission in, among other things, understanding an SDR's overall business structure, governance arrangements, and operations, all of which will assist the Commission in its inspection and examination of the SDR and the Commission's decision on whether to grant the SDR's registration.

Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association, available on the Commission's website at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml (suggesting defining "affiliate" for the purposes of Title VII rulemaking generally as "any group of entities that is under common control and that reports information or prepares its financial statements on a consolidated basis"). The commenter focused on the effect of the definition in the context of inter-affiliate transactions, such as whether inter-affiliate transactions should be counted when determining if a person is required to register as an SBS dealer. Among other things, the commenter addressed the reporting of inter-affiliate transactions to SDRs. Because Form SDR and the SDR Rules do not pertain to what transactions must be reported to an SDR, the Commission believes that the letter is not relevant to Form SDR or the SDR Rules. Additionally, the Commission believes that it is important that an applicant for registration as an SDR provide information regarding all of its affiliates, regardless of whether the SDR's and affiliates' financial statements are prepared on a consolidated basis. Among other reasons, the Commission needs to know the identity of an SDR's affiliates before it can determine whether the SDR has any material conflicts of interest based on the services provided by those affiliates or is providing favorable treatment to affiliates in accessing the SDR's services or whether the SDR is complying with other rules and core principles, such as the core principle related to access to services and data.

248 See Item 21 of Form SDR.

249 See Item 22 of Form SDR.

250 See Item 23 of Form SDR.

The Commission is revising Form SDR from the proposal requiring disclosure of business affiliations in the "derivatives industry" rather than the "OTC derivatives industry" for an applicant's designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees[251] The Commission is making this revision to clarify that the disclosure covers derivatives traded on exchanges and SB SEFs as well as those traded over-the-counter.

Financial Information. Each applicant is required to disclose as exhibits to Form SDR certain financial and related information, including (1) its statement of financial position, results of operations, statement of sources and application of revenues, and all notes or schedules thereto, as of the most recent fiscal year of the applicant, or, alternatively, a financial report, as discussed further in Section VI.J.5 of this release;[252] (2) a statement of financial position and results of operations for each affiliate of the applicant as of the end of the most recent fiscal year of each such affiliate, or, alternatively, identification of the most recently filed annual report on Form 10-K of the applicant's affiliate, if available;[253] (3) a list of all dues, fees, and other charges imposed, or to be imposed, for the applicant's services, as well as all discounts and rebates

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251 Compare Items 14(f) and 15(f) of proposed Form SDR with Items 15(f) and 16(f) of Form SDR, as adopted.

252 See Item 24 of Form SDR. As proposed, this item referred to a "balance sheet" and a "statement of income and expenses" rather than a "statement of financial position" and "results of operations." The Commission is making this change from the proposal for consistency with Rule 13n-11(f)(4). See Section VI.J.5 of this release discussing Rule 13n-11(f). This revision is not intended to substantively change the requirements of this item.

253 See Item 25 of Form SDR. As proposed, this item referred to a "balance sheet" and a "statement of income and expenses" rather than a "statement of financial position" and "results of operations." The Commission is making this change from the proposal for consistency with Rule 13n-11(f)(4). See Section VI.J.5 of this release discussing Rule 13n-11(f). This revision is not intended to substantively change the requirements of this item.

offered, or to be offered;[254] (4) a description of the basis and methods used in determining the level and structure of the applicant's services as well as its dues, fees, other charges, discounts, or rebates;[255] and (5) a description of any differentiations in such dues, fees, other charges, discounts, and rebates.[256] This information will assist the Commission in, among other things, its decision of whether to grant the SDR's registration and in its evaluation of the financial resources available to the SDR to support its operations.

Operational Capability. Form SDR requires each applicant to provide as exhibits information on its operational capability, including (1) its SDR and SIP functions and services;[257] (2) the computer hardware that it uses to perform its SDR or SIP functions;[258] (3) personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the applicant or the division, subdivision, or other segregable entity within the applicant;[259] (4) the applicant's measures or procedures to provide for the security of any system employed to perform its SDR or SIP functions, including any physical and operational safeguards designed to prevent unauthorized access to the system;[260] (5) any circumstances within the past year in which such security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence;[261] (6) any measures used by the applicant to satisfy itself that the information received or disseminated by

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254 See Item 26.a of Form SDR.

255 See Item 26.b of Form SDR.

256 See Item 26.c of Form SDR.

257 See Item 27 of Form SDR.

258 See Item 28 of Form SDR.

259 See Item 29 of Form SDR.

260 See Item 30 of Form SDR.

261 See Item 30 of Form SDR.

the system is accurate;[262] (7) the applicant's backup systems or subsystems that are designed to prevent interruptions in the performance of any SDR or SIP functions;[263] (8) limitations on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) its data and factors that account for such limitations;[264] and (9) the priorities of assignment of capacity between functions of an SDR or SIP and any other uses and methods used or able to be used to divert capacity between such functions and other uses.[265] As stated in the Cross-Border Proposing Release, SDRs themselves are subject to certain operational risks that may impede their ability to fulfill their roles.[266] Obtaining information regarding an SDR's operational capability will assist the Commission in determining, among other things, whether an SDR's automated systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

As highlighted by one commenter, it is imperative that Form SDR includes "information related to the SDR's operating schedule, real-time processing, existence of multiple redundant infrastructures for continuity, strong information security controls, and robust reporting operations."[267] The Commission believes that the operational capability information requested on Form SDR sufficiently addresses the commenter's concern. In addition, Commission

262 See Item 30 of Form SDR.

263 See Item 31 of Form SDR.

264 See Item 32.a of Form SDR.

265 See Item 32.b of Form SDR.

266 Cross-Border Proposing Release, 78 FR at 31042 n.719, supra note 3 (citing the Proposing Release, 75 FR at 77307 ("The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the [security-based swap] market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.")).

267 DTCC 2, supra note 19.

representatives may conduct inspections or examinations to assess a registered SDR's ongoing operational capability and compliance with the federal securities laws and the rules and regulations thereunder.[268]

Access to Services and Data. Form SDR requires an applicant to provide as exhibits information regarding access to its services and data, including (1) the number of persons who presently subscribe, or who have notified the applicant of their intention to subscribe, to its services;[269] (2) instances in which the applicant has prohibited or limited any person with respect to access to services offered or data maintained by the applicant;[270] (3) for each service that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, the total number of devices to which information is, or will be supplied and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant;[271] (4) the storage media of any service furnished in machine-readable form and the data elements of such service;[272] (5) copies of all contracts governing the terms by which persons may subscribe to the SDR services, SIP services, and any ancillary services provided by the applicant;[273] (6) any specifications, qualifications, or

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268 See Section VI.A.2 of this release discussing Rule 13n-1(c) (reviews by Commission staff of the SDR's operational capacity and ability are important to determine whether the Commission should grant an SDR's application for registration or revoke the registration of a registered SDR pursuant to Rule 13n-2(e)).

269 See Item 33.a of Form SDR.

270 See Item 33.b of Form SDR; see also infra note 278 (discussing denials of access to services offered by SDRs).

271 See Item 33.c of Form SDR. The Commission is including this item from Form SIP to Form SDR for purposes of combining the two forms. See Section VI.A.1 of this release discussing Form SIP.

272 See Item 33.d of Form SDR.

273 See Item 34 of Form SDR.

other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any SDR or SIP services offered or data maintained by the applicant;[274] (7) any specifications, qualifications, or other criteria required of persons who supply SBS information to the applicant for collection, maintenance, processing, preparing for distribution, and publication by the applicant or of persons who seek to connect to or link with the applicant;[275] (8) any specifications, qualifications, or other criteria required of any person who requests access to data maintained by the applicant;[276] and (9) the applicant's policies and procedures to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.[277]

The information regarding access to services and data will assist the Commission in determining, among other things, whether an SDR can comply with Rule 13n-4(c)(1), which relates to the core principle for market access to services and data, as discussed further in Section VI.D.3.a of this release. With respect to Item 33 of Form SDR (requiring an SDR to provide information regarding access to services and data, including any denials of such access), the Commission further believes that, due to an SDR's role as a central recordkeeping facility for SBSs, upon which the Commission and the public will rely for market-wide SBS data, the

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274 See Item 35 of Form SDR.

275 See Item 36 of Form SDR.

276 See Item 37 of Form SDR. The Commission is correcting a typographical error in proposed Item 36 of Form SDR. As proposed, the item stated "any person, including, but not limited to . . . third party service providers who request access . . . ." As adopted, Item 37 states "any person, including, but not limited to . . . third party service providers, who requests access . . . ."

277 See Item 38 of Form SDR.

Commission should be informed of persons who have been granted access to an SDR's services and data, as well as instances in which an SDR prohibits or limits access to its services.[278] As part of the process to amend Form SDR from the proposal to accommodate SIP registration, discussed above, the Commission is adding Item 33(c) to Form SDR so that the Commission can obtain specific information regarding an SDR's supply of information for public dissemination purposes.

Other Policies and Procedures. Form SDR requires each applicant to attach as exhibits: (1) the applicant's policies and procedures to protect the privacy of any and all SBS transaction information that the applicant receives from a market participant or any registered entity;[279] (2) a description of the applicant's safeguards, policies, and procedures to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by the applicant or any person associated with the applicant for their

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278 See Regulation SBSR Adopting Release, supra note 13 (discussing Rule 909, which requires a registered SDR to also register as a SIP); Proposing Release, 75 FR at 77311 n.33, supra note 2 (noting that if the Commission adopts proposed Rule 909 of Regulation SBSR, then Exchange Act Section 11A(b)(5) would govern denials of access to all SDRs' services); see also 15 U.S.C. 78k-1(b)(5) (A registered SIP must promptly file notice with the Commission if it, directly or indirectly, prohibits or limits any person in respect of access to its services, which may be subject to review by the Commission. If the Commission finds that (a) such limitation or prohibition is not consistent with Exchange Act Section 11A and the rules and regulations thereunder and that such person has been discriminated against unfairly or (b) the prohibition or limitation imposes any burden on competition not necessary or appropriate, it may set aside the prohibition or limitation and require the SIP to permit such person access to its services.). The Commission has made certain changes to Form SDR from the proposal to accommodate SIP registration. See supra note 220.

279 See Item 39 of Form SDR.

personal benefit or for the benefit of others;[280] (3) the applicant's policies and procedures regarding its use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person for non-commercial and/or commercial purposes;[281] (4) the applicant's procedures and a description of its facilities for resolving disputes over the accuracy of the transaction data and positions that are recorded in the SDR;[282] (5) the applicant's policies and procedures relating to its calculation of positions;[283] (6) the applicant's policies and procedures to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the applicant;[284] and (7) a plan to ensure that the transaction data and position data that are recorded in the SDR continue to be maintained after the applicant withdraws from registration, which shall include procedures for transferring transaction data and position data to the Commission or its designee (including another registered SDR).[285] This information will assist the Commission in determining, among other things, whether an SDR can comply with the requirements to establish, maintain, and enforce these seven policies and procedures, as discussed further in Sections VI.D, VI.E, VI.G, and VI.I of this release. In addition, Form SDR requires an applicant to attach as exhibits all of the policies and procedures set forth in Regulation SBSR.[286]

One commenter suggested that the Commission require an applicant to submit its

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280 See Item 40 of Form SDR.

281 See Item 41 of Form SDR.

282 See Item 42 of Form SDR.

283 See Item 43 of Form SDR.

284 See Item 44 of Form SDR.

285 See Item 45 of Form SDR.

286 See Item 46 of Form SDR; Regulation SBSR Adopting Release, supra note 13 (Rule 907 requiring SDRs to establish and maintain certain written policies and procedures).

"rulebook."[287] The Commission does not believe that such a requirement is necessary, but is revising Form SDR from the proposal to provide that if an applicant has a rulebook, then it may attach its rulebook as an exhibit to the form,[288] as a supplement to the policies and procedures required by Form SDR. The Commission believes that if an applicant has a rulebook, much of the information that would be contained in the rulebook likely would be filed as part of an SDR's policies and procedures.[289] To the extent that an applicant's rulebook is broader, an applicant may submit its rulebook to the Commission if, for example, the applicant believes that it would be useful for the Commission to better understand the context of the applicant's policies and procedures or how the policies and procedures relate to one another.

Legal Opinion. Form SDR requires each non-resident SDR to attach as an exhibit an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.[290]

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287 DTCC 3, supra note 19.

288 See Item 47 of Form SDR.

289 The Commission notes that an SDR that is also registered with the CFTC as a swap data repository is required under CFTC Rule 49.8 to either submit its rules and amendments thereto for approval by the CFTC or self-certify that the rulebook complies with the CFTC's swap data repository rules and the CEA. See 17 CFR 49.8. The Dodd-Frank Act did not establish SDRs as self-regulatory organizations ("SROs") (which, under the Exchange Act, are required to file their rules with the Commission) or create an express obligation for SDRs to file their rules with the Commission. As noted above, SDRs must provide certain policies and procedures on Form SDR. The Commission believes that this disclosure is sufficient to enable the Commission to determine whether an SDR's policies and procedures are in compliance with the Exchange Act, including Section 13(n), and the rules and regulations thereunder. The Commission recognizes, however, that reviewing a rulebook that is voluntarily submitted to the Commission may assist the Commission in understanding other items in an applicant's Form SDR.

290 See Item 48 of Form SDR.

As discussed above, one commenter suggested that the legal opinion requirement would subject non-resident SDRs to a stricter regulatory regime than resident SDRs.[291] The Commission, however, continues to believe that non-resident SDRs that are registered, or seek to register, with the Commission should be required to provide the opinion of counsel. Each jurisdiction may have a different legal framework (e.g., privacy laws) that may limit or restrict the Commission's ability to access information from an SDR. Rather than create unequal regulatory obligations, the legal opinion requirement equalizes the regulatory landscape for SDRs by addressing whether a non-resident SDR is able to comply with the requirements for it to provide the Commission with prompt access to the SDR's books and records,[292] and to submit to onsite inspection and examination by the Commission,[293] similar to SDRs that reside in the United States. Failure to provide an opinion of counsel may be a basis for the Commission to institute proceedings to consider denying an application for registration.

Electronic Filing. The Commission is revising Rule 13n-1(b) from the proposal to conform the rule with General Instruction 1 to Form SDR. As revised, Rule 13n-1(b) provides that in addition to an application for registration as an SDR, all amendments thereto must be filed electronically in a tagged[294] data format on Form SDR with the Commission in accordance with

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291 ESMA, supra note 19.

292 See Rule 13n-7(b)(3) (requiring every SDR to, upon request of any representative of the Commission, promptly furnish requested documents to the representative).

293 See Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (subjecting registered SDRs to inspection and examination by any representative of the Commission)).

294 The term "tag" (including the term "tagged") is being revised from the proposal to have the same meaning as set forth in Rule 11 of Regulation S-T (defining "tag" as "an identifier that highlights specific information to EDGAR that is in the format required by the EDGAR Filer Manual"). See Rules 13n-1(a)(2), 13n-2(a)(1), and 13n-11(b)(9); see also 17 CFR 232.11. The Commission is revising this term from the proposal to be consistent with all the other terms in the SDR Rules that cross-reference to the definitions

the instructions contained in the form.[295] This modification to also require all amendments on Form SDR be filed electronically in a tagged data format is intended to conform with General Instruction 1 to Form SDR, which requires the form and exhibits thereto to be filed electronically in a tagged data format by an applicant for registration as an SDR and by an SDR amending its application for registration.

The Commission anticipates developing an electronic filing system through which an SDR will be able to file and update Form SDR on or about the effective date of Rule 13n-1.[296] If the Commission's electronic filing system is unavailable at the time an applicant seeks to file its application for registration on Form SDR, the applicant may file the form, including any amendments thereto, in paper format with the Commission's Division of Trading and Markets at the Commission's principal office in Washington, DC. However, doing so does not relieve the SDR from compliance with the requirement in Rule 13n-1(b) to file Form SDR "electronically in a tagged data format." Therefore, when the Commission's electronic filing system is available,

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set forth in Regulation S-T, where applicable. For example, the term "EDGAR Filer Manual" has the same meaning as set forth in Rule 11 of Regulation S-T (defining "EDGAR Filer Manual" as "the current version of the manual prepared by the Commission setting out the technical format requirements for an electronic submission"). See Rule 13n-11(b)(3); see also 17 CFR 232.11.

295 See Rule 13n-1(b).

296 This electronic filing system for Form SDR will be through EDGAR, and thus, the electronic filing requirements of Regulation S-T will apply. See generally 17 CFR 232 (governing the electronic submission of documents filed with the Commission). The Commission is amending General Instruction 1 to Form SDR to clarify the applicability of Regulation S-T to Form SDR. To conform with how filings are presently made through EDGAR, the Commission has made several minor edits to Form SDR from the proposal. See, e.g., Instruction 10 of Form SDR (providing guidance on filing Form SDR as an amendment, other than an annual amendment); Item 3 of Form SDR (requesting mailing address, which includes state/country and mailing zip/postal code); Item 9 of Form SDR (requesting information regarding an entity's incorporation or organization); Item 13 of Form SDR (requesting date of signature in different format).

the applicant should file electronically any initial and amended Form SDRs that had been filed previously in paper format.[297] The Commission expects that the information filed will be made available on the Commission's website, except in cases where confidential treatment is requested by an SDR and granted by the Commission.[298] The Commission acknowledges that SDRs will likely incur additional costs and burdens, particularly in initial compliance, with the data tagging requirement, when compared with filing Form SDR in paper format. However, the Commission believes that such costs will be minimal and that this requirement will facilitate review and analysis of registration materials by Commission staff and, to the extent such materials are made public, the public. The Commission believes that the costs of completing Form SDR in tagged data format are justified by the benefits derived from the ability of investors, analysts, and Commission staff to be able to more effectively capture, review, and analyze the SDR registration materials if they are in tagged data format.[299]

297 See Proposing Release, 75 FR at 77309 n.25, supra note 2 (noting that SDRs might be required to file Form SDR in paper until such time as an electronic filing system is operational and capable of receiving the form and the Commission may require each SDR to promptly re-file electronically Form SDR and any amendments to the form).

298 As discussed below, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

299 As part of the Commission's longstanding efforts to increase transparency and the usefulness of information, the Commission has been implementing data tagging of information contained in electronic filings to improve the accuracy of financial information and facilitate its analysis. See Regulation S-T, 17 CFR 232; see also Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Investment Company Release

Technical Amendments to Electronic Filing Requirements. The Commission is adopting technical amendments to Exchange Act Rule 24b-2[300] and Rule 101 of Regulation S-T[301] to clarify that SDRs' electronic filings pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder[302] must include any information with respect to which confidential treatment is requested ("confidential portion"). Generally speaking, Exchange Act Rule 24b-2 and Rule 101 of Regulation S-T require confidential treatment requests and the confidential portion to be submitted in paper format only. The Commission's technical amendments provide an exception from Rule 24b-2's and Rule 101's paper-only filing requirements for all SDR filings. Under this exception, the confidential portion of all SDR filings must be filed in electronic format.

The Commission is revising Rule 24b-2 in two ways. First, the Commission is revising Rule 24b-2(b) to provide an exception for persons providing materials pursuant to Rule 24b-2(h)

No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010); What is Interactive Data and Who's Using It?, http://www.sec.gov/spotlight/xbrl/what-is-idata.shtml (last updated March 15, 2010) (link to the Commission's Office of Interactive Disclosure's discussion of the benefits of interactive data). Data becomes machine-readable when it is labeled, or tagged, using a computer markup language that can be processed by software programs for analysis. Such computer markup languages use standard sets of definitions, or "taxonomies," that translate text-based information in Commission filings into structured data that can be retrieved, searched, and analyzed through automated means. Requiring the information to be tagged in a machine-readable format using a data standard that is freely available, consistent, and compatible with the tagged data formats already in use for Commission filings will enable the Commission to review and analyze more effectively Form SDR submissions.

300 17 CFR 240.24b-2.

301 17 CFR 232.101.

302 See, e.g., Rule 13n-2(b) (relating to withdrawal on Form SDR) and Rule 13n-11(d)(2) (relating to compliance reports); see also Rule 13n-11(f)(5) (relating to financial reports); General Instruction 1 to Form SDR (requiring Form SDR and exhibits to be filed electronically in a tagged data format, including amendments filed under Rule 13n-1(d)).

from the general requirement to omit the confidential portion from "the material filed."[303] Second, the Commission is adding Rule 24b-2(h) to provide that an SDR must not omit the confidential portion from the material filed in electronic format pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, and must request confidential treatment electronically in lieu of the procedures described in Rule 24b-2(b).

The Commission is also revising Rule 101 to add paragraph (a)(1)(xvii) to the list of mandated electronic submissions. Specifically, paragraph (a)(1)(xvii) adds to this list documents filed with the Commission pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, including Form SDR and reports filed pursuant to Exchange Act Rules 13n-11(d) and (f).[304] The Commission is also revising Rule 101(c) to provide that except as otherwise specified in Rule 101(d), confidential treatment requests and the information with respect to which confidential treatment is requested must not be submitted in electronic format. The Commission is further adding Rule 101(d) to provide as an exception to Rule 101(c)'s paper-only filing requirement all documents, including any information with respect to which confidential treatment is requested, filed pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder.

Electronic filing of all materials filed by SDRs, including the confidential portion, will reduce the burden on SDRs by not requiring a separate paper submission and facilitate the

303 Rule 24b-2(a) refers to "any registration statement, report, application, statement, correspondence, notice or other document" as "the material filed."

304 See Sections VI.J.4 and VI.J.5 of this release discussing compliance reports and financial reports filed pursuant to Rules 13n-11(d) and (f).

Commission's review and analysis of the filings.[305]

2. Factors for Approval of Registration and Procedural Process for Review (Rule 13n-1(c))

a. Proposed Rule

Proposed Rule 13n-1(c) would establish the timeframe for Commission action on applications for registration as an SDR, as well as the Commission's procedures for reviewing applications for registration. In particular, proposed Rule 13n-1(c) provided that, within 90 days of the date of the filing of an application for registration on Form SDR (or within such longer period as to which the SDR consents), the Commission will either grant the registration by order or institute proceedings to determine whether registration should be denied. The proposed rule set forth the time period for such proceedings. The proposed rule also set forth the standard applicable to an application for registration as an SDR.

b. Comments on the Proposed Rule

Although the Commission did not receive any comments directly relating to this proposed rule, two commenters expressed their views on the SDR registration process generally.[306]

The first commenter recommended sufficient time for an appropriate level of due diligence with respect to applications for registration.[307] While the commenter expressly

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305 See Rules 13-1(b); 13n-2(b); 13n-11(d)(2); see also Rule 13n-11(f)(5); General Instruction 1 to Form SDR.

306 See DTCC 2, supra note 19; ICE CB, supra note 26.

307 DTCC 2, supra note 19 ("DTCC is concerned that the SEC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the temporary registration regime, may lead to compromised solutions, including operational and security compromises . . . . [P]otential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date. DTCC recommends that appropriate

referenced the proposed temporary registration rule, the Commission believes that the commenter's concern regarding the operational capability of SDRs is applicable to any applicant for registration as an SDR.[308] Additionally, the same commenter supported combining new Form SDR with Form SIP,[309] which would necessitate a revision to Rule 13n-1(c), as described below.[310]

The second commenter requested the Commission's expedited review of SDR registration.[311]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-1(c) as proposed, with minor modifications. First, the Commission is making minor revisions from the proposal relating to the event that begins the 90-day period for Commission review and action on the application for registration as an SDR. The final rule provides that within 90 days of the date of the publication of notice of the filing of an application for registration (or within such longer

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due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls."); see also DTCC 3, supra note 19 ("SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities . . . . Assessment of these core capabilities is a critical component of any registration process, including a temporary registration.").

308 See Section VI.A.3.c of this release discussing the Commission's decision not to adopt the proposed temporary registration rule.

309 DTCC 2, supra note 19 (requesting that the Commission combine Form SDR and Form SIP such that an SDR would register as an SDR and a SIP using only one form or permit either Form SDR or Form SIP to be the application for registration as both an SDR and an SIP); DTCC 3, supra note 19.

310 See Section VI.A.1 of this release discussing combining Form SDR and Form SIP.

311 ICE CB, supra note 26 (suggesting that the Commission take into consideration the SDR's provisional registration with the CFTC).

period as to which the applicant consents), the Commission will either grant the registration by order or institute proceedings to determine whether registration should be granted or denied.[312] The 90-day period will not begin to run until an SDR files a complete Form SDR with the Commission,[313] and the Commission publishes notice of the filing of Form SDR to afford interested persons an opportunity to submit written comments concerning such application.[314] As discussed above, in light of the Commission's adoption of the requirement for a registered SDR to also register as a SIP in Regulation SBSR,[315] the Commission has decided to consolidate Form SIP and Form SDR in order to make the registration process for SDRs more efficient; this approach has been endorsed by one commenter.[316] The Commission's revision of Rule 13n-1(c)

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312 Rule 13n-1(c).

313 See Proposing Release, 75 FR at 77313, supra note 2. If a Form SDR is incomplete, then it may be deemed as not acceptable for filing. General Instruction 7 to Form SDR, as adopted, provides that "[a] form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing." Further, the application must include information sufficient to allow the Commission to assess the applicant's ability to comply with the federal securities laws and the rules and regulations thereunder. Form SDR consists of instructions, a list of questions, a signature page, and a list of exhibits that the Commission requires in order to be able to determine whether an applicant is able to comply with the federal securities laws and the rules and regulations thereunder. An application on Form SDR may not be considered complete unless the applicant has filed, at a minimum, responses to all the questions listed, the signature page, and exhibits as required in Form SDR, and any other materials the Commission may require, upon request, in order to assess whether an applicant is able to comply with the federal securities laws and the rules and regulations thereunder. If the application is not complete, then the application will not be deemed to have been filed for the Commission's review.

314 If, however, an SDR files an amendment to its application for registration after the Commission has already published notice of the filing of Form SDR and the Commission finds that the amendment renders the prior filing materially incomplete, then the 90-day period will reset from the time that the Commission deems the amended application to be complete for the Commission's review.

315 See Regulation SBSR Adopting Release, supra note 13 (Rule 909).

316 See DTCC 2, supra note 19; DTCC 3, supra note 19.

relating to the publication of notice makes it procedurally consistent with the registration process applicable to SIPs under Exchange Act Section 11A(b)[317] and stems from the Commission's requirement that a registered SDR register as a SIP[318] and the Commission's revision of Form SDR to accommodate SIP registration. Exchange Act Section 11A(b)(3) provides that the Commission will, upon the filing of an application for registration as a SIP, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application; within 90 days of the date of the publication of such notice (or within such longer period as to which the applicant consents), the Commission will by order grant such registration or institute proceedings to determine whether registration should be denied.[319] The Commission has determined to adopt Rule 13n-1(c) with revised text from the proposal that conforms the event preceding the period for Commission action, with respect to applications for registration as an SDR, to the event set forth in Section 11A(b)(3), with respect to applications for registration as a SIP.[320]

Second, the Commission is revising Rule 13n-1(c) from the proposal to clarify that the purpose of proceedings instituted pursuant to the rule is to determine whether an applicant's registration as an SDR should be granted or denied, rather than only denied (as proposed).[321] The Commission is further revising Rule 13n-1(c) from the proposal to provide that proceedings instituted pursuant to the rule will include notice of the issues under consideration (rather than

317 See 15 U.S.C. 78k-1(b).

318 See Regulation SBSR Adopting Release, supra note 13 (Rule 909).

319 See 15 U.S.C. 78k-1(b)(3).

320 A publication of notice of the filing of an application for registration is required in the SIP context.

321 See Rule 13n-1(c)(2).

grounds for denial under consideration, as proposed) and opportunity for hearing on the record and will be concluded within 180 days after the date of the publication of notice of the filing of the application for registration.[322] These revisions from the proposal are intended to make the rule internally consistent.[323]

The Commission is adopting Rule 13n-1(c) as proposed in all other respects. Rule 13n-1(c) provides that at the conclusion of proceedings instituted pursuant to the rule, the Commission, by order, will grant or deny such registration.[324] The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the SDR consents.[325]

As noted in the Proposing Release, the Commission believes that the timeframes for reviewing applications for registration as an SDR are appropriate to allow Commission staff sufficient time to ask questions and, as needed, to request amendments or changes by SDRs to address legal or regulatory concerns before the Commission takes final action on an application

322 See Rule 13n-1(c)(2). For the reasons provided above, in conjunction with the revision from the proposal to the event that precedes the 90-day period, and for consistency within the rule, the Commission is also revising from the proposal the event that precedes the 180-day period for conclusion of Commission action on the application for registration as an SDR. In making this revision, the Commission is changing "not later than 180 days" to "within 180 days" for consistency within the rule.

323 Proposed Rule 13n-1(c)(2) stated that the Commission may institute proceedings to determine whether registration should be "denied," and that such proceedings include notice of the "grounds for denial," but that at the conclusion of such proceedings, the Commission shall "grant or deny" registration. As adopted, the rule clarifies that the Commission may institute proceedings to determine whether registration should be "granted or denied" and that proceedings instituted pursuant to this rule must include notice of the "issues under consideration."

324 Rule 13n-1(c)(2).

325 Rule 13n-1(c)(2).

for registration.[326] In addition, the registration process provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder.[327] One commenter requested that the Commission provide for expedited review of the commenter's application for registration as an SDR, in part because of its provisional registration with the CFTC as a swap data repository.[328] It is unclear what the commenter means by "expedited review," but the Commission believes that the procedures for reviewing applications for registration as an SDR that the Commission is adopting in this release provide reasonable timeframes for the Commission's review of the applications and the Compliance Date for the SDR Rules will address the concerns of existing SDRs operating during the registration period.[329] Moreover, these procedures are consistent with the procedures for reviewing applications of other registrants by the Commission (e.g., SIPs, broker-dealers, nationally recognized statistical ratings organizations, national securities exchanges, registered securities associations, and registered clearing agencies) although the timeframes for review vary.[330] Additionally, the Commission notes that its review of an SDR's application for registration is

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[326] Proposing Release, 75 FR at 77313, supra note 2. In addition to the applicant's registration on Form SDR, "[a]s part of the application process, each SDR shall provide additional information to any representative of the Commission upon request." See Rule 13n-1(b).

[327] See Proposing Release, 75 FR at 77313, supra note 2 (discussing Rule 13n-1(c) and noting that "the registration provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder").

[328] See ICE CB, supra note 26.

[329] See Section V.C of this release discussing the Commission's efforts designed to minimize interference with ongoing operations of existing SDRs during the implementation of the SDR Rules.

[330] See Exchange Act Sections 11A(b)(3), 15(b), 15E(a)(2), and 19(a), 15 U.S.C. 78k-1(b)(3), 78o(b), 78o-7(a)(2), and 78s(a).

independent of the CFTC's review of a swap data repository's application for registration.[331]

The Commission will grant the registration of an SDR if the Commission finds that the SDR is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.[332] The Commission will deny the registration of an SDR if the Commission does not make such a finding.[333]

One commenter indicated that applicants for registration as an SDR should be able to "demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls."[334] Similarly, the same commenter stated that "SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities" and "[a]ssessment of these core capabilities is a critical component of any registration process."[335] The Commission generally agrees with this commenter and believes that an SDR's infrastructure and operational capabilities are important factors in determining whether to grant an SDR's application for registration.[336]

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331 But see ICE CB, supra note 26 (suggesting that the Commission take into consideration the SDR's provisional registration with the CFTC).

332 Rule 13n-1(c)(3).

333 Id.

334 DTCC 2, supra note 19.

335 DTCC 3, supra note 19.

336 See Rule 13n-6 (requiring SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security); Rule 13n-1(c)(3) (discussing the standards for the Commission to grant registration of an SDR, including having the

In the Proposing Release, the Commission asked whether, in order to form a more complete and informed basis on which to determine whether to grant, deny, or revoke an SDR's registration, it should adopt a requirement that an SDR file with the Commission, as a condition of registration or continued registration, a review relating to the SDR's operational capacity and ability to meet its regulatory obligations.[337] The Commission did not receive any comments directly on this issue, but upon further consideration, the Commission has determined not to require an SDR to file with the Commission a review of the SDR's operational capacity and ability to meet its regulatory obligations because it is not clear that the benefits of such a requirement would justify the costs. However, in determining whether an applicant meets the criteria set forth in Rule 13n-1(c), the Commission will consider the application and any additional information obtained from the SDR, which may include information obtained in connection with an inspection or examination of the SDR. Additionally, in connection therewith, the Commission may consider, among other things, whether an applicant can demonstrate its operational capabilities and conduct its operations in compliance with its statutory and regulatory obligations. If an applicant (rather than its affiliate) is already registered with the Commission as, for example, a clearing agency, then Commission representatives may also take into account any recent examinations in its determination pursuant to Rule 13n-1(c)(3).

The Commission will consider a registered SDR's operational capacity and ability to meet its statutory and regulatory obligations to determine whether the SDR should continue to operate as such or whether the Commission should take steps to revoke the SDR's registration.

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capacity to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, and comply with any applicable provision of the federal securities laws and the rules and regulations thereunder).

337 Proposing Release, 75 FR at 77313, supra note 2.

As provided in Exchange Act Section 13(n)(2), "[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission."[338] The results of such inspection and examination will be used to inform the Commission whether the SDR is complying with the federal securities laws and the rules and regulations thereunder. As discussed further below, under Rule 13n-2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has, among other things, failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the SDR's registration.[339]

In considering initial applications for registration on Form SDR filed contemporaneously with the Commission, the Commission intends to process such applications for multiple SDRs accepting SBS transaction data from the same asset classes within the same period of time so as to address competition concerns that could arise if such SDRs were granted registration at different times.[340] Further, in light of the Commission's adoption of the requirement in Regulation SBSR for a registered SDR to register as a SIP,[341] the Commission is adopting Form SDR, which incorporates the requirements of Form SIP, as discussed in Section VI.A.1.c above. The Commission's review of an applicant's registration as an SDR on Form SDR will encompass review with respect to both SDR and SIP registration. The Commission

338 Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2). See also Section VI.D.2 of this release discussing Rule 13n-4(b)(1), which implements Exchange Act Section 13(n)(2).

339 See Section VI.B of this release discussing Rule 13n-2(e).

340 Certain unexpected events that raise compliance concerns with respect to one applicant but not another, such as deficiencies identified in connection with the Commission's consideration of whether an applicant meets the criteria set forth in Rule 13n-1(c), may interfere with the Commission's ability to process initial applications for registration within the same period of time.

341 See Regulation SBSR Adopting Release, supra note 13 (Rule 909).

contemplates that it will grant registrations to an applicant both as an SDR and as a SIP simultaneously.

3. Temporary Registration (Rule 13n-1(d))

a. Proposed Rule

As proposed, Rule 13n-1(d) provided a method for SDRs to register temporarily with the Commission. The proposed rule provided that, upon the request of an SDR, the Commission may grant temporary registration of the SDR that would expire on the earlier of: (1) the date that the Commission grants or denies (permanent) registration of the SDR, or (2) the date that the Commission rescinds the temporary registration of the SDR.[342]

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[343] One commenter recommended that the Commission establish clear standards and requirements for temporary registration.[344] Similarly, another commenter recommended that "the Commission establish clearly articulated standards and requirements for temporary registration so that existing trade repositories may quickly begin to provide similar transparency to the [SBS] markets that is currently provided to the rest of the swaps market, thus facilitating the Commission's oversight of these markets."[345] That same commenter also expressed concern about the temporary registration provision, particularly the cumulative effect of the short time frame afforded for

342 Proposed Rule 13n-1(d).

343 See DTCC 2, supra note 19; ICE CB, supra note 26; see also DTCC 5, supra note 19.

344 ICE CB, supra note 26.

345 DTCC 5, supra note 19 ("Further clarity on the standards and process that will be utilized to grant temporary registration will also provide applicants to register as [SDRs] with a better understanding of the Commission's expectations with respect to their obligations and requirements prior to being granted full registration.").

registration and the possibility that a temporary registration regime "may lead to compromised solutions [at SDRs], including operational and security compromises."[346] Additionally, the commenter urged the Commission to ensure that the registration process does not interfere with the ongoing operation of existing SDRs.[347]

c. Final Rule

After considering the comments, the Commission has determined not to adopt proposed Rule 13n-1(d). As stated in the Proposing Release, the temporary registration provision would have enabled an SDR to comply with the Dodd-Frank Act upon its effective date (i.e., the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Exchange Act Section 13(n))[348] regardless of any unexpected contingencies that may arise in connection with the filing of Form SDR. The proposed temporary registration

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346 DTCC 2, supra note 19 ("DTCC is concerned that the SEC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the temporary registration regime, may lead to compromised solutions, including operational and security compromises . . . . [P]otential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date. DTCC recommends that appropriate due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls."); see also DTCC 3, supra note 19 ("SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities . . . . Assessment of these core capabilities is a critical component of any registration process, including a temporary registration.").

347 DTCC 2, supra note 19; see also DTCC 5, supra note 19 (stating the same and "[w]hether done through a phasing-in of final [SDR] rules or the Commission's prompt issuance of temporary registration conditioned on implementation of enhancements to comply more fully with specified provisions, the Commission should ensure the continuation of counterparty reporting and the ability of the entities currently performing the functions of an [SDR] to receive and maintain current trade information on an ongoing basis").

348 Proposing Release, 75 FR at 77314, supra note 2; see also Dodd-Frank Act Section 774.

would also have allowed the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while still giving the Commission sufficient time to review fully the application of an SDR after it becomes operational, but before granting a registration that is not limited in duration.

These concerns were motivated primarily by the short timeframe between when the SDR Rules were first proposed and when registration would have been required (i.e., as of July 16, 2011). However, the exemptive relief provided by the Commission, which was effective on June 15, 2011,[349] addressed this primary purpose for temporary registration. Further, the Compliance Date for the SDR Rules[350] should provide sufficient time for SDRs to analyze and understand the final SDR Rules, to develop and test new systems required to comply with the Dodd-Frank Act's provisions governing SDRs and the SDR Rules, to prepare and file Form SDR, to demonstrate their ability to meet the criteria for registration set forth in Rule 13n-1(c)(3), and to obtain registration with the Commission. Therefore, the Commission believes that it has addressed commenters' concerns relating to interference with the ongoing operation of existing SDRs.[351] For these reasons, the Commission no longer believes that a temporary registration regime for SDRs is necessary or appropriate.

4. Amendment on Form SDR (Proposed Rule 13n-1(e)/Final Rule 13n-1(d))

a. Proposed Rule

As proposed, Rule 13n-1(e) would require an SDR to file promptly an amendment on Form SDR ("interim amendment") if any information reported in Items 1 through 16, 25, and

349 See Effective Date Order, 76 FR at 36306, supra note 9.

350 See Section V.C of this release discussing the Compliance Date.

351 See, e.g., DTCC 2, supra note 19; DTCC 5, supra note 19.

46[352] of Form SDR or in any amendment thereto is or becomes inaccurate for any reason. The Proposing Release indicated that an SDR would generally be required to file such an amendment within 30 days from the time such information becomes inaccurate.[353] In addition, an SDR would be required to file an annual amendment on Form SDR within 60 days after the end of its fiscal year.

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-1(e) as proposed, redesignated as Rule 13n-1(d). Under Rule 13n-1(d), if any information reported in Items 1 through 17, 26, and 48 of Form SDR (designated as Items 1 through 16, 25, and 46 in proposed Rule 13n-1(e)) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, an SDR shall promptly file an amendment on Form SDR updating the information. An SDR should file an interim amendment as soon as practicable, and generally no later than 30 days from the time such information becomes inaccurate in order for the filing to be viewed as "promptly" filed. For example, an SDR should file an amendment promptly after any change in

352 The Commission notes that the Proposing Release, proposed Rule 13n-1(e), and General Instruction 6 to proposed Form SDR inadvertently referred to Item 44 instead of Item 46. See Proposing Release, 75 FR at 77314, 77315, and 77374, supra note 2. However, the discussion in the Proposing Release made clear that the Commission expected a non-resident SDR to promptly amend its Form SDR after any changes in the legal and regulatory framework that would impact the SDR's ability to provide the Commission with prompt access to the SDR's books and records, and such amendment should include a revised opinion of counsel. See Proposing Release, 75 FR at 77314, supra note 2. This discussion was clearly referring to the requirements in proposed Item 46 (requiring opinion of counsel by non-resident SDRs), and not proposed Item 44 (requiring plan to ensure data is maintained after the applicant withdraws from registration).

353 Proposing Release, 75 FR at 77314, supra note 2.

the identity of its CCO or if the biographical information provided about its CCO changes (e.g., if the CCO becomes the subject of certain specified SRO actions).[354]

In addition to interim amendments, an SDR is required to file a comprehensive annual amendment on Form SDR, including all items subject to interim amendments, within 60 days after the end of its fiscal year.[355] This annual amendment must be fully restated and complete, including all pages, answers to all items, together with exhibits.[356] This annual amendment must also indicate which items have been amended since the last annual amendment, or if the SDR has not yet filed an annual amendment, since the SDR's application for registration. Rule 13n-1(d) is consistent with the Commission's requirements for other registrants (e.g., national securities exchanges, broker-dealers, transfer agents, SIPs) to file updated and annual amendments to registration forms with the Commission.[357] The Commission believes that such amendments are important to obtain updated information on each SDR, which will assist the Commission in

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354 See Section VI.J of this release discussing the CCO requirements in Rule 13n-11.

355 See Rule 13n-1(d).

356 The General Instructions to Form SDR have been amended from the proposal to clarify what items and exhibits need to be included when filing an amendment. Additionally, the Commission is revising Form SDR from the proposal to include separate designations on the form for an annual amendment and an amendment other than an annual amendment, rather than a single designation that covers any amendment. The signature block to Form SDR has also been amended from the proposal to clarify that an SDR that files an amendment (other than an annual amendment) need only represent that all unamended information contained in Items 1 through 17, 26, and 48 remains true, current, and complete as filed, rather than all unamended items and exhibits to Form SDR.

357 See Exchange Act Rule 6a-2, 17 CFR 240.6a-2 (requiring national securities exchanges to amend some information on Form 1 within 10 days, and other information annually); Exchange Act Rule 15b3-1, 17 CFR 240.15b3-1 (requiring broker-dealers to promptly amend applications for registration); Exchange Act Rules 17Ac2-1 and 17Ac2-2, 17 CFR 240.17Ac2-1 and 240.17Ac2-2 (requiring transfer agents to amend information on Form TA-1 within 60 days, and to file an annual report); Rule 609 of Regulation NMS, 17 CFR 242.609, and Form SIP, 17 CFR 249.1001 (requiring SIPs to amend certain items on Form SIP promptly and also requiring an annual amendment).

determining whether each SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Obtaining updated information will also assist Commission representatives in their inspection and examination of an SDR. The Commission may make filed amendments available on its website, except for information where confidential treatment is requested by the SDR[358] and granted by the Commission.

5. Service of Process and Non-Resident SDRs (Proposed Rules 13n-1(f) and 13n-1(g)/Final Rules 13n-1(e) and 13n-1(f))

a. Proposed Rule

As proposed, Rule 13n-1(f) would require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Proposed Rule 13n-1(g) would require any non-resident SDR applying for registration to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to proposed Rule 13n-1(f). One

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358 As discussed above, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

commenter submitted a comment relating to proposed Rule 13n-1(g).[359] The commenter expressed concern that proposed Rule 13n-1(g) would subject non-resident SDRs to a stricter regime than that applicable to resident SDRs.[360]

c. Final Rule

The Commission is adopting Rule 13n-1(f) as proposed, redesignated as Rule 13n-1(e). Rule 13n-1(e) requires each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. If an SDR appoints a different agent to accept such notice or service of process, then the SDR will be required to file promptly an amendment on Form SDR updating this information.[361] The requirement applies equally to both SDRs within the United States and non-resident SDRs that are required to register with the Commission. Rule 13n-1(e) is intended to conserve the Commission's resources and to minimize any logistical obstacles (e.g., locating defendants or respondents within the United States or abroad) that the Commission may encounter when attempting to effect service. For instance, by requiring an SDR to designate an agent for service of process in the United States, and by prohibiting an SDR from designating a Commission member, official, or employee as its agent for service of process, the rule will reduce a

359 See ESMA, supra note 19.

360 ESMA, supra note 19 ("According to our reading, non-resident SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the SEC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the SEC.").

361 See Rule 13n-1(d) (requiring an SDR to promptly file an amendment on Form SDR updating information in Item 11 of Form SDR).

significant resource burden on the Commission, including resources to locate agents of registrants overseas and keep track of their whereabouts.

After considering the comment to proposed Rule 13n-1(g), the Commission is adopting Rule 13n-1(g) as proposed, redesignated as Rule 13n-1(f), with one modification. Rule 13n-1(f) requires any non-resident SDR applying for registration pursuant to this rule to certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission. Rule 13n-1(f) also requires any non-resident SDR applying for registration to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. The final rule differs from the proposed rule in that, as proposed, a non-resident SDR would be required to certify that it "can, as a matter of law" provide prompt access to the SDR's books and records and submit to onsite inspection and examination. As adopted, the rule requires the non-resident SDR to certify that it "can, as a matter of law, and will" do those things. This change from the proposal is intended to make clear to a non-resident SDR that it is making an affirmative commitment to comply with its obligation to provide the Commission with prompt access to the SDR's books and records and submit to onsite inspection and examination.[362]

362 See Proposing Release, 75 FR at 77312, supra note 2 (asking whether "the representations that would be required to be made by the person who signs Form SDR [are] appropriate and sufficiently clear," and whether "the Commission [should] require any additional or alternative representations"). See also Exchange Act Section 13(n)(2) and Rule 13n-4(b)(1) (both requiring registered SDRs to be subject to inspection and examination by any representative of the Commission) and Rule 13n-7(b) (requiring SDRs to keep and preserve books and records and promptly furnish them to any representative of the Commission upon request).

While the Commission acknowledges that the rule will impose an additional requirement on non-resident SDRs, for the reasons stated in Section VI.A.1.c above relating to Form SDR's certification and legal opinion requirements, the Commission continues to believe that before granting registration to a non-resident SDR, it is appropriate to obtain a certification and opinion of counsel that such person is in a position to provide legally the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission.[363]

6. Definition of "Report" (Proposed Rule 13n-1(h)/Final Rule 13n-1(g))

a. Proposed Rule

Proposed Rule 13n-1(h) provided that "[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of [Exchange Act Sections 18(a) and 32(a)] and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder."

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-1(h) as proposed, redesignated as Rule 13n-1(g). Rule 13n-1(g) provides that "[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of [Exchange Act Sections 18(a) and 32(a)] and the rules and regulations thereunder and other

363 See also Section VI.D.2 of this release discussing inspection and examination by Commission representatives.

applicable provisions of the United States Code and the rules and regulations thereunder." Exchange Act Sections 18(a) and 32(a) set forth the potential liability for a person who makes, or causes to be made, any false or misleading statement in any "report" filed with the Commission (e.g., Form SDR).[364] The Commission believes that subjecting a person to this potential liability will enhance the reliability and credibility of any "report" that is filed with the Commission pursuant to Rule 13n-1 because the person will have incentive to take steps to verify the accuracy of the report in order to avoid liability.

B. Withdrawal From Registration; Revocation and Cancellation (Rule 13n-2)

1. Proposed Rule

Proposed Rule 13n-2 set forth a process for a person to withdraw its registration as an SDR and for the Commission to revoke, suspend, or cancel an SDR's registration. With respect to proposed Rule 13n-2(b), a registered SDR would be required to withdraw from registration by filing a notice of withdrawal with the Commission. The proposed rule would require the SDR to designate on its notice of withdrawal a person associated with the SDR to serve as the custodian

364 Exchange Act Section 18(a) provides, in part, that "[a]ny person who shall make or cause to be made any statement in any . . . report . . . which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading." 15 U.S.C. 78r(a). Exchange Act Section 32(a) provides, in part, that "[a]ny person who willfully and knowingly makes, or causes to be made, any statement in any . . . report . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed." 15 U.S.C. 78ff(a).

of the SDR's books and records.[365] Prior to filing a notice of withdrawal, an SDR would be required to file an amended Form SDR to update any inaccurate information.[366] If there is no inaccurate information to update, then an SDR would include a confirmation to that effect in its notice of withdrawal.

Proposed Rule 13n-2(c) set forth the effective date of a notice of withdrawal from registration. Proposed Rule 13n-2(d) provided that a notice of withdrawal from registration that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.[367] Proposed Rule 13n-2(e) set forth the basis for the Commission, by order, to revoke the registration of an SDR. Finally, proposed Rule 13n-2(f) provided that the Commission, by order, may cancel the registration of an SDR if it finds that the SDR is no longer in existence or has ceased to do business in the capacity specified in its application for registration.

2. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

3. Final Rule

The Commission is adopting Rule 13n-2 as proposed with a few modifications.[368] The Commission is revising the proposed rule to eliminate the requirement for a registered SDR to

365 Proposed Rule 13n-2(b).

366 Proposed Rule 13n-2(b).

367 15 U.S.C. 78r(a), 78ff(a).

368 The Commission did not receive any comments on the definitions of "control" and "person associated with a security-based swap data repository" in proposed Rule 13n-2(a), but is omitting these definitions in Rule 13n-2 because the Commission's revision of the rule, as discussed in this section, no longer uses these terms.

file a separate notice of withdrawal with the Commission in order to streamline the withdrawal process and make it more efficient for SDRs and Commission staff. Instead, Rule 13n-2(b) permits a registered SDR to withdraw from registration by filing Form SDR electronically in a tagged data format;[369] when making such a filing, the SDR must indicate on Form SDR that it is filed for the purpose of withdrawing from registration.[370] The Commission is also revising the proposed rule to give an SDR more flexibility in designating the custodian of the SDR's books and records by requiring the SDR to designate a person to serve as the custodian of the SDR's books and records;[371] the person does not necessarily need to be associated with an SDR, as proposed, and thus, the SDR has the option to designate an unaffiliated entity, such as another

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369 The Commission is revising proposed Rule 13n-2(a) to add the definition of "tag" (including the term tagged) to have the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11). This definition is added in order to conform the requirements for filing Form SDR to withdraw registration with the requirements for filing Form SDR to register or amend registration pursuant to Rule 13n-1.

370 Exchange Act Section 11A(b)(4) states that "[a] registered securities information processor may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission." 15 U.S.C. 78k-1(b)(4). A SIP that is dually-registered as an SDR may withdraw from registration by filing Form SDR, which the Commission would deem as a written notice of withdrawal under Exchange Act Section 11A(b)(4). In addition, the Commission has modified the heading of this rule. As proposed, the heading of this rule was "Withdrawal from registration." As adopted, the heading is "Withdrawal from registration; revocation and cancellation." This change in the heading provides a more accurate description of the subject of the rule.

371 Rule 13n-2(b). The Commission is amending Form SDR from the proposal to add new Item 12 to implement the requirement in Rule 13n-2(b) for an SDR to designate a custodian of its books and records if it withdraws from registration. See new Item 12 to Form SDR and Section VI.A.1 of this release discussing Form SDR. The Commission has also made some conforming changes to proposed Form SDR and the General Instructions to make clear that the form may be used for withdrawal of registration. For example, General Instruction 1 now indicates that Form SDR and exhibits thereto are to be filed electronically in a tagged data format in connection with withdrawing an SDR's registration. See General Instruction 1 to Form SDR.

registered SDR, as the custodian. The purpose of this requirement is to ensure that an SDR's books and records are maintained and available to the Commission and other regulators after the SDR withdraws from registration, and to assist the Commission in enforcing Rules 13n-5(b)(7)[372] and 13n-7(c).[373]

When filing a Form SDR as a withdrawal from registration, the SDR should update any inaccurate information contained in its most recently filed Form SDR.[374] This requirement is substantively the same as the proposal, which would require an SDR, prior to filing a notice of withdrawal, to file an amended Form SDR to update any inaccurate information.[375] If there is no inaccurate information to update, then an SDR should include a confirmation to that effect when filing Form SDR. The Commission may make filed withdrawals available on its website, except for information where confidential treatment is requested by the SDR[376] and granted by the Commission.

Rule 13n-2(c) provides that a withdrawal from registration filed by an SDR on Form

372 See Section VI.E.7 of this release discussing requirement that an SDR that ceases to do business preserve, maintain, and make accessible transaction data and historical positions.

373 See Section VI.G.3 of this release discussing requirement that an SDR that ceases to do business preserve, maintain, and make accessible certain records relating to its business.

374 See Rule 13n-2(b). The General Instructions to Form SDR have been amended from the proposal to clarify what items and exhibits need to be included when filing a withdrawal. See General Instruction 11 to Form SDR.

375 Proposed Rule 13n-2(b).

376 As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

SDR shall become effective for all matters (except as provided in Rule 13n-2(c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such SDR consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine. A withdrawal from registration filed on Form SDR that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing.[377] Rule 13n-2(d) provides that a withdrawal from registration filed on Form SDR that is filed pursuant to this rule shall be considered a "report" filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.[378]

Under Rule 13n-2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. The rule further provides that pending final determination of whether any registration be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.[379] Finally, Rule 13n-2(f) provides that if the Commission finds that a registered SDR

377 See General Instruction 7 to Form SDR.

378 See Section VI.A.6 of this release discussing definition of "report."

379 Rule 13n-2(e).

is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.[380]

The Commission believes that it is important to set forth a process for a person to withdraw its registration as an SDR and for the Commission to be able to revoke, suspend, or cancel an SDR's registration, similar to the approach that it takes with some of its other registrants.[381]

C. Registration of Successor to Registered SDR (Rule 13n-3)

1. Proposed Rule

Proposed Rule 13n-3 would govern the registration of a successor to a registered SDR. Successor registration would be accomplished either by filing a new application on Form SDR or, in certain circumstances, by filing an amendment on Form SDR.

2. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

3. Final Rule

The Commission is adopting Rule 13n-3 as proposed, with minor revisions to track the language of Rules 13n-1 and 13n-2 as adopted. Rule 13n-3 governs the registration of a

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380 Where an SDR anticipates that it will cease to exist or cease to do business as an SDR, the SDR may withdraw from registration by filing a withdrawal on Form SDR pursuant to Rule 13n-2(b). Regardless of whether the SDR withdraws from registration pursuant to Rule 13n-2(b), the Commission revokes the SDR's registration pursuant to Rule 13n-2(e), or the Commission cancels the SDR's registration pursuant to Rule 13n-2(f), the SDR is obligated to comply with Rules 13n-5(b)(7) and 13n-7(c), which are discussed in Sections VI.E.7 and VI.G.3 of this release, respectively.

381 Rule 13n-2 is similar to Exchange Act Rule 15b6-1, 17 CFR 240.15b6-1, which relates to withdrawal from registration as a broker-dealer, and includes a provision similar to a provision in Exchange Act Section 15(b)(5), 15 U.S.C. 78o(b)(5) (stating that "[i]f the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer").

successor to a registered SDR. Because this rule is substantially similar to Exchange Act Rule 15b1-3,[382] which governs the registration of a successor to a registered broker-dealer, the same concepts that the Commission explained when it adopted amendments to Rule 15b1-3 are applicable here.[383]

a. Succession by Application

Rule 13n-3(a) provides that in the event that an SDR succeeds to and continues the business of an SDR registered pursuant to Exchange Act Section 13(n), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR, and the predecessor files a withdrawal from registration on Form SDR with the Commission.[384] A successor will not be permitted to "lock in" the 30-day window period by filing an application for registration that is incomplete in material respects.

Rule 13n-3(a) further provides that the registration of the predecessor SDR shall cease to be effective 90 days after the date of the publication of notice of the filing of an application for registration on Form SDR by the successor SDR.[385] In other words, the 90-day period will not

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382 See 17 CFR 240.15b1-3.

383 See Registration of Successors to Broker-Dealers and Investment Advisers, Exchange Act Release No. 31661 (Dec. 28, 1992), 58 FR 7 (Jan. 4, 1993).

384 As adopted, Rule 13n-2 differs from the proposal by requiring a "filing a withdrawal from registration on Form SDR" rather than "filing a notice of withdrawal." The Commission is revising Rule 13n-3(a) from the proposal to track the language of Rule 13n-2.

385 As adopted, Rule 13n-1(c) differs from the proposal by starting the 90-day period from the publication of notice of the filing of Form SDR rather than from the filing of Form SDR. The Commission is revising Rule 13n-3(a) from the proposal to track more closely the language of Rule 13n-1(c). As discussed in Section VI.A.2.c of this release, the Commission is revising Rule 13n-1(c) from the proposal to make it procedurally consistent with the registration process applicable to SIPs and the rule stems from the

begin to run until a complete Form SDR has been filed by the successor with the Commission and the Commission publishes notice of the filing of Form SDR to afford interested persons an opportunity to submit written comments concerning such application. This 90-day period is consistent with the time period set forth in final Rule 13n-1, pursuant to which the Commission would have 90 days to grant registration or institute proceedings to determine if registration should be granted or denied.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) an acquisition, through which an unregistered person purchases or assumes substantially all of the assets and liabilities of an SDR and then operates the business of the SDR, (2) a consolidation of two or more registered SDRs, resulting in their conducting business through a new unregistered SDR, which assumes substantially all of the assets and liabilities of the predecessor SDRs, and (3) dual successions, through which one registered SDR subdivides its business into two or more new unregistered SDRs.

b. Succession by Amendment

Rule 13n-3(b) provides that notwithstanding Rule 13n-3(a), if an SDR succeeds to and continues the business of a registered predecessor SDR, and the succession is based solely on (1) a change in the predecessor's date or state of incorporation, (2) form of organization, or (3) composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor SDR on Form SDR to reflect these changes. Such amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR.

Commission's requirement that a registered SDR register as a SIP and the Commission's revision of Form SDR to accommodate SIP registration.

The Commission believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these three types of successions.

c. Scope and Applicability of Rule 13n-3

The purpose of Rule 13n-3 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The rule is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only if there is a direct and substantial business nexus between the predecessor and the successor SDR. The rule cannot be used when a registered SDR sells its registration, eliminates substantial liabilities, spins off personnel, or facilitates the transfer of the registration of a "shell" organization that does not conduct any business. No person will be permitted to rely on Rule 13n-3 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Rule 13n-3 does not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs need not use the rule because they can continue to rely on their existing registrations. The rule also does not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties. If a person acquires some or all of the shares of a registered SDR, or if one registered SDR purchases part or all of the business assets or assumes personnel of another registered SDR, then reliance on this rule would not be necessary.[386]

386 In the case of the purchase of the business assets or assumption of the personnel of one registered SDR by another SDR, the purchasing SDR would file an amendment on Form SDR to reflect any changes in its operations, while the other SDR would either file a

D. Enumerated Duties and Core Principles (Rule 13n-4)

Dodd-Frank Act Section 763(i) requires an SDR to comply with the requirements and core principles described in Exchange Act Section 13(n) as well as any requirement that the Commission prescribes by rule or regulation in order to be registered and maintain registration as an SDR with the Commission.[387] After considering comments, the Commission is adopting Rule 13n-4 as proposed, with modifications.

The Commission is not adopting proposed Rules 13n-4(b)(9) and (10), which address relevant authorities' access to SBS data maintained by SDRs. As discussed below, the Commission anticipates soliciting additional public comment regarding relevant authorities' access to SBS data maintained by SDRs.

1. Definitions (Rule 13n-4(a))

a. Proposed Rule

Proposed Rule 13n-4(a) defined the following terms: "affiliate," "board," "control," "director," "direct electronic access," "end-user," "market participant," "nonaffiliated third party," and "person associated with a security-based swap data repository."

b. Comments on the Proposed Rule

The Commission received one comment on the proposed definitions in the context of the

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Form SDR to withdraw its registration or file an interim amendment on the form, depending on whether the SDR remains in the SDR business.

387 See Exchange Act Section 13(n)(3), 15 U.S.C. 78m(n)(3), as added by Dodd-Frank Act Section 763(i). The Dodd-Frank Act authorizes the Commission to establish additional requirements for SDRs by rule or regulation. Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9), 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9), as added by Dodd-Frank Act Section 763(i).

SDR Rules.[388] Specifically, one commenter believed that the Commission's requirement in the definition of "direct electronic access" that data is "updated at the same time as the [SDR's] data is updated" may pose "operational difficulties that do not outweigh the marginal benefits to the Commission."[389] The commenter also believed that "[t]he Commission's proposed definition provides for no latency between the moment when an [SDR's] records are updated and when the systems used by the Commission (or its designee with direct electronic access) are updated."[390] For these reasons, the commenter suggested that the Commission "allow time for an [SDR] to validate, process, and store the data received prior to populating the data to the environment that will be utilized to provide such direct electronic access to the Commission."[391]

c. Final Rule

After considering the comment, the Commission is adopting Rule 13n-4(a) as proposed, with modifications related to the definition of "end-user."[392] Specifically, the Commission is adopting Rule 13n-4(a) without the definition of "end-user." As discussed above, the Commission proposed rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims.[393] In anticipation that the

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388 See DTCC 5, supra note 19. See also supra note 247 (discussing a general comment regarding the term "affiliate").

389 DTCC 5, supra note 19.

390 DTCC 5, supra note 19.

391 DTCC 5, supra note 19.

392 The Commission is also correcting a typographical error in the proposed rule. Proposed Rule 13n-4(a)(3)(ii) referred to the right to vote 25 percent "of" more of a class of securities. See Proposing Release, 75 FR at 77367, supra note 2. As adopted, Rule 13n-4(a)(3)(ii) refers to the right to vote 25 percent "or" more of a class of securities. In addition, certain definitions are being renumbered due to the removal of the definition of "end-user."

393 See End-User Exception Proposing Release, supra note 15.

Commission will consider final rules relating to end-users in a separate rulemaking, the Commission has decided not to adopt the proposed definition of "end-user" in this release. The Commission believes that it is better to address the issue of end-users more fully in that release than in this release.

The Commission is adopting the definition of "direct electronic access" as proposed to mean "access, which shall be in a form and manner acceptable to the Commission, to data stored by [an SDR] in an electronic format and updated at the same time as the [SDR]'s data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the [SDR] can query or analyze the data." This includes access to all transaction data and positions, as defined in Rule 13n-5(a),[394] and related identifying information, such as transaction IDs and time stamps.[395] With respect to one commenter's view that requiring SBS data to be updated at the same time as the data is updated at an SDR may pose "operational difficulties that do not outweigh the marginal benefits to the Commission,"[396] the Commission believes that its definition of "direct electronic access" is necessary for the Commission's adequate oversight of the SBS market. The commenter asserted that the Commission's definition of "direct electronic access" "provides for no latency between the moment when an [SDR's] records are updated and when the systems used by the Commission (or its designee with direct electronic access) are updated."[397] The Commission understands that

394 See Section VI.E.1 of this release discussing the definition of "transaction data" and Section VI.E.2 of this release discussing the definition of "position."

395 See Regulation SBSR Adopting Release, supra note 13 (Rules 901(f) and (g)).

396 See DTCC 5, supra note 19.

397 See DTCC 5, supra note 19 (suggesting that the Commission "allow time for an [SDR] to validate, process, and store the data received prior to populating the data to the

latency is inherent when updating systems, and that there may be some time lag between when the SDR receives and updates the data and when the updated data is available for the Commission to access. The Commission also understands that an SDR needs to check the data for errors and omissions and process the data before providing the data to the Commission or its designees. Otherwise, the Commission or its designees will not be able to query or analyze the data. Thus, by referencing to the Commission's or its designees' ability to query or analyze the data in the definition of "direct electronic access," the Commission anticipates that there may be a lag time for SDRs to check and process the data before providing the data to the Commission or its designees. The Commission notes, however, that once an SDR checks and processes the data, the SDR is required to provide the Commission or its designees with the ability to access the checked and processed data at the same time as the checked and processed data is updated in the SDR's records.

2. Enumerated Duties (Rule 13n-4(b))

a. Proposed Rule

Proposed Rule 13n-4(b) would incorporate an SDR's duties that are enumerated in Exchange Act Sections 13(n)(2), 13(n)(5), and 13(n)(6),[398] which require each SDR to: (1) subject itself to inspection and examination by the Commission; (2) accept SBS data as prescribed by Regulation SBSR;[399] (3) confirm with both counterparties to the SBS the accuracy of the data that was submitted; (4) maintain the data as prescribed by the Commission; (5)

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environment that will be utilized to provide such direct electronic access to the Commission").

398 Exchange Act Section 13(n), 15 U.S.C. 78m(n).

399 See supra note 201 (discussing Regulation SBSR, which prescribes the data elements that an SDR will be required to accept for each SBS in association with requirements under Dodd-Frank Act Section 763(i)).

provide direct electronic access to the Commission or any of its designees; (6) provide certain information as the Commission may require to comply with Exchange Act Section 13(m);[400] (7) at such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing SBS data; (8) maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity; (9) on a confidential basis pursuant to Exchange Act Section 24 and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR to certain relevant authorities; (10) before sharing information with a relevant authority, obtain a written confidentiality agreement and obtain an agreement from the relevant authority to indemnify the SDR and the Commission; and (11) designate a CCO who must comply with specified duties.

b. Comments on the Proposed Rule

Six commenters submitted comments relating to various aspects of proposed Rule 13n-4(b).[401] These comment letters are described in more detail below, other than those that relate

[400] Exchange Act Section 13(m) pertains to the public availability of SBS data. See 15 U.S.C. 78m(m). In a separate release relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(m)), the Commission proposed rules that impose various duties on SDRs in connection with the reporting and public dissemination of SBS information. See Regulation SBSR Proposing Release, supra note 8; see also Cross-Border Proposing Release, 78 FR at 31210-6, supra note 3 (re-proposing Regulation SBSR). The Commission is adopting those rules as part of Regulation SBSR. See Regulation SBSR Adopting Release, supra note 13.

[401] See Barnard, supra note 19; Better Markets 1, supra note 19; DTCC 2, supra note 19; ESMA, supra note 19; MFA 1, supra note 19; US & Foreign Banks, supra note 24; see also DTCC 1*, supra note 20; DTCC 3, supra note 19; DTCC 5, supra note 19. In addition to these commenters, one commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that release confidential under the Freedom of Information Act ("FOIA") or to seek a legislative solution. Deutsche Temp Rule, supra note 28. Although this comment does not explicitly reference to the SDR Rules, the Commission

solely to relevant authorities' access to SBS data maintained by SDRs, which the Commission anticipates will be addressed separately. Generally speaking, one commenter believed that "all of the substantive rule provisions proposed [as of July 22, 2013] must remain as strong as possible, irrespective of the Commission's approach to its very limited jurisdiction over cross-border transactions or the CFTC's approach to the implementation of Title VII."[402]

i. Inspection and Examination

One commenter expressed concern regarding the potential cost to non-resident SDRs of complying with multiple regulatory regimes, including inspections and examinations by multiple regulators.[403]

ii. Direct Electronic Access

As discussed in Section IV above, two commenters suggested that the Commission designate one SDR to receive SBS data from other SDRs, through direct electronic access, in order to provide the Commission and other regulators a consolidated location from which to access SBS data.[404] Both commenters believed that such designation would ensure efficient consolidation of data.[405]

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addresses this point in Section VI.D.2 of this release to the extent that the SDR Rules require SDRs to submit information to the Commission.

402 Better Markets 2, supra note 19 (urging the Commission to not dilute or weaken the [p]roposed [r]ules to accommodate concerns about international regulation of the SBS markets).

403 ESMA, supra note 19.

404 DTCC 1*, supra note 20; Better Markets 1, supra note 19. Comments regarding direct electronic access in the context of substituted compliance are addressed in a separate release. See Regulation SBSR Adopting Release, supra note 13.

405 DTCC 1*, supra note 20; Better Markets 1, supra note 19; see also DTCC 2, supra note 19 ("The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources."); DTCC 3, supra note 19 ("When there are multiple SDRs in any particular

iii. Monitoring, Screening, and Analysis

In the Proposing Release, the Commission proposed taking a measured approach and not requiring SDRs to establish automated systems for monitoring, screening, and analyzing SBS data at that time.[406] One commenter disagreed with this proposal.[407] Another commenter supported "the broad concept that an SDR should monitor, screen and analyze SBS data as input for the [Commission] to facilitate its oversight and monitoring responsibilities," but believed that the proposed rule is too broad and "not clear enough on the level of detail required and on the level of responsibility imposed on SDRs."[408] A third commenter suggested that monitoring, screening, and analysis should be performed centrally by an SDR for efficiency and that the data maintained by the SDR should then be made available to relevant authorities.[409]

iv. Other Enumerated Duties

Comments on the other enumerated duties either are discussed later in this release or addressed in the Regulation SBSR Adopting Release or the Regulation SBSR Proposed

asset class, the [Commission] should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs.").

406 Proposing Release, 75 FR at 77318, supra note 2.

407 Better Markets 1, supra note 19 ("The fact that this market is in its 'infancy' is a unique opportunity for the Commission to guide its development in a way that protects the public interest, promotes competition, and prevents what has been the routine development of conflicts and predatory conduct.").

408 Barnard, supra note 19 (recommending that the Commission "provide additional details on the anticipated requirements in order to better manage the expectations of SDRs and wider market participants concerning their duties in this area").

409 DTCC 2, supra note 19.

Amendments Release.[410] The Commission anticipates addressing comments regarding relevant authorities' access to SBS data maintained by SDRs in a separate release when it solicits additional public comment regarding the issue.

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-4(b) as proposed, with modifications. Specifically, each SDR is required to:

(1) subject itself to inspection and examination by any representative of the Commission;[411]

(2) accept data as prescribed in Regulation SBSR[412] for each SBS;

(3) confirm, as prescribed in Rule 13n-5, with both counterparties to the SBS the accuracy of the data that was submitted, as discussed further in Section VI.E.1 of this release;

(4) maintain, as prescribed in Rule 13n-5, the data described in Regulation SBSR in such form, in such manner, and for such period as provided therein and in the Exchange Act and the rules and regulations thereunder, as discussed further in Section VI.E of this release;

(5) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

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410 See Regulation SBSR Adopting Release, supra note 13; Regulation SBSR Proposed Amendments Release, supra note 13.

411 The Commission is revising its proposed rule by adding "any representative of" before "the Commission" to track more closely Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) ("Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.").

412 The Commission addresses this enumerated duty in further detail in Regulation SBSR. See Regulation SBSR Adopting Release, supra note 13.

(6) provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with requirements set forth in Exchange Act Section 13(m) and the rules and regulations thereunder;[413]

(7) at such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing SBS data;

(8) maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as prescribed in Rule 13n-9 and as discussed further in Section VI.I.1 of this release; and

(9) [Reserved]

(10) [Reserved]

(11) designate an individual to serve as a CCO, as discussed further in Section VI.J of this release.[414]

With respect to one commenter's general recommendation that all of the Commission's substantive rules "remain as strong as possible, irrespective of the Commission's approach to its very limited jurisdiction over cross-border transactions or the CFTC's approach to the implementation of Title VII,"[415] the Commission believes that the final SDR Rules are robust and reflect an appropriate approach to furthering the goals of the Dodd-Frank Act and

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413 The Commission addresses this enumerated duty in further detail in Regulation SBSR. See Regulation SBSR Adopting Release, supra note 13.

414 The Commission is revising proposed Rule 13n-4(b)(11) by not including the phrase "who shall comply with the duties set forth in Exchange Act Rule 13n-11." This revision is being made to clarify that an SDR is only required to designate a CCO.

415 Better Markets 2, supra note 19 (urging the Commission to not dilute or weaken the [p]roposed [r]ules to accommodate concerns about international regulation of the SBS markets).

minimizing an SDR's cost of compliance.[416]

Because the Commission anticipates soliciting additional public comment regarding relevant authorities' access to SBS data maintained by SDRs in a separate release, the Commission is not adopting proposed Rules 13n-4(b)(9) and (10) at this time and is marking those sections as "Reserved."[417] However, SDRs will have to comply with all statutory requirements, including Exchange Act Sections 13(n)(5)(G) and (H),[418] when the current exemptive relief from the statutory requirements expires.[419]

i. Inspection and Examination

Each registered SDR is statutorily required to be subject to inspection and examination by any representative of the Commission.[420] With respect to one commenter's concern regarding the potential cost to non-resident SDRs of complying with multiple regulatory regimes, including inspections and examinations by multiple regulators,[421] the Commission appreciates this concern and has discussed this concern in the Cross-Border Proposing Release.[422] To address the

416 See Section VIII of this release discussing economic analysis.

417 In the Cross-Border Proposing Release, the Commission proposed interpretive guidance to specify how SDRs may comply with the notification requirement set forth in Exchange Act Section 13(n)(5)(G) and proposed Rule 13n-4(b)(9). Cross-Border Proposing Release, 78 FR at 31046-31047, supra note 3. The Commission also specified how the Commission proposed to determine whether a relevant authority is appropriate for purposes of receiving SBS data from an SDR. Id. at 31047-31048. The Commission is not taking any action on these proposals at this time and anticipates addressing these issues in a separate release.

418 See 15 U.S.C. 78m(n)(5)(G) and 78m(n)(5)(H).

419 See Section V of this release discussing implementation of the SDR Rules.

420 See Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2).

421 See ESMA, supra note 19.

422 See Cross-Border Proposing Release, 78 FR at 31043, supra note 3 (discussing duplicative regulatory regimes for non-U.S. persons performing the functions of an SDR, which may include non-resident SDRs).

commenter's broader concern of duplicative regulatory regimes, the Commission is adopting Rule 13n-12 to provide an exemption from specific SDR requirements in certain circumstances, as discussed in Section VI.K of this release.[423]

ii. Direct Electronic Access

Each SDR should coordinate with the Commission to provide direct electronic access to the Commission or any of its designees. The form and manner that will be acceptable to the Commission for an SDR to provide direct electronic access may vary on a case-by-case basis and may change over time, depending on a number of factors. These factors could include the development of new types of SBSs or variations of existing SBSs that require additional data to accurately describe them. Additionally, the extent to which the Commission encounters difficulty in normalizing and aggregating SBS data across multiple registered SDRs would be a factor in considering the nature of the direct access provided by an SDR to the Commission.

As contemplated in the Proposing Release, the Commission anticipates that an SDR may be able to satisfy its duty to provide direct electronic access to the Commission by providing, for example, (1) a direct streaming of the data maintained by the SDR to the Commission or any of its designees, (2) a user interface that provides the Commission or any of its designees with direct access to the data maintained by the SDR and that provides the Commission or any of its designees with the ability to query or analyze the data in the same manner that is available to the SDR, or (3) another mechanism that provides a mirror copy of the data maintained by the SDR, which is in an electronic form that is downloadable by the Commission or any of its designees and is in a format that provides the Commission or any of its designees with the ability to query

423 See also Regulation SBSR Adopting Release, supra note 13 (discussing substituted compliance); Exchange Act Rule 0-13, 17 CFR 240.0-13 (relating to procedures for filing applications for substituted compliance).

or analyze the data in the same manner that is available to the SDR.[424] The alternative ways to provide direct electronic access to the Commission are not intended to be mutually exclusive.

Additionally, the rule provides that the data must be in a form and manner acceptable to the Commission.[425] Since one of the primary purposes of an SDR is to facilitate regulatory oversight of the SBS market, a significant portion of the benefits of an SDR will not be realized if data stored at an SDR is provided to the Commission in a form or manner that cannot be easily utilized by the Commission. Furthermore, the form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs.

The Commission continues to consider whether it should require the data to be provided to the Commission in a particular format.[426] The Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission. The Commission intends to maximize the use of any applicable current industry standards for the

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424 Proposing Release, 75 FR at 77318, supra note 2.

425 See Rule 13n-4(a)(5) (defining "direct electronic access" to mean "access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data"); see also Section VI.E.4 of this release discussing the requirement to maintain transaction data and positions in a place and format that is readily accessible to the Commission.

426 Cf. Proposing Release, 75 FR at 77319 and 77331, supra note 2 (asking questions about how direct electronic access could be provided, and asking whether the Commission should require information be kept in a particular format, such as FpML or another standard).

description of SBS data, build upon such standards to accommodate any additional data fields as may be required, and develop such formats and taxonomies in a timeframe consistent with the implementation of SBS data reporting by SDRs. The Commission recognizes that as the SBS market develops, new or different data fields may be needed to accurately represent new types of SBSs, in which case the Commission may provide updated specifications of formats and taxonomies to reflect these new developments. Until such time as the Commission adopts specific formats and taxonomies, SDRs may provide direct electronic access to the Commission to data in the form in which the SDRs maintain such data.

As stated in Section IV of this release with respect to commenters' suggestions regarding consolidation of SBS data,[427] the Commission does not believe that it is necessary to designate, at this time, an SDR or any registered entity to receive, through direct electronic access, SBS data maintained by other SDRs in order to aggregate the data. At this time, the Commission believes that it—rather than any particular registered entity—is in the best position to aggregate data across multiple registered SDRs. The Commission anticipates that its proposal on the formats and taxonomies for SBS data provided to the Commission pursuant to Rule 13n-4(b)(5) will facilitate its ability to carry out this function. The Commission may revisit this issue as the SBS market evolves.

A commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that

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427 See DTCC 1*, supra note 20 (recommending that the Commission designate one SDR to receive, through direct electronic access, information from other SDRs to ensure efficient consolidation of data); Better Markets 1, supra note 19 (recommending that "the Commission designate one SDR as the recipient of information of other SDRs, through direct electronic access to the SBS data at the other SDRs, in order to provide the Commission and relevant authorities with a consolidated location for SBS data").

release confidential under FOIA or to seek a legislative solution.[428] The Commission anticipates that it will keep reported data that it obtains from an SDR (via direct electronic access or any other means) confidential, subject to the provisions of applicable law.[429]

After considering the comments, the Commission is adopting Rule 13n-4(b)(5) as proposed.

iii. Monitoring, Screening, and Analysis

Although the Commission is adopting Rule 13n-4(b)(7) as proposed, it is not, at this time, directing SDRs to establish any automated systems for monitoring, screening, and analyzing SBS data. One commenter urged the Commission to adopt a rule to require an SDR to establish automated systems for monitoring, screening, and analyzing SBS data,[430] but the Commission continues to believe that it is better to take a measured approach in addressing this statutory requirement to minimize imposing costs on SDRs until the Commission is in a better position to determine what information it needs in addition to the information that it can obtain from SDRs through other rules applicable to SDRs, such as Rule 13n-4(b)(5).[431] For the same reasons, the

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428 See Deutsche Temp Rule, supra note 28. It is unclear what the commenter contemplates by its suggestion that the Commission seek a "legislative solution," but the Commission notes that it does not intend to affirmatively seek any legislative action to protect further such information. The commenter is not precluded from doing so on its own initiative.

429 Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. See 17 CFR 200.83 (regarding confidential treatment procedures under FOIA).

430 See Better Markets 1, supra note 19.

431 See Proposing Release, 75 FR at 77318, supra note 2 (discussing reasons to take a measured approach with respect to requiring an SDR to establish automated systems for monitoring, screening, and analyzing SBS data). In a separate release, the Commission is adopting a rule requiring an SDR to provide the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to the SDR. See Regulation SBSR Adopting Release, supra note 13 (Rule 907(e)). In addition, the Commission proposed a rule that would require a counterparty to an SBS that invokes

Commission is not, as another commenter suggested,[432] providing additional details on what may be expected of SDRs in this area. The Commission, however, expects to consider further steps to implement this requirement as the SBS market develops and the Commission gains experience in regulating this market.[433] Because the Commission is not requiring an SDR to monitor, screen, and analyze SBS data maintained by the SDR at this time, the Commission is also not taking one commenter's suggestion to designate, at this time, an SDR to centrally monitor, screen, and analyze SBS data maintained by all SDRs.[434] The Commission believes that it is premature to do so without better understanding what additional information would be useful to the Commission. After considering the comments, the Commission is adopting Rule 13n-4(b)(7) as proposed.

3. Implementation of Core Principles (Rule 13n-4(c))

Each SDR is required, under Exchange Act Section 13(n)(7), to comply with core principles relating to (1) market access to services and data, (2) governance arrangements, and (3) conflicts of interest.[435] Specifically, unless necessary or appropriate to achieve the purposes

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the end-user clearing exemption to deliver or cause to deliver certain information to a registered SDR, and, if adopted, then an SDR would be required to maintain this information in accordance with Rule 13n-5(b)(4). See End-User Exception Proposing Release, supra note 15.

432 See Barnard, supra note 19 (stating that the proposed rule regarding monitoring, screening, and analysis is too broad and "not clear enough on the level of detail required and on the level of responsibility imposed on SDRs").

433 The Commission may revisit these issues as the Commission becomes more familiar with the SBS market and consider requiring SDRs to monitor, screen, and analyze SBS data if, for example, it is difficult for the Commission to aggregate and analyze the data because SBS data is too fragmented among multiple SDRs or the data is maintained by multiple SDRs in different formats.

434 See DTCC 2, supra note 19.

435 See Exchange Act Section 13(n)(7), 15 U.S.C. 78m(n)(7).

of the Exchange Act, an SDR[436] is prohibited from adopting any rules[437] or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, or reporting of transactions.[438] In addition, each SDR must establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal Government, owners, and participants.[439] Moreover, each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving any such conflicts of interest.[440] Rule 13n-4(c) incorporates and implements these three core principles.

a. First Core Principle: Market Access to Services and Data (Rule 13n-4(c)(1))

i. Proposed Rule

Proposed Rule 13n-4(c)(1) would incorporate and implement the first core principle[441] by requiring SDRs, unless necessary or appropriate to achieve the purposes of the Exchange Act and the rules and regulations thereunder, to not (i) adopt any policies and procedures or take any action that results in an unreasonable restraint of trade; or (ii) impose any material

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436 Although Exchange Act Section 13(n)(7)(A) refers to "swap data repository," the Commission believes that the Congress intended it to refer to "security-based swap data repository." See generally Am. Petroleum Institute v. SEC, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (explaining that "[t]he Dodd-Frank Act is an enormous and complex statute, and it contains" a number of "scrivener's errors").

437 See Section VI.A.1.c of this release discussing the likelihood that most of the information that would be contained in a "rulebook" would be filed as part of an SDR's policies and procedures that are attached to Form SDR.

438 See Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

439 See Exchange Act Section 13(n)(7)(B), 15 U.S.C. 78m(n)(7)(B).

440 See Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C).

441 See Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

anticompetitive burden on the trading, clearing, or reporting of transactions.[442] Proposed Rule 13n-4(c)(1) would include four specific requirements. First, each SDR would be required to ensure that any dues, fees, or other charges it imposes, and any discounts or rebates it offers, are fair and reasonable and not unreasonably discriminatory; such dues, fees, other charges, discounts, or rebates would be required to apply consistently across all similarly-situated users of the SDR's services.[443] Second, each SDR would be required to permit market participants to access specific services offered by the SDR separately.[444] Third, each SDR would be required to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR.[445] Finally, each SDR would be required to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.[446]

ii. Comments on the Proposed Rule

As discussed below, eight commenters submitted comments relating to this proposed

442 Proposed Rule 13n-4(c)(1).

443 Proposed Rule 13n-4(c)(1)(i).

444 Proposed Rule 13n-4(c)(1)(ii).

445 Proposed Rule 13n-4(c)(1)(iii).

446 Proposed Rule 13n-4(c)(1)(iv).

rule,[447] which were mixed.[448] Generally speaking, one commenter supported "the Commission's stated goals of protecting market participants and maintaining a fair, orderly, and efficient [SBS] market through the promotion of competition" and urged "the Commission to adopt rules that preserve a competitive marketplace and forbid [ ] anti-competitive practices by all [SBS] market participants."[449] The commenter stated that "[i]n a global SB swap market, the anti-competitive practices of even a single market participant have potential ramifications for the entire marketplace."[450]

In suggesting that the Commission rely on CPSS-IOSCO's recommendations such as the

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447 See Barnard, supra note 19; Better Markets 1, supra note 19; DTCC 2, supra note 19; MarkitServ, supra note 19; Tradeweb SBSR, supra note 27; Benchmark*, supra note 20; CDEU*, supra note 20; McLeish*, supra note 20; see also Better Markets 2, supra note 19; DTCC 5, supra note 19; DTCC CB, supra note 26.

448 Three comments submitted prior to the Proposing Release agreed with the Commission on the importance of market transparency. See McLeish*, supra note 20; CDEU*, supra note 20 (supporting "efforts by Congress to improve transparency, accountability and stability"); Benchmark*, supra note 20 ("fully support[ing] regulatory efforts to increase transparency in the OTC markets"); see also SIFMA*, supra note 20 (indicating that increased price transparency will improve the application of models used in the computation of capital requirements for purposes of complying with Exchange Act Rule 15c3-1). For example, one commenter stressed the importance of requiring market transparency for all market participants without any exceptions. McLeish*, supra note 20 (believing that "there should be transparency for everyone" and there should be "no exceptions"). Another commenter believed that market transparency will improve liquidity in the SBS market. Benchmark*, supra note 20. To the extent that these commenters are broadly supporting transparency, the Commission believes that Rule 13n-4(c)(1) reflects this broad support.

449 DTCC 5, supra note 19 (stating that "the Commission correctly emphasizes that market participants offering potentially competing services should not be subject to anti-competitive practices, including product tying, overly restrictive terms of use, and anti-competitive price discrimination"). With respect to this comment, the Commission notes that the rules adopted in this release apply to only SDRs. To the extent that the Commission adopts rules prohibiting other market participants from engaging in anti-competitive practices, those rules will be addressed in separate releases.

450 DTCC CB, supra note 26.

PFMI Report, the commenter cited, as an example, to the Commission's concurrence, in the Proposing Release, with the CPSS-IOSCO Trade Repository Report's recommendation that "[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anticompetitive practices such as product tying, contracts with non-compete and/ or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination."[451]

(1) Rule 13n-4(c)(1)(i): Fair, Reasonable, and Not Unreasonably Discriminatory Dues, Fees, Other Charges, Discounts, and Rebates

One commenter supported the requirements in proposed Rule 13n-4(c)(1)(i) because "they should encourage market participants to use SDRs' services."[452] The commenter believed that an SDR should charge different fee structures only if it relates to the SDR's "differing costs of providing access or service to particular categories" and that "[a]nything else would be discrimination."[453] The commenter suggested that "any preferential pricing such as volume discounts or reductions should be generally viewed as discriminatory" and believed that "[s]uch volume discounts or reductions tend to discriminate in favour of the large players."[454]

Two commenters believed that SDRs should be permitted to continue using the current "dealer pays" or "sell-side pays" model,[455] or at least to continue using that model if it is

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451 DTCC CB, supra note 26; see also Proposing Release, 75 FR at 77321, supra note 2; CPSS-IOSCO Trade Repository Report, supra note 48.

452 Barnard, supra note 19.

453 Barnard, supra note 19.

454 Barnard, supra note 19.

455 DTCC 2, supra note 19 (noting the success of a model that charges dealers for services on an at-cost basis and that operates at no cost to the buy-side and end-users); MarkitSERV, supra note 19.

acceptable by the SDRs' market participants.[456] One of the commenters expressed particular concern about the effect that the Commission's proposed rule requiring nondiscriminatory pricing would have on the current "dealer pays" or "sell-side pays" model.[457] The commenter suggested that alternatively, the Commission's proposed rule could be amended to permit: (a) different fee structures for different classes of participants (e.g., sell-side and buy-side) to reflect the different cost of their usage of the SDR, or (b) payment of fees by only the reporting party.[458] The commenter believed that this approach would be consistent with the Commission's proposed "not unreasonably discriminatory" requirement because "SDRs would be prohibited from discriminating within each class, while participants in different classes may be charged different fees."[459] The commenter further believed that "any other literal interpretation of 'non-discriminatory access' would have the unintended consequence of significantly increasing the costs for buy-side participants and, by doing so, generally discouraging their use of [SDRs]."[460]

The same two commenters further believed that an SDR's fees for certain services should reflect the SDR's costs of providing related services.[461] One of these commenters believed, for example, that "if a reporting party uses a third party service provider for trade submission, which fulfils the SDR's requirement to confirm the trade with both parties, this report would potentially be charged at a lower cost than a direct report to the SDR, requiring the SDR itself to confirm

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456 MarkitSERV, supra note 19.

457 MarkitSERV, supra note 19.

458 MarkitSERV, supra note 19.

459 MarkitSERV, supra note 19.

460 MarkitSERV, supra note 19.

461 DTCC 2, supra note 19; MarkitSERV, supra note 19; see also DTCC CB, supra note 26 (not supporting anti-competitive price discrimination).

with the other party."[462] The commenter further noted that since small "non-reporting counterparties will legitimately want to interact with SDRs, if only to verify what has been reported, SDRs should have the flexibility to facilitate such access by not charging, or charging only nominal amounts, for such interaction."[463] In addition, the commenter suggested that the Commission clarify its rules to "prevent predatory or coercive pricing by providers engaged in any two or more trading, clearing or repository services" and to prohibit cross-subsidies between services.[464] The other commenter suggested that SDRs should be permitted to charge different (i.e., higher) fees in order to recoup costs associated with "processing any highly non-standard, albeit eligible [(i.e., within the asset class for which the SDR accepts data)], SBS transactions."[465]

Another commenter believed that the Commission's proposed rule, which refers to a standard of "fair and reasonable" and "not unreasonably discriminatory" and which requires consistent application across all similarly-situated users, is vague and suggested that the Commission "establish fees, rates, or even formulas for determining rates."[466] The commenter suggested that in order to prevent SDRs from taking "unfair advantage of the mandated use of their services," particularly "in SBS markets where there is no effective competition, SDRs [should] be required to justify the reasonableness of price levels charged to both suppliers of data

462 DTCC 2, supra note 19.

463 DTCC 2, supra note 19.

464 DTCC 4, supra note 19 ("While market participants should be able to enjoy the economies of shared platforms . . . the allocations of platform operating costs between services cannot be arbitrary.").

465 MarkitSERV, supra note 19.

466 Better Markets 1, supra note 19.

and recipients of data."[467]

One commenter to proposed Regulation SBSR suggested that SDRs should not be permitted to charge fees to third parties acting on behalf of counterparties for accepting SBS transaction information because such fees would increase the cost of using an SB SEF or other third party.[468] The commenter believed that SDRs would likely charge the same third parties for subsequent use of SBS data maintained by the SDRs.[469] In submitting comments to the Commission's rulemaking regarding SB SEFs, the same commenter suggested that the Commission require SDRs to (i) make available any data they collect and may properly use for commercial purposes to all market participants, including SB SEFs and clearing agencies, on reasonable terms and pricing and on a non-discriminatory basis, and (ii) share, on commercially reasonable terms, revenue that SDRs generate from redistributing such data with parties providing the data to the SDRs (e.g., SB SEFs).[470] The commenter believed that without these requirements, the Commission would be effectively taking away from market participants, including SB SEFs and clearing agencies, a potentially significant and valuable component of their potential market data revenue streams.[471]

(2) <u>Rule 13n-4(c)(1)(ii): Offering Services Separately</u>

Three commenters supported the Commission's proposed rule requiring SDRs to permit

[467] Better Markets 1, <u>supra</u> note 19.

[468] Tradeweb SBSR, <u>supra</u> note 27.

[469] Tradeweb SBSR, <u>supra</u> note 27.

[470] Tradeweb SB SEF, <u>supra</u> note 29.

[471] Tradeweb SB SEF, <u>supra</u> note 29.

market participants to access services offered by SDRs separately.[472] Specifically, one commenter agreed that SDRs' fees should be transparent.[473] As a corollary to this, one of the commenters suggested that third party service providers should be barred from bundling their services with an SDR's services.[474] Additionally, the same commenter believed that "[a]ny provider offering trading[,] clearing or repository services for one asset class should not be permitted [to] bundl[e] or t[ie] when providing services for other asset classes."[475] The commenter suggested, however, that SDRs should be permitted to offer two or more service options, including one that fulfills the minimum regulatory reporting requirements and a suite of other services to complement the mandatory reporting function.[476]

One commenter believed that SDRs should be able to offer ancillary services, whether

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472 DTCC 2, supra note 19; MarkitSERV, supra note 19 ("[M]arket participants' decisions to use or not use a given [SDR] or its affiliates' [a]ncillary [s]ervices should rest entirely with the market participant[s]. These decisions should not be tied to any other service provided by a regulated entity or its affiliate . . . or [an SDR] and any related [third party service provider]."); TriOptima, supra note 19 ("[I]t is important that market participants have the ability to access specific services offered by the [SDR] separately."); see also DTCC 3, supra note 19 (noting that the Commission's proposed rule requiring "each SDR to permit market participants to access specific services offered by the SDR separately" is consistent with the CPSS-IOSCO Trade Repository Report); DTCC CB, supra note 26 (not supporting anti-competitive practices such as product tying).

473 MarkitSERV, supra note 19.

474 DTCC 2, supra note 19 ("Allowing bundling of obligations undertaken by third party service providers with an SDR will detract from the SDR's utility function and jeopardize the value of SDRs to regulators and the market."); see also DTCC 4, supra note 19 ("[N]o provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates . . . . [A]side from being anti-competitive, this type of vertical bundling would also (a) reverse the principal-agent relationship . . . and (b) add a layer of unnecessary risk to the control processes that market participants may determine are needed.").

475 DTCC 4, supra note 19.

476 DTCC 2, supra note 19.

bundled or not.[477] The commenter, however, did not support the bundling of ancillary services with mandatory or regulatory services.[478]

Another commenter stated that the proposed rule went "a long way to address a third party's (such as a service provider's) non-discriminatory access rights to granular [SDR] Information," and that such access is important so as to "not stifle innovation and the competition in the provision of post-trade processing services" and to "uphold a fair, secure and efficient post-trade market."[479] In the context of discussing proposed Rule 13n-4(c)(1)(ii), the commenter suggested that, to further these goals, the Commission should clarify that all "users" of an SDR's services, including unaffiliated third party service providers, and not only market participants that submit trade data, should be permitted to access each of the SDR's services separately.[480]

(3) Rule 13n-4(c)(1)(iii): Fair, Open, and Not Unreasonably Discriminatory Access

Four commenters generally supported the Commission's proposed rule regarding fair, open, and not unreasonably discriminatory access to services offered and data maintained by SDRs, but a few of these commenters also recommended additional requirements.[481] One of

477 Barnard, supra note 19.

478 Barnard, supra note 19.

479 TriOptima, supra note 19.

480 TriOptima, supra note 19 ("[W]e would encourage the SEC to clarify that [proposed Rule 13n-4(c)(1)(ii)] should apply to all users of an [SDR], including third party service providers with Written Client Disclosure Consents seeking to access the [SDR] Information, and not just market participants who submit trade data. I.e., users of an [SDR] should have the right to access services provided by an [SDR] separately.").

481 DTCC 2, supra note 19 (SDRs "should demonstrate strict impartiality in making data available to, or receiving data from, other providers, including affiliates of SDRs."); MarkitSERV, supra note 19; Better Markets 1, supra note 19; TriOptima, supra note 19; see also Better Markets 2, supra note 19; DTCC CB, supra note 26 (not supporting anti-

these commenters noted that "all counterparties to trades reported to an SDR should, as a matter of principle, have access to all data relating to trades to which they are [counterparties]" and that "[t]his access should be made available to smaller, lower volume market participants, as necessary, through the reduction or waiver of certain fees."[482] The same commenter also noted that "clearinghouses and [SB SEFs] should have the ability to report trades to SDRs . . . to satisfy their customers' reporting preferences."[483] In addition, the commenter supported "open access to data by other service providers (based on the consent of the parties for that provider to receive the data) [because it] is critical to preserve the trading parties' control over their own data."[484]

Another commenter who supported the rule indicated that SDRs should be able to condition access by specifying the methods and channels that must be used in order to connect to the SDR and setting certain minimum standards.[485] This commenter also recommended that SDRs should be permitted to provide connectivity to third party service providers, without requiring any specific services from them as a condition to their gaining access to the SBS

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competitive practices such as contracts with non-compete and/or exclusivity clauses and overly restrictive terms of use).

482 DTCC 2, supra note 19; see also DTCC 3, supra note 19 (recommending that SDRs "be able to accept trades in any manner consistent with the regulations, from any market participant" and " have appropriate communications links, to the extent feasible, with all parties to its transactions"); DTCC SBSR, supra note 27 (stating that SDRs "will need to support an appropriate set of connectivity methods; the Commission should not, however, require SDRs to support all connectivity methods, as the costs to do so would be prohibitive"); see also TriOptima, supra note 19 ("[I]t is clear that an [SDR] should provide [s]wap [p]articipants with access to their own trade data.").

483 DTCC 3, supra note 19.

484 DTCC 3, supra note 19; see also DTCC 2, supra note 19 (believing that open access to data by other service providers "is an important principle for allowing development of automation and efficient operational processing in the market, while preserving the parties' control over confidential information").

485 MarkitSERV, supra note 19.

data.[486]

One commenter urged the Commission to "clarify in the final rule that [SDRs] shall provide third party service providers, who have been authorized to access information by the counterparties to the relevant trades under Written Client Disclosure Consents, with access to [SDR] Information."[487] The commenter further stressed the importance of providing "full and unrestricted" access to SBS data to third party service providers, particularly those acting on behalf of SBS counterparties.[488] The commenter objected to the lack of an "obligation on the [SDR] to provide full and unrestricted access to [granular trade data] to a third party service provider" and suggested that "this obligation should apply where the counterparties to the relevant trades have provided [written consents and authorizations] to the [SDR] to disclose granular trading data to the third party service provider."[489] The commenter noted that, when such third party service provider is acting pursuant to a written consent by an SBS counterparty, it is exercising that counterparty's right to access its own trade information.[490] The commenter

486 MarkitSERV, supra note 19.

487 TriOptima, supra note 19.

488 TriOptima, supra note 19 (emphasizing "the importance of enhanced non-discriminatory access rights to [SDR] Information for third party service providers in order to maintain competition and innovation within the post-trade area, especially where such third party service providers have been authorized to access [SDR] Information under Written Client Disclosure Consents" and stating that "[a]n explicit obligation for an [SDR] to provide such full and unrestricted access to [SDR] Information to a third party (service provider) is important in order to uphold a fair, secure and efficient post-trade market; an [SDR] should not restrict access to [SDR] Information on other grounds than integrity risks to the [SDR] Information").

489 TriOptima, supra note 19.

490 TriOptima, supra note 19 ("We note that the third party service provider, for whom a Written Client Disclosure Consents is given, is actually exercising the Swap Participant's right to access their own trade information which is held by the [SDR]. An [SDR] should be required to treat a third party service provider with a disclosure consent as acting as an

"stress[ed] the importance that data access rights and requirements imposed on a third party (service provider) seeking to access [SDR] Information[ ] are applied equally to the [SDR] itself when providing ancillary services and to affiliated service providers within the same group as the [SDR]."[491] In this regard, the commenter believed that "the [SDR] should not have discretion to offer advantages in respect of its own ancillary services or services offered by affiliated service providers vis-à-vis other third party service providers."[492]

One commenter recommended that the Commission require that each SDR establish and maintain effective interoperability and interconnectivity with other SDRs, market infrastructures, and venues from which data can be submitted to the SDR.[493] Additionally, the commenter suggested that market participants should have "equal and fair access to data on SBS transactions,"[494] and that the Commission's rules "establish stronger and more detailed standards against discriminatory access, and they should also establish regulatory oversight of access denials."[495] The commenter further suggested that the Commission's proposed rules set forth the "clearly stated objective criteria" and permit denial of access only on risk-based grounds, i.e., risks related to the security or functioning of the market.[496]

'agent' for the owner of the trade information and provide the third party service provider with the same type of access which the owner of such data is entitled to, subject to any restrictions set out in the disclosure consent.").

491 TriOptima, supra note 19.

492 TriOptima, supra note 19.

493 Better Markets 1, supra note 19; see also DTCC 4, supra note 19 (suggesting that the Commission clarify its rules to prevent unfair or coercive linking or blocking of links between trading, clearing, or repository services).

494 Better Markets 2, supra note 19.

495 Better Markets 1, supra note 19.

496 Better Markets 1, supra note 19.

(4) Rule 13n-4(c)(1)(iv): Prohibited or Limited Access

One commenter recommended that the Commission require an SDR "to promptly file a notice with the Commission if the SDR . . . prohibits or limits any person's access to services offered or data maintained by the SDR."[497]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n-4(c)(1) as proposed, with one minor modification.[498] Rule 13n-4(c)(1), which tracks the statutory language,[499] provides that "[u]nless necessary or appropriate to achieve the purposes of the [Exchange] Act and the rules and regulations thereunder, the security-based swap data repository shall not adopt any policies or procedures[500] or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions." In implementing the first core principle, this rule is intended to protect investors and to maintain a fair, orderly, and efficient SBS market.[501] The Commission believes that this rule will protect investors by, for example, fostering service transparency and promoting competition in the SBS market.[502] Generally speaking, the Commission also believes

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497 Better Markets 1, supra note 19.

498 See infra note 500 of the release discussing a modification to proposed Rule 13n-4(c)(1).

499 See Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

500 The Commission is making a typographical modification to proposed Rule 13n-4(c)(1), which refers to "any policies and procedures." As adopted, the rule refers to "any policies or procedures."

501 See DTCC 5, supra note 19 (supporting "the Commission's stated goals of protecting market participants and maintaining a fair, orderly, and efficient [SBS] market through the promotion of competition").

502 See DTCC 5, supra note 19 (urging "the Commission to adopt rules that preserve a competitive marketplace and forbid [ ] anti-competitive practices by all [SBS] market participants"); see also DTCC CB, supra note 26 (stating that "[i]n a global [SBS]

that "[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anti-competitive practices such as product tying, contracts with non-compete and/or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination."[503] As discussed in the Proposing Release and more fully below, when administering this rule, the Commission generally expects to apply the principles and procedures that it has developed in other areas in which it monitors analogous services, such as clearing agencies.[504] To comply with the first core principle, an SDR is required to comply with four specific requirements.

(1) Rule 13n-4(c)(1)(i): Fair, Reasonable, and Not Unreasonably Discriminatory Dues, Fees, Other Charges, Discounts, and Rebates

Rule 13n-4(c)(1)(i) requires each SDR to ensure that any dues, fees, or other charges that it imposes, and any discounts or rebates that it offers, are fair and reasonable and not unreasonably discriminatory.[505] The rule also requires such dues, fees, other charges, discounts,

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market, the anti-competitive practices of even a single market participant have potential ramifications for the entire marketplace").

503 Proposing Release, 75 FR at 77321, supra note 2; accord DTCC CB, supra note 26 (citing to the CPSS-IOSCO Trade Repository Report's recommendation that market infrastructures and service providers should not be subject to anticompetitive practices).

504 Proposing Release, 75 FR at 77320, supra note 2.

505 The Exchange Act applies a similar standard for other registrants. See, e.g., Exchange Act Section 6(b)(4), 15 U.S.C. 78f(b)(4) ("The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."); Exchange Act Section 17A(b)(3)(D), 15 U.S.C. 78q-1(b)(3)(D) ("The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants."); see also Exchange Act Sections 11A(c)(1)(C) and (D), 15 U.S.C. 78k-1(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all SIPs may, "for purposes of distribution and publication, obtain on fair and reasonable terms such information" and to assure that "all other persons may obtain on terms which are not

or rebates to be applied consistently across all similarly-situated users of the SDR's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the SDR (including exchanges, SB SEFs, electronic trading venues, and matching and confirmation platforms), and third party service providers.

As discussed in the Proposing Release, the terms "fair" and "reasonable" often need standards to guide their application in practice.[506] One factor that the Commission has taken into consideration to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the cost incurred to provide the service.[507] Consistent with commenters' views,[508] the Commission believes that if an SDR's fees for certain services reflect the SDR's costs of providing those services, then the fees would generally be considered fair and reasonable.

Based on the Commission's experience with other registrants, the Commission will take a flexible approach to evaluate the fairness and reasonableness of an SDR's fees and charges on a case-by-case basis. The Commission recognizes that there may be instances in which an SDR could charge different users different prices for the same or similar services. Such differences, however, cannot be unreasonably discriminatory.

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unreasonably discriminatory" the transaction information published or distributed by SIPs).

506 Proposing Release, 75 FR at 77320, supra note 2.

507 See Regulation of Market Information Fees and Revenues, Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613, 70619 (Dec. 17, 1999).

508 See DTCC 2, supra note 19; MarkitSERV, supra note 19 (both believing that an SDR's fees for services should be allowable if such fees reflect the SDR's costs of providing such services).

The Commission continues to believe that an SDR should make reasonable accommodations, including consideration of any cost burdens, on a non-reporting counterparty to an SBS in connection with the SDR following up on the accuracy of the SBS transaction data.[509] Thus, the Commission agrees with one commenter's view that an SDR may facilitate a non-reporting counterparty's ability to verify the accuracy of a reported SBS transaction by not charging the counterparty or charging the counterparty only a nominal amount.[510]

With respect to commenters' views on the current "dealer pays" or "sell-side pays" model,[511] the Commission does not believe that such a model is unreasonably discriminatory per se. As such, the Commission believes that amending proposed Rule 13n-4(c)(1)(i) to explicitly permit different fee structures, as suggested by one commenter,[512] is not necessary. Furthermore, Rule 13n-4(c)(1)(i) is not intended to prohibit an SDR from utilizing any one particular model, including a "dealer pays" or "sell-side pays" model, a model with different fee structures for different classes of participants, or a model where only the reporting party is required to pay an SDR's fees, as long as there is a fair and reasonable basis for the fee structure and it is not unreasonably discriminatory. If, however, an SDR imposes dues, fees, or other charges to create intentionally a barrier to access the SDR without a legitimate basis, then those dues, fees, or charges may be considered unfair or unreasonable.

The Commission disagrees with three comments received. The first commenter suggested that the Commission establish fees or rates, or dictate formulas by which fees or rates

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509 See Proposing Release, 75 FR at 77320, supra note 2.

510 See DTCC 2, supra note 19.

511 See DTCC 2, supra note 19; MarkitSERV, supra note 19.

512 See MarkitSERV, supra note 19.

are determined.[513] The Commission believes that in light of the various SDR business models and fee structures that may emerge, it is better to provide SDRs with the flexibility to establish their own fees or rates, provided that they are fair, reasonable, and not unreasonably discriminatory. The Commission is providing SDRs with such flexibility to promote competition among SDRs, thereby keeping the cost of SDRs' services to a minimum.

The second commenter believed that an SDR should charge different fee structures only if it relates to the SDR's "differing costs of providing access or service to particular categories" and that "any preferential pricing such as volume discounts or reductions should be generally viewed as discriminatory."[514] Although an SDR's costs in providing its services or access to SBS data maintained by the SDR may be a factor in evaluating the SDR's fee structure, the Commission believes that it is not necessarily the only factor. There may be instances in which an SDR's fees or discounts (including volume discounts) are fair, reasonable, and not unreasonably discriminatory, even if the fees or discounts are not related to the SDR's costs in providing such services or access. In all instances, the SDR is responsible for demonstrating that its fees or discounts meet this regulatory standard.[515] As stated above, the Commission expects to evaluate the fairness and reasonableness of an SDR's fees and charges on a case-by-case basis.

The third commenter suggested that the Commission require SDRs to make available any data they collect and may properly use for commercial purposes to all market participants on

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513 Better Markets 1, supra note 19.

514 Barnard, supra note 19.

515 See Item 26 of Form SDR.

reasonable terms and pricing and on a non-discriminatory basis.[516] Although the Commission agrees that fees imposed by SDRs should be "on reasonable terms and pricing and on a non-discriminatory basis," the Commission notes that an SDR is not required to make SBS data available to all market participants, aside from SBS data that is publicly disseminated pursuant to Regulation SBSR.[517] As discussed below, there may be limited instances in which an SDR denies access to a market participant.[518]

With respect to cross-subsidies, the Commission believes that it is not necessary, as one commenter suggested,[519] to prohibit cross-subsidies between services provided by an SDR, but the Commission recognizes that there may be instances in which such cross-subsidies would violate Rule 13n-4(c)(1)(i). For example, cross-subsidies between an SDR's services that result in fees that are arbitrary or have no relationship to the costs of providing the service on a discrete basis may not be consistent with Rule 13n-4(c)(1)(i). This is because an arbitrary fee structure could mean that fees are not being incurred consistently by similarly-situated users of the SDR's services and because the Commission believes that, in certain instances, fee structures without some relationship to the costs of the SDR may not be fair and reasonable due to the differential impact such charges would have on market participants that may choose to

516 Tradeweb SB SEF, supra note 29.

517 See Regulation SBSR Adopting Release, supra note 13 (Rule 902 requiring SDRs to publicly disseminate certain SBS information).

518 See Section VI.D.3.a.iii(3) of this release discussing an SDR's obligation to provide fair, open, and not unreasonably discriminatory access to others.

519 See DTCC 4, supra note 19.

use some, but not all, of the SDR's or its affiliate's services.[520] Another commenter suggested that the Commission prohibit SDRs from charging fees to third parties acting on behalf of counterparties for accepting SBS transaction information.[521] The commenter also suggested that the Commission require SDRs to share their revenue from redistributing data with parties providing the data to the SDRs.[522] Consistent with the Commission's approach with its other registrants, including exchanges and clearing agencies, the Commission does not believe that it is appropriate to dictate who an SDR can and cannot charge or with whom an SDR must share its revenue.

One commenter suggested that the Commission extend the applicability of its rule to providers engaged in two or more of trading, clearing, or repository services to prevent predatory or coercive pricing by the providers.[523] As with its other rules governing SDRs, the Commission's rule implementing the first core principle generally applies only to SDR services. To the extent that the Commission decides that predatory or coercive pricing with respect to non-SDR services needs to be addressed, the Commission will take appropriate action.

(2) Rule 13n-4(c)(1)(ii): Offering Services Separately

Rule 13n-4(c)(1)(ii) requires each SDR to permit market participants to access specific services offered by the SDR separately. As one commenter suggested,[524] an SDR may bundle its

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520 Accord Exchange Act Section 17A(b)(3)(D), 15 U.S.C. 78q-1(b)(3)(D) (requiring the rules of a clearing agency to provide for the equitable allocation of reasonable dues, fees, and other charges among its participants).

521 Tradeweb SBSR, supra note 27.

522 Tradeweb SB SEF, supra note 29.

523 DTCC 4, supra note 19.

524 See DTCC 2, supra note 19 (suggesting that SDRs should be permitted to offer two or more service options, including one that fulfills the minimum regulatory reporting requirements and other services to complement the mandatory reporting function). But

services, including any ancillary services, regardless of the asset class at issue, but this rule requires the SDR to also provide market participants with the option of using its services separately.[525] The Commission believes that it is appropriate to adopt this rule as proposed to promote competition.[526]

If an SDR or its affiliate[527] provides an ancillary service, such as a matching and confirmation service, then the SDR is prohibited by Rule 13n-4(c)(1)(ii) from requiring a market participant to use and pay for that service as a condition of using the SDR's data collection and maintenance services.[528] In such an instance, the SDR is also prohibited from requiring a market participant that uses the SDR's or affiliate's ancillary service to use the SDR's data collection and maintenance services. The Commission also believes that if an SDR enters into an oral or written agreement or arrangement with an affiliate or third party service provider that reflects a business plan in which the affiliate or third party service provider will require its customers to use the core services of that SDR, then the SDR would not be in compliance with Rule 13n-4(c)(1)(ii).[529] In evaluating the fairness and reasonableness of fees that an SDR charges for bundled and unbundled services, the Commission will take into consideration, among other

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see DTCC 4, supra note 19 (suggesting that bundling should not be permitted across asset classes).

525 See Barnard, supra note 19 (believing that SDRs should be able to offer ancillary services, whether bundled or not, but not supporting the bundling of ancillary services with mandatory or regulatory services).

526 See Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A) (regarding the first SDR core principle). See also Section VIII discussing economic analysis.

527 See supra note 247 (defining "affiliate").

528 See Proposing Release, 75 FR at 77320-77321, supra note 2.

529 The Commission notes that under Exchange Act Section 20(b), 15 U.S.C. 78t(b), "[i]t shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of [the Exchange Act] or any rule or regulation thereunder through or by means of any other person."

things, the SDR's cost of making those services available on a bundled or unbundled basis, as the case may be, and a market participant's proportional use of the SDR's services.

With regard to one commenter's suggestion that all "users" of an SDR's services, including unaffiliated third party service providers, should be permitted to access the SDR's non-SDR services separately,[530] the Commission agrees, as set forth in Rule 13n-4(c)(1)(ii), that market participants that use an SDR's services should have access to specific services offered by the SDR, including any ancillary services, separately. The Commission believes that SDRs should consider giving third party service providers acting as agents for such market participants the same rights as the market participants to access these services separately. However, Rule 13n-4(c)(1)(ii) does not require an SDR to afford the agent access to the SDR's unbundled services outside of its agency capacity.

(3) Rule 13n-4(c)(1)(iii): Fair, Open, and Not Unreasonably Discriminatory Access

Rule 13n-4(c)(1)(iii) requires each SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR. As with Rule 13n-4(c)(1)(i), the Commission will evaluate whether such access or participation is "fair, open, and not unreasonably discriminatory" on a case-by-case basis. Although this rule does not explicitly require, as one commenter

530 See TriOptima, supra note 19.

suggested,[531] SDRs to establish and maintain effective interoperability and interconnectivity with other SDRs,[532] market infrastructures, and venues from which data can be submitted, the rule is intended to encourage such interoperability and interconnectivity by requiring SDRs to establish criteria that would permit fair, open, and not unreasonably discriminatory participation by others, including those that seek to connect to or link with the SDR.

The Commission agrees with most of the comments on this rule. One commenter suggested that market participants should have "equal and fair access to data on SBS transactions."[533] The Commission agrees with the comment to the extent that the commenter equated "equal and fair access" with the "fair, reasonable and not unreasonably discriminatory" standard in the rule. However, the Commission notes that all market participants are not required to be treated the same way in all instances. For example, if a market participant fails to pay the SDR's reasonable fees, then it may be "fair, reasonable and not unreasonably discriminatory" for an SDR to deny access to the market participant.

The Commission agrees that an SDR should be able to condition access to SBS data that it maintains by specifying the methods and channels that must be used to connect to the SDR and by setting certain minimum standards,[534] provided that such conditions are fair, open, and not

531 See Better Markets 1, supra note 19.

532 The Commission is not explicitly requiring SDRs to maintain effective interoperability and interconnectivity with other SDRs at this time, partly because such a requirement could hinder the developing infrastructure for SBS transactions.

533 See Better Markets 2, supra note 19.

534 See MarkitSERV, supra note 19. Related to this comment, another commenter suggested that market infrastructures such as clearing agencies and SB SEFs should generally have the ability to report SBS transactions to SDRs to satisfy their customers' reporting preferences. See DTCC 3, supra note 19. As stated above, the Commission intends to adopt rules relating to clearing agencies and SB SEFs in separate releases.

unreasonably discriminatory. The Commission also agrees with one commenter's view that an SDR should, to the extent feasible, provide each counterparty to an SBS transaction that is reported to an SDR with reasonable access to the data relating to that transaction.[535] If an SDR provides such access to smaller, lower volume market participants at reduced or waived fees, as one commenter suggested,[536] then the discount must be fair and reasonable and not unreasonably discriminatory.[537] The Commission further agrees with commenters' views that an SDR should provide connectivity to others, including third party service providers, clearinghouses, and SB SEFs,[538] and, as one commenter suggested,[539] if the SDR delegates the function of providing connectivity to another entity, that entity cannot require anyone to use the entity's services as a condition to obtaining connectivity to the SDR. The Commission also agrees with another commenter that an SDR generally should impose similar data access rights and requirements on itself (and its affiliates) as those imposed on a third party acting as an agent on behalf of an SBS counterparty.[540]

As stated in the Proposing Release, the Commission is concerned, among other things,

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535 See DTCC 2, supra note 19; see also DTCC 3, supra note 19 (noting that SDRs should be able to accept trades in any manner consistent with the regulations, from any market participant and have appropriate communication links, to the extent feasible, with all counterparties to SBS transactions reported to the SDR); DTCC SBSR, supra note 27 (stating that SDRs "will need to support an appropriate set of connectivity methods").

536 See DTCC 2, supra note 19 (noting that in providing access to SBS data, SDRs should reduce or waive certain fees, as necessary, to smaller, lower volume market participants).

537 See Rule 13n-4(c)(1)(i).

538 See, e.g., DTCC 3, supra note 19 (supporting open access to SBS data maintained by an SDR by other service providers); Better Markets 1, supra note 19.

539 See MarkitSERV, supra note 19.

540 See TriOptima, supra note 19 (stating that non-discriminatory access is important so as to "not stifle innovation and the competition in the provision of post-trade processing services").

that an SDR, controlled or influenced by a market participant, may limit the level of access to the services offered or data maintained by the SDR as a means to impede competition from other market participants or third party service providers.[541] The Commission believes that Rule 13n-4(c)(1)(iii) addresses this concern.

One commenter recommended that the Commission permit SDRs to deny access only on risk-based grounds.[542] Although the Commission concurs that an SDR should always consider the risks that an actual or prospective market participant may pose to the SDR, the Commission does not believe that it is appropriate to explicitly limit an SDR's ability to deny access because there may be reasonable grounds for denial that may not be risk-related – e.g., a counterparty to an SBS fails to pay the SDR's reasonable fees or a third party service provider breaches its contractual obligation to maintain the privacy of data received by the SDR. The same commenter suggested that the Commission should set forth "clearly stated objective criteria" with respect to fair access and denial of access in the final rule,[543] but the Commission does not believe that it is necessary to do so. Under Rule 13n-4(c)(1)(iii), SDRs must establish appropriate criteria to govern access to their services and data as well as participation by those seeking to connect to or link with the SDR.

The Commission does not believe that Rule 13n-1(c)(1)(iii) should require an SDR to provide "full and unrestricted" access to third party service providers acting pursuant to written authorizations from an SBS counterparty, as suggested by one commenter.[544] While the

541 Proposing Release, 75 FR at 77321, supra note 2.

542 Better Markets 1, supra note 19.

543 Better Markets 1, supra note 19.

544 See TriOptima, supra note 19.

Commission agrees with the commenter that such a third party service provider is exercising the SBS counterparty's right to access data with respect to that counterparty's trades, the Commission believes that requiring an SDR to provide "full and unrestricted" access (beyond that provided to the SBS counterparty acting directly) would appear to be inconsistent with the Exchange Act. Even if the service provider has received written authorization from one SBS counterparty, the SDR nonetheless would be required to protect the privacy and confidentiality of the other counterparty;[545] thus, the SDR need only provide the third party service provider with access to such data that the SBS counterparty that has authorized disclosure would be entitled to access. As noted by the commenter, such a third party service provider is acting as the SBS counterparty's agent and should be entitled to the same level of access as provided to the SBS counterparty.[546] The Commission agrees with the commenter regarding the importance of upholding "a fair, secure and efficient post-trade market"[547] and believes that the rule as adopted achieves this goal.

(4) Rule 13n-4(c)(1)(iv): Prohibited or Limited Access

Rule 13n-4(c)(1)(iv) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.

As stated in the Proposing Release, the Commission believes that, for any such policies

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545 See Exchange Act Section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F), and Rule 13n-9 (requiring SDRs to maintain the privacy of SBS transaction information).

546 See TriOptima, supra note 19.

547 See TriOptima, supra note 19.

and procedures to be reasonable, at a minimum, those at an SDR involved in the decision-making process of prohibiting or limiting a person's access to the SDR's services or data cannot be involved in the review of whether the prohibition or limitation was appropriate.[548] Otherwise, the purpose of the review process would be undermined. Additionally, an SDR may wish to consider whether its internal review process should be done by the SDR's board[549] or an executive committee.

As discussed above, one commenter suggested that the Commission require an SDR to promptly file a notice with the Commission if the SDR prohibits or limits any person's access to services offered or data maintained by the SDR.[550] Rule 909 of Regulation SBSR, which the Commission is concurrently adopting in a separate release, requires each registered SDR to register as a SIP, and, as such, Exchange Act Section 11A(b)(5) governs denials of access to services by an SDR.[551] This section provides that "[i]f any registered securities information processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor, the registered securities information processor shall promptly file notice thereof with the Commission."[552] Accordingly, an SDR must promptly notify the Commission if it prohibits or limits access to any of its services to any person. In addition, the SDR is required to notify the Commission of any prohibition or limitation with respect to services offered or data maintained by the SDR in its annual

548 Proposing Release, 75 FR at 77321, supra note 2.

549 The term "board" is defined as "the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository." See Rule 13n-4(a)(2); see also Rule 13n-11(b)(1).

550 See Better Markets 1, supra note 19.

551 See Regulation SBSR Adopting Release, supra note 13.

552 15 U.S.C. 78k-1(b)(5).

amendment to its Form SDR, which will also enable the Commission to evaluate whether the prohibition or limitation is appropriate.[553] Also, pursuant to Rule 13n-7, records of the decision to prohibit or limit access are required to be maintained by the SDR, and the SDR must promptly furnish such records to any representative of the Commission upon request.[554]

b. Second Core Principle: Governance Arrangements (Rule 13n-4(c)(2))

i. Proposed Rule

Proposed Rule 13n-4(c)(2) would incorporate and implement the second core principle[555] by requiring SDRs to establish governance arrangements that are transparent (i) to fulfill public interest requirements under the Exchange Act and the rules and regulations thereunder; (ii) to carry out functions consistent with the Exchange Act, the rules and regulations thereunder, and the purposes of the Exchange Act; and (iii) to support the objectives of the Federal Government, owners, and participants.[556] The proposed rule would impose four specific requirements. First, an SDR would be required to establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls.[557] Second, an SDR's governance arrangements would be required to provide for fair representation of market participants.[558] Third, an SDR would be required to provide representatives of market participants, including end-users, with the opportunity to participate in the process for

553 See Item 33 of Form SDR.

554 See Section VI.G of this release discussing Rule 13n-7.

555 See Exchange Act Section 13(n)(7)(B), 15 U.S.C. 78m(n)(7)(B).

556 Proposed Rule 13n-4(c)(2).

557 Proposed Rule 13n-4(c)(2)(i).

558 Proposed Rule 13n-4(c)(2)(ii).

nominating directors and with the right to petition for alternative candidates.[559] Finally, an SDR would be required to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.[560]

In the Proposing Release, the Commission solicited comments on whether to impose any additional requirements, including ownership or voting limitations on SDRs and persons associated with SDRs.[561]

ii. Comments on the Proposed Rule

Four commenters submitted comments relating to this proposed rule.[562] Comments on the proposal were mixed. As a general matter, one commenter stated that the role of the Commission is to "insure that the governing structure [of SDRs] is fair to all market participants."[563]

In suggesting that "ownership and voting limitations be eliminated in their entirety,"[564] another commenter noted that such limitations would be an imprecise tool to achieve the

559 Proposed Rule 13n-4(c)(2)(iii).

560 Proposed Rule 13-4(c)(2)(iv).

561 Proposing Release, 75 FR at 77323-77324, supra note 2.

562 See Barnard, supra note 19; Better Markets 1, supra note 19; DTCC 2, supra note 19; Saul, supra note 19; see also Better Markets 2, supra note 19; DTCC 3, supra note 19.

563 Saul, supra note 19.

564 DTCC 3, supra note 19.

Commission's policy goals regarding conflicts of interest.[565] The commenter stated that instead, "[t]hese policy goals can best be met by structural governance requirements" such as governance by market participants.[566] The commenter believed that "[i]n the specific case of an SDR, governance by market participants is appropriate, given that most potential conflicts of interest are dealt with directly in the Proposed Rule and will be overseen directly by the regulator."[567] The commenter further believed that because the "SDR is not defining the reporting party, timeliness or content for public dissemination, and similarly the SDR is not defining the reporting party, content or process for regulatory access . . . the SDR does not have significant influence over the inclusion or omission of information in the reporting process, nor does it control the output of the process."[568] The commenter suggested that the Commission focus on ensuring open access and, to support such access, "the SDR needs governance that has independence from its affiliates and is representative of users who are the beneficiaries of choice in service providers."[569] Along this line, the commenter believed that SDRs should assure that "dealings with affiliates . . . be subject to oversight by members of the SDR's board of directors who are not engaged in the governance or oversight of either the affiliates or their

565 DTCC 2, supra note 19.

566 DTCC 2, supra note 19

567 DTCC 2, supra note 19.

568 DTCC 2, supra note 19 (An SDR's conflicts of interest are "significantly different from other market infrastructures, where these infrastructures may have the ability to influence participation in a service (e.g. execution, clearing membership, portfolio compression), or completeness of product offering (where it is proposed that all trades in an asset class are accepted).").

569 DTCC 2, supra note 19; see also DTCC 3, supra note 19 ("[S]tructural governance requirements offer the best solution to reduce risk, increase transparency and promote market integrity within the financial system while avoiding the potential negative impact on capital, liquidity and mitigating systemic risk that could result from any ownership or voting limitations.").

competitors."[570] The commenter also suggested that SDRs be "user-governed," including "a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non-regulatory uses of data of a particular class of market participants that are objectionable to that class."[571] The commenter believed that "[i]ndependent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive expertise on those issues critical to the extraordinarily complex financial operations of SDRs."[572]

A third commenter recommended that "meaningful corporate governance requirements apply to [SDRs]."[573] In this regard, the commenter recommended that the Commission's rules relating to governance arrangements "be much more detailed and clear" and "require SDRs to establish boards and nominating committees that are composed of a majority of independent directors."[574] The commenter believed that "[i]ndependent boards are one of the most effective tools for ensuring that an SDR will abide by the letter and spirit of the enumerated duties and core principles set forth in the Dodd-Frank Act."[575] The commenter also believed that as "important safeguards against the dominant influence of some market participants over others," the Commission's rules should impose both individual and aggregate limitations on ownership and voting (e.g., limit the aggregate ownership interest in an SDR by SDR participants and their related persons to 20%, prohibit SDR participants and their related persons from directly or

570 DTCC 2, supra note 19.

571 DTCC 2, supra note 19.

572 DTCC 2, supra note 19.

573 Better Markets 2, supra note 19.

574 Better Markets 1, supra note 19; see also Better Markets 2, supra note 19 (reiterating the importance of independent boards for SDR governance).

575 Better Markets 1, supra note 19.

indirectly exercising more than 20% of the voting power of any class of ownership interest in the SDR).[576]

Another commenter suggested that, with respect to "board membership requirements and ownership and voting limits, there should be a level playing field between at least SDRs and other swap entities."[577] The commenter recommended that the Commission propose something similar to the CFTC's "Independent Perspective"[578] by "requiring a registered SDR to have independent public directors on (i) its board of directors and (ii) any committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action of the board of directors."[579]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n-4(c)(2) as proposed, with one minor modification.[580] Under this rule, each SDR is required to establish governance arrangements that are transparent to fulfill public interest requirements under the Exchange Act and the rules and regulations thereunder; to carry out functions consistent with the

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576 Better Markets 1, supra note 19; see also Better Markets 2, supra note 19 (reiterating the importance of ownership and voting restrictions for SDRs governance).

577 Barnard, supra note 19.

578 The CFTC requires each swap data repository to establish, maintain, and enforce written policies or procedures to ensure that the nomination process for its board of directors, as well as the process for assigning members of the board of directors or other person to such committees, adequately incorporates an "Independent Perspective," which is defined as "a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved." See CFTC Rules 49.2(a)(14) and 49.20(c)(1)(i)(B), 17 CFR 49.2(a)(14) and 49.20(c)(1)(i)(B); see also CFTC Part 45 Adopting Release, 76 FR at 54563, supra note 37 (discussing a swap data repository's consideration of an Independent Perspective).

579 Barnard, supra note 19.

580 See infra accompanying text to note 586 of this release discussing a modification to proposed Rule 13n-4(c)(2).

Exchange Act, the rules and regulations thereunder, and the purpose of the Exchange Act; and to support the objectives of the Federal Government, owners, and participants.[581] To comply with the second core principle, each SDR is required to comply with four specific requirements: (i) establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls;[582] (ii) establish governance arrangements that provide for fair representation of market participants;[583] (iii) provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates;[584] and (iv) establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.[585]

As proposed, Rule 13n-4(c)(2)(iv) would have required an SDR's policies and procedures be reasonably designed to ensure that its senior management and each member of the board or

581 Rule 13n-4(c)(2).

582 Rule 13n-4(c)(2)(i).

583 Rule 13n-4(c)(2)(ii). Accord Exchange Act Section 17A(b)(3)(C), 15 U.S.C. 78q-1(b)(3)(C) (requiring the rules of a clearing agency assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs). The term "market participant" is defined as "(1) any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction." See Rule 13n-4(a)(6); see also Rule 13n-9(a)(3); Rule 13n-10(a)(1).

584 Rule 13n-4(c)(2)(iii).

585 Rule 13n-4(c)(2)(iv).

committee that has the authority to act on behalf of the board to "possess requisite skills and expertise . . . to have a clear understanding of their responsibilities" and "possess requisite skills and expertise . . . to exercise sound judgment about the [SDR's] affairs." The Commission is revising the proposed rule by removing the word "to" from the clauses above, to provide that an SDR's policies and procedures be reasonably designed to ensure that its senior management and each member of the board or committee that has the authority to act on behalf of the board is required to actually have a clear understanding of their responsibilities and exercise sound judgment about the SDR's affairs, rather than simply possess the skills and expertise to do so.[586] Without the revision from the proposal, the rule could have been misinterpreted to mean that an SDR's management and each member of the board or committee that has the authority to act on behalf of the board need only possess the skills and expertise to have a clear understanding of their responsibilities. With respect to sound judgment, an SDR may want to include, in its policies and procedures, a requirement that its management and each member of the board or committee that has the authority to act on behalf of the board consider fairly all relevant information and views without undue influence from others, and provide advice and recommendations that are reasonable under the relevant facts and circumstances.

Given an SDR's unique and integral role in the SBS market, the Commission believes that it is particularly important that an SDR establish a governance arrangement that is well defined and include a clear organizational structure with effective internal controls. Because the board has a role in overseeing the SDR's compliance with the SDR's statutory and regulatory

586 Rule 13n-4(c)(2)(iv).

obligations,[587] the Commission also believes that it is important that those who are managing and overseeing an SDR's activities are qualified to do so. An SDR's failure to comply with their obligations could affect, for example, the SDR's operational efficiency, which could, in turn, impact the SBS market as a whole.[588]

The Commission believes that Rule 13n-4(c)(2)'s requirement that SDRs establish governance arrangements that provide for fair representation of market participants is consistent with one commenter's view that governance of SDRs by market participants is appropriate.[589] With respect to one commenter's recommendation that an SDR's governance should be independent from its affiliates by, for example, ensuring that dealings with its affiliates are subject to oversight by members of the SDR's board who are not engaged in the governance or oversight of either the affiliates or their competitors,[590] the Commission believes that this is one effective way to comply with the rule and to minimize the SDR's potential conflicts of interest, as discussed further in Section VI.D.3.c of this release.

In establishing a governance arrangement that provides for fair representation of market participants, one way for an SDR to comply with Rule 13n-4(c)(2) is to provide market

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587 See Rule 13n-11(e) (requiring an SDR's CCO to submit an annual compliance report to the board for its review prior to the filing of the report to with the Commission).

588 Accord Proposing Release, 75 FR at 77307, supra note 2 ("The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.").

589 See DTCC 2, supra note 19. In discussing governance arrangements, the commenter seemed to imply that the Commission is responsible for directly overseeing an SDR's conflicts of interest. To clarify, it is the SDR itself that is statutorily required to establish and enforce policies and procedures to minimize its conflicts of interest in its decision-making process. See Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C).

590 See DTCC 2, supra note 19.

participants with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates. These two requirements are interrelated. The Commission believes that if market participants have no say in an SDR's governance process, then the market participants may not be fairly represented.[591] The Commission notes, however, that having fair representation of market participants does not necessarily equate to requiring a fixed number or percentage of enumerated categories of market participants. Instead, the requirement is intended to promote a fair representation of the views and perspectives of market participants.

The Commission considered whether an SDR's potential and existing conflicts of interest would warrant prescriptive rules relating to governance (e.g., ownership or voting limitations, independent directors, nominating committees composed of a majority of independent directors), as two commenters suggested,[592] but believes that the rules that are intended to minimize such

591 One commenter suggested that the Commission propose something similar to the CFTC's "Independent Perspective." Barnard, supra note 19. The Commission believes that although Rule 13n-4(c)(2) is different from CFTC Rule 49.20 in this area, both rules may achieve the same objective of broad representation on SDRs' boards. Rule 13n-4(c)(2)(ii) requires SDRs to "[e]stablish governance arrangements that provide for fair representation of market participants," and Rule 13n-4(c)(2)(iii) requires SDRs to "[p]rovide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates." Instead of focusing on fair representation of market participants, CFTC Rule 49.20(c) requires a swap data repository to establish, maintain, and enforce written policies and procedures to ensure that its board and other committees adequately consider an "Independent Perspective" in their decision-making process. See 17 CFR 49.20(c). Cf. DTCC 2, supra note 19 (stating that "[i]ndependent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive expertise on those issues critical to the extraordinarily complex financial operations of SDRs").

592 See Barnard, supra note 19; Better Markets 1, supra note 19; see also Better Markets 2, supra note 19.

conflicts and to help ensure that SDRs meet core principles are sufficient at this time.[593] If the Commission were to impose additional governance requirements and limitations, SDRs would likely incur costs in addition to the costs already imposed by the SDR Rules.[594] The Commission, however, does not believe that the additional costs are warranted at this time. Also, consistent with one comment,[595] the Commission continues to believe that it is appropriate and cost-effective to provide SDRs with flexibility in determining their ownership and governance structure. The Commission may, however, revisit the issue of whether to impose additional governance requirements and limitations as the SBS market evolves.

c. Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest (Rule 13n-4(c)(3))

i. Proposed Rule

Proposed Rule 13n-4(c)(3) would incorporate the third core principle[596] by requiring each SDR to establish and enforce written policies and procedures reasonably designed to minimize

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593 See, e.g., Rule 13n-4(c)(1) (implementing core principle relating to market access to SDRs' services and data), as discussed in Section VI.D.3.a of this release; Rule 13n-4(c)(3) (implementing core principle relating to conflicts of interest), as discussed in Section VI.D.3.c of this release; and Rule 13n-5 (requiring an SDR to accept all SBSs in a given asset class if it accepts any SBS in that asset class), as discussed in Section VI.E of this release; see also Item 32 of Form SDR (requiring disclosure of instances in which an SDR has prohibited or limited a person with respect to access to the SDR's services or data). As stated in Section VI.D.3.a.iii(4) of this release, the Commission is adopting Rule 909 of Regulation SBSR, which requires each SDR to register as a SIP; as such, Exchange Act Section 11A(b)(5) governs denials of access to all services of an SDR. See Regulation SBSR Adopting Release, supra note 13; Exchange Act Section 11A(b)(5), 15 U.S.C. 78k-1(b)(5).

594 See Section VIII.D of this release (discussing SDRs' costs of complying with the SDR Rules).

595 See DTCC 2, supra note 19 (recommending structural governance requirements instead of ownership and voting limitations); see also DTCC 3, supra note 19 (supporting the mitigation of conflicts of interest through the imposition of structural governance requirements instead of ownership and voting limitations).

596 See Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C)).

conflicts of interest in the decision making process of the SDR, and establish a process for resolving any such conflicts of interest.[597] The proposed rule provided general examples of conflicts of interest that should be considered by an SDR and would require each SDR to comply with the core principle by (i) establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis;[598] (ii) recusing any person involved in a conflict of interest from the decision-making process for resolving such conflicts of interest;[599] and (iii) establishing, maintaining, and enforcing reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person.[600]

ii. Comments on the Proposed Rule

Seven commenters submitted comments relating to this proposed rule.[601] One commenter agreed that the Proposing Release "correctly highlights a number of the harmful practices that can thrive in an environment that does not adequately address conflicts of interest . . . ."[602] These practices are discussed further in Section VI.D.3.c.iii below. Another commenter acknowledged that "[t]he mandatory reporting regime [under the Dodd-Frank Act] creates an

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597 Proposed Rule 13n-4(c)(3).

598 Proposed Rule 13n-4(c)(3)(i).

599 Proposed Rule 13n-4(c)(3)(ii).

600 Proposed Rule 13n-4(c)(3)(iii).

601 See Better Markets 1, supra note 19; DTCC 2, supra note 19; Markit, supra note 19; MarkitSERV, supra note 19; MFA 1, supra note 19; WMBAA SBSR, supra note 27; Tradeweb SB SEF, supra note 29; see also DTCC SBSR, supra note 27.

602 Better Markets 1, supra note 19.

opportunity for [an] SDR to improperly commercialize the information it receives" and agreed with the Commission that "market access by service providers to an SDR could be a potential source for conflicts of interest."[603] This commenter expressed the view, however, that because "[t]he reporting rules for SDRs are highly prescriptive, and the primary consumers of this data are regulators, [there is] limited room for conflicts involving regulatory or public data access."[604] The commenter noted that "[i]t is important that regulators ensure that the public utility function of SDRs . . . is separated from potential commercial uses of the data."[605]

As noted in the Proposing Release, a few entities that presently provide or had anticipated providing trade repository services identified the following conflicts of interest that could arise at an SDR.[606] First, owners of an SDR could have commercial incentives to exert undue influence to control the level of access to the services offered and data maintained by the SDR and to implement policies and procedures that would further their self-interests to the detriment of others.[607] Specifically, owners of an SDR could exert their influence and control to prohibit or limit access to the services offered and data maintained by the SDR in order to impede

603 DTCC 2, supra note 19 (discussing an SDR's conflicts of interest identified by the Commission in the Proposing Release).

604 DTCC 2, supra note 19.

605 DTCC 2, supra note 19.

606 Proposing Release, 75 FR at 77324-77325, supra note 2.

607 See, e.g., Reval, Responses to the CFTC's Questions on the SDR Requirements, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission9_100110-reval.pdf (stating that an SDR with any ownership or revenue sharing arrangements directly or indirectly with a dealer would be an obvious conflict of interest) ("Reval CFTC Response Letter").

competition.[608] Second, an SDR could favor certain market participants over others with respect to the SDR's services and pricing for such services.[609] Third, an SDR could require that services be purchased on a "bundled" basis.[610] Finally, an SDR or a person associated with the SDR could misuse or misappropriate data reported to the SDR for financial gain.[611] As one trade repository noted, "SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis. The use of this data in this manner would present competitive problems" as well as conflicts of interest issues.[612]

Several commenters expressed their views on the ownership of SBS data maintained by SDRs. Specifically, three commenters believed that ownership of SBS data should remain with counterparties to the SBS unless specifically agreed by them.[613] One commenter to proposed

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608 See, e.g., Warehouse Trust Company, Draft Response to CFTC re: CFTC Request for Information regarding SDR Governance, available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission9_100510-wt.pdf (stating that "ownership of an SDR could lead to access restrictions on non-owners") ("Warehouse Trust CFTC Response Letter").

609 See Reval CFTC Response Letter, supra note 607 (stating that preferential treatment in services provided by an SDR could also occur).

610 See Warehouse Trust CFTC Response Letter, supra note 608 ("The issue of vertical bundling could arise where [SB SEFs and clearing agencies] have preferred access or servicing arrangements with SDRs primarily due to ownership overlaps.").

611 See Reval CFTC Response Letter, supra note 607 ("[T]here would always be an underlying conflict to ensure that the position information or client activity does not get into the hands of investors or business partners of the SDR who could benefit from that information.").

612 Warehouse Trust CFTC Response Letter, supra note 608; see also Reval CFTC Response Letter, supra note 607 ("[I]f only one SDR is created for an asset class and that SDR is held by a market participant that could gain by having an edge on when the information is received, even if by a split second, it could have a trading edge.").

613 MarkitSERV, supra note 19 ("[I]n the interest of ensuring minimal intrusion on commercial activity and optimal incentives for parties to support and encourage robust and accurate reporting, and the development of valuable commercial products . . . data provided to [SDRs] should only be used as permitted by the relevant market participants

Regulation SBSR stated that ownership of SBS data should be retained by the reporting party (e.g., SB SEFs, counterparties to an SBS),[614] whereas a commenter to the Proposing Release believed that data ownership does not transfer to an SB SEF or any other regulated entity.[615] Three commenters, including two commenters to proposed Regulation SBSR, believed that SDRs and/or their affiliates should be prohibited from using SBS data for commercial purposes.[616] One of those commenters supported an SDR's use of aggregated data for commercial use, such as marketing.[617]

One commenter to the SB SEF Proposing Release recommended that the Commission clarify in its final rules or adopting release that its rules are not intended to impose or imply any limit on the ability of market participants, including counterparties to SBS transactions, SB SEFs, and clearing agencies, to use and/or commercialize data that they create or receive in

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in agreements between them and the [SDR]."); Markit, supra note 19 (stating that "commercialization of data should only be done with the specific consent of the data owners"); DTCC 2, supra note 19 ("The principle of user control over the data for non-regulatory purposes must . . . be scrupulously maintained."); see also DTCC 3, supra note 19 ("It is critical to preserve the trading parties' control over their own data.").

614 WMBAA SBSR, supra note 27.

615 Markit, supra note 19.

616 MFA 1, supra note 19 (suggesting that the Commission adopt a rule similar to the CFTC's proposed rule that would prohibit SDRs from using data for commercial purposes without express written consent); DTCC SBSR, supra note 27 ("It is good public policy that the aggregating entity not itself use the data for commercial purposes, particularly where data is required to be reported to an aggregator serving a regulatory purpose, and make such data available to value added providers on a non-discriminatory basis, consistent with restrictions placed on the data by the data contributors themselves."); WMBAA SBSR, supra note 27 ("Consistent with reporting practices in other markets, the reporting of SBS transaction information to a registered SDR should not bestow the SDR with the authority to use the SBS transaction data for any purpose other than those explicitly enumerated in the Commission's regulations.").

617 MFA 1, supra note 19; see also Tradeweb SB SEF, supra note 29 (supporting SDRs' commercial use of data with limitations).

connection with the execution or reporting of SBS data.[618] Similarly, one commenter to proposed Regulation SBSR suggested that the Commission require SDRs to adopt policies and procedures explicitly acknowledging that counterparties to SBS transactions and SB SEFs retain the ability to market and commercialize their own proprietary data.[619]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n-4(c)(3) as proposed. Under this rule, each SDR is required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving any such conflicts of interest.[620]

Rule 13n-4(c)(3) provides general examples of conflicts of interest that should be considered by an SDR, including, but not limited to: (1) conflicts between the commercial interests of an SDR and its statutory and regulatory responsibilities, (2) conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others, (3) conflicts between, among, or with persons associated with the SDR,[621] market participants, affiliates of the SDR, and nonaffiliated third

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618 Tradeweb SB SEF, supra note 29 (believing that its recommendation will help ensure a robust and competitive market, as envisioned by the Dodd-Frank Act, and help limit the possibility of overreaching by SDRs due to their unique position in the data-reporting regime).

619 WMBAA SBSR, supra note 27.

620 Rule 13n-4(c)(3).

621 Rule 13n-4(a)(8) defines "person associated with a security-based swap data repository" as (i) any partner, officer, or director of such SDR (or any person occupying a similar status or performing similar functions), (ii) any person directly or indirectly controlling, controlled by, or under common control with such SDR, or (iii) any employee of such SDR. See also Rule 13n-9(a)(7). This definition draws from the definition of "person associated with a broker or dealer" in the Exchange Act, and includes persons associated with an SDR whose functions are solely clerical or ministerial. See Exchange Act ...

parties,[622] and (4) misuse of confidential information, material, nonpublic information, and/or intellectual property. These general examples are the same as those included in proposed Rule 13n-4(c)(3) with one modification. The proposed rule provided, as an example, "conflicts between the commercial interests of [an SDR] and its statutory responsibilities." Upon further consideration, the Commission is revising this example, to include potential conflicts between an SDR's commercial interests and its regulatory responsibilities. This revision is intended to clarify that an SDR's commercial interests can conflict with not only its statutory responsibilities, but also its regulatory responsibilities, which may be more prescriptive than its statutory responsibilities.

To comply with the third core principle, an SDR is required to comply with three specific

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Section 3(a)(18), 15 U.S.C. 78c(a)(18). Rule 13n-4(a)(3) defines "control" (including the terms "controlled by" and "under common control with") as "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." Pursuant to Rule 13n-4(a)(3), "[a] person is presumed to control another person if the person: (i) is a director, general partner, or officer exercising executive responsibility (or having similar status or functions); (ii) 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 (iii) in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital." The Commission is correcting a typographical error in the proposed definition. Proposed Rule 13n-4(a)(3)(ii) referred to the right to vote 25 percent "of" more of a class of securities. See Proposing Release, 75 FR at 77367, supra note 2. As adopted, Rule 13n-4(a)(3)(ii) refers to the right to vote 25 percent "or" more of a class of securities. See also Rules 13n-9(a)(2) and 13n-11(b)(2). The definition of "control" incorporates the definition of "control" in Exchange Act Rule 12b-2 and Form BD, the registration form for broker-dealers. See 17 CFR 240.12b-2 and Form BD, 17 CFR 249.501.

622 The term "nonaffiliated third party" of an SDR is defined as any person except (1) the SDR, (2) an SDR's affiliate, or (3) a person employed by an SDR and any entity that is not the SDR's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person). See Rule 13n-4(a)(7); see also Rule 13n-9(a)(4). This definition draws from the definition of "nonaffiliated third party" in § 248.3 of Regulation S-P. See 17 CFR 248.3.

requirements. First, Rule 13n-4(c)(3)(i) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis. The Commission continues to believe that requiring an SDR to conduct ongoing identification and mitigation of conflicts of interest is important because such conflicts can arise gradually over time or unexpectedly. Furthermore, a situation that is acceptable one day may present a conflict of interest the next. The Commission believes that in order to identify and address potential conflicts that may arise over time, an SDR's procedures generally should provide a means for regular review of conflicts as they impact the SDR's decision-making processes. Rather than imposing prescriptive requirements on SDRs regarding how to address conflicts, the Commission believes that SDRs should be provided the flexibility to determine how best to address and manage their conflicts.

Second, Rule 13n-4(c)(3)(ii) requires an SDR to recuse any person involved in a conflict of interest from the decision-making process for resolving that conflict of interest. As stated in the Proposing Release, the Commission believes that such recusal is necessary to eliminate an apparent conflict of interest in an SDR's decision-making process.[623] Additionally, recusal will likely increase confidence in the SDR's decision-making process and avoid an appearance of impropriety.

Finally, Rule 13n-4(c)(3)(iii) requires an SDR to establish, maintain, and enforce reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person. The Commission recognizes that an SDR may have

623 Proposing Release, 75 FR at 77325, supra note 2.

commercial incentives to operate as an SDR and agrees with one commenter's view that the Dodd-Frank Act's mandatory reporting regime creates an opportunity for an SDR to commercialize improperly the information that it receives.[624] To the extent that an SDR uses data that it receives from others for commercial purposes, the Commission believes that such uses should be clearly defined and disclosed to market participants.[625] If, for example, a market participant is considering waiving confidentiality of the data that it provides to an SDR, then, at the very least, such disclosure should provide the market participant with the information necessary to make a meaningful choice. One commenter suggested that an SDR should, as a way to minimize potential conflicts of interest, consider separating its utility function from its commercial use of the SBS transaction information that it receives.[626] The Commission agrees that this could be a way to address potential conflicts of interest, but the Commission does not believe that it necessarily mitigates or eliminates conflicts in all circumstances. Thus, while SDRs may wish to consider this approach, the Commission is not requiring them to do so at this time.

As discussed in the Proposing Release, the Commission believes that a small number of dealers could control an SDR, which may require SDR owners to balance competing interests.[627] Owners of an SDR could derive greater revenues from their non-trade repository activities in the SBS market than they would from sharing in the profits of the SDR in which they hold a financial interest; consequently, the owners of an SDR may be conflicted in making decisions

[624] See DTCC 2, supra note 19.

[625] See Section VI.I.2 of this release discussing an SDR's disclosure requirements.

[626] DTCC 2, supra note 19.

[627] Proposing Release, 75 FR at 77324, supra note 2.

that would increase the SDR's profitability, but decrease the profitability of their non-trade repository activities. In addition, there may be a tension between an SDR's statutory or regulatory obligations (e.g., maintaining the privacy of data reported to the SDR) and its own commercial interests or those of its owners (e.g., using data reported to the SDR for commercial purposes).[628]

An SDR's conflicts of interest that are not properly managed could limit the benefits of the SDR to the markets and regulators of SDRs as well as undermine the mandatory reporting requirement in Exchange Act Section 13(m)(1)(G), thereby impacting efficiency in the SBS market.[629] If, for instance, a market participant loses confidence in a particular SDR because the SDR fails to minimize its conflicts of interest, then the market participant may report its SBS transactions to an alternative SDR, which could lead to data fragmentation. By requiring an SDR to take specific actions to minimize its conflicts of interest, the Commission believes that Rule 13n-4(c)(3), as adopted, addresses these concerns as well as the concerns expressed in comments received on the rule proposal.

Several commenters expressed their views on whether an SDR should be permitted to use

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628 See Proposing Release, 75 FR at 77324, supra note 2 (citing to CPSS-IOSCO Trade Repository Report (noting the conflicts of interest "between the unique public role of the [SDR] and its own commercial interests particularly if the [SDR] offers services other than record keeping or between commercial interests relating to different participants and linked market infrastructures and service providers")).

629 See 15 U.S.C. 78m(m)(1)(G). Exchange Act Section 13(m)(1)(G) imposes a mandatory reporting requirement, which provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository." See also Exchange Act Section 13A(a)(1), 15 U.S.C. 78m-1(a)(1) ("Each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to – (A) a security-based swap data repository . . . , or (B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission . . . .").

data for commercial purposes.[630] For a number of reasons, the Commission continues to believe that it is not appropriate to adopt, at this time, a rule prohibiting an SDR and its affiliates from using for commercial purposes SBS data that the SDR maintains without obtaining express written consent from both counterparties to the SBS transaction or the reporting party. First, the Commission believes that such a prohibition may limit transparency by hindering an SDR's ability to provide anonymized and aggregated reports to the public if the Commission does not specifically mandate an SDR to provide these reports to the public. Under the final rule, an SDR may provide these reports to the public, provided that it complies with the privacy requirements of Rule 13n-9, as discussed in Section VI.I.1 below.[631] Second, a rule that prohibits an SDR from using SBS data for commercial purposes seems to presume that the market participants or reporting party owns the data. As evidenced by the comment letters received,[632] the issue of who owns the data is not clear cut, particularly when value is added to it. Third, a general prohibition

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630 See Markit, supra note 19 (stating that "commercialization of data should only be done with the specific consent of the data owners"); MarkitSERV, supra note 19 (stating that "data provided to [SDRs] should only be used as permitted by the relevant market participants in agreements between them and the [SDR]"); MFA 1, supra note 19 (suggesting that the Commission adopt a rule similar to the CFTC's proposed rule that would prohibit SDRs from using data for commercial purposes without express written consent); see also DTCC SBSR, supra note 27 (suggesting that an SDR should not use data for commercial purposes); WMBAA SBSR, supra note 27 (indicating that an SDR should not have the authority to use SBS transaction data "for any purpose other than those explicitly enumerated in the Commission's regulations"). See also CFTC Rule 49.17(g), 17 CFR 49.17(g) ("Swap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities"; however, "[t]he swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of the data by express written consent.").

631 Cf. SBSR Adopting Release, supra note 13 (prohibiting public dissemination of "non-mandatory reports," as defined in Regulation SBSR).

632 See DTCC 2, supra note 19; Markit, supra note 19; MarkitSERV, supra note 19; MFA 1, supra note 19; DTCC SBSR, supra note 27; WMBAA SBSR, supra note 27.

on an SDR's commercial use of SBS data could hinder competition and the establishment of new SDRs. As stated in Section III.D of this release, the Commission does not support any particular business model; restricting an SDR's commercial use of SBS data entirely, however, may be viewed as the Commission favoring one model over other models. Finally, the Commission believes that it is adopting adequate mechanisms to prevent or detect an SDR's misuse of SBS data.[633] If, however, such mechanisms prove to be inadequate, then the Commission may revisit this issue.

At this time, the Commission believes that the core principles and statutory requirements applicable to SDRs under the Dodd-Frank Act can be appropriately addressed under the final SDR Rules, without the need for the Commission to take a position on ownership of SBS data. In response to one commenter's request for clarification,[634] the Commission notes that Rule 13n-4(c)(3) is not intended to impose or imply any limit on the ability of market participants, including counterparties to SBS transactions, SB SEFs, and clearing agencies, to use or commercialize data that they create or receive in connection with the execution or reporting of SBS data. The Commission, however, does not believe that it is necessary, as another commenter suggested,[635] to require SDRs to adopt policies and procedures explicitly acknowledging that market participants retain the ability to market and commercialize their own proprietary data.

633 See, e.g., Rules 13n-4(c)(1)(i) (fair and reasonable fee requirements) and 13n-9 (privacy requirements).

634 See Tradeweb SB SEF, supra note 29.

635 See WMBAA SBSR, supra note 27.

4. Indemnification Exemption (Rule 13n-4(d))

In the Cross-Border Proposing Release, the Commission proposed Rule 13n-4(d), pursuant to its authority under Exchange Act Section 36,[636] to provide a tailored exemption from the indemnification requirement set forth in Exchange Act Section 13(n)(5)(H)(ii)[637] and previously proposed Rule 13n-4(b)(10) thereunder.[638] The Commission received a number of comments relating to the indemnification requirement and the proposed exemption.[639] While the Commission continues to believe that an exemption from the indemnification requirement should be considered, the Commission also believes that the final resolution of this issue can benefit from further consideration and public comment. Accordingly, the Commission is not adopting proposed Rule 13n-4(d) at this time. The Commission anticipates soliciting additional public comment regarding the indemnification requirement and a proposed exemption. As discussed above, SDRs will have to comply with all statutory requirements, including the indemnification requirement set forth in Exchange Act Section 13(n)(5)(H)(ii),[640] when the current exemptive relief from the statutory requirements expires.[641]

E. Data Collection and Maintenance (Rule 13n-5)

The Commission proposed Exchange Act Rule 13n-5 to specify the data collection and

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636 15 U.S.C. 78mm.

637 15 U.S.C. 78m(n)(5)(H)(ii).

638 Cross-Border Proposing Release, 78 FR at 31209, supra note 3.

639 See DTCC 2, supra note 19; ESMA, supra note 19; US & Foreign Banks, supra note 24; see also DTCC 1*, supra note 20; DTCC CB, supra note 26.

640 15 U.S.C. 78m(n)(5)(H)(ii).

641 See Section V of this release discussing the implementation of the SDR Rules.

maintenance requirements applicable to SDRs.[642] After considering the comments received on this proposal, the Commission is adopting Rule 13n-5 as proposed, with certain modifications.[643]

1. Transaction Data (Rule 13n-5(b)(1))

a. Proposed Rule

Proposed Rule 13n-5(b)(1)(i) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR, and would require the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. Proposed Rule 13n-5(a)(1) defined "transaction data" to mean all the information reported to an SDR pursuant to the Exchange Act and the rules and regulations thereunder.[644]

Proposed Rule 13n-5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given

642 Rule 13n-5 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). See 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9). Rule 13n-5(b) does not apply to SDR records other than transaction data and positions, as defined below. Records made or kept by an SDR, other than transaction data and positions, are governed by Rule 13n-7, as discussed in Section VI.G of this release.

643 Each definition in Rule 13n-5(a) is discussed alongside the substantive rule in which the definition is used. See Section VI.E.1 below discussing "asset class" and "transaction data"; and Section VI.E.2 below discussing "position."

644 In a separate rulemaking implementing Dodd-Frank Act Sections 763(i) and 766(a) (adding Exchange Act Sections 13(m) and 13A(a)(1) respectively), the Commission is adopting rules requiring SBS transactions to be reported to a registered SDR. See Regulation SBSR Adopting Release, supra note 13 (Rules 901 and 902). In another separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E)), the Commission proposed rules that would require SDRs to receive SBS transaction data that satisfies the notice requirement for parties that elect the end-user exception to mandatory clearing of SBSs in order to aid the Commission in its responsibility to prevent abuse of the end-user exception as provided for in Exchange Act Section 3C(g). See End-User Exception Proposing Release, supra note 15 ("Using the centralized facilities of SDRs should also make it easier for the Commission to analyze how the end-user clearing exception is being used, monitor for potentially abusive practices, and take timely action to address abusive practices if they were to develop.").

asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of the proposed rule. Proposed Rule 13n-5(a)(3) defined "asset class" as "those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives."

Proposed Rule 13n-5(b)(1)(iii) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. This proposed rule would also require every SDR to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that transaction data.[645]

Proposed Rule 13n-5(b)(1)(iv) would require every SDR to promptly record the transaction data it receives.[646]

b. Comments on the Proposed Rule

Three commenters submitted comments relating to this proposed rule.[647] One commenter stated that an SDR should have "certain minimum data standards" with regard to the transaction data that it accepts, but that "such standards should be able to accommodate a wide variety of SBS transactions submitted per asset class."[648] The commenter also stated that "the regulations

645 Proposed Rule 13n-5(b)(1)(iii).

646 In a separate release, the Commission is adopting rules prescribing the data elements that an SDR is required to accept for each SBS, in association with requirements under Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification). See Regulation SBSR Adopting Release, supra note 13 (Rule 901).

647 See DTCC 2, supra note 19; MarkitSERV, supra note 19; MFA 1, supra note 19; see also DTCC 3, supra note 19; DTCC 4, supra note 19; DTCC 5, supra note 19.

648 MarkitSERV, supra note 19.

should be understood to permit [SDRs] to specify the methods and channels that participants need to use to connect to them, which will most commonly be provided in the form of the Application Programming Interfaces (APIs) and through setting of certain minimum standards."[649]

Another commenter recommended revising the definition of "asset class" from the proposal to eliminate "the distinction between loan-based and credit asset classes," and noted that "products like CDS on loans, while loan-based, are currently reported alongside other CDS products."[650] The commenter believed that "[i]n general, equity and credit derivatives will be easy to classify, although it is possible that certain transactions could be mixed and more difficult to classify."[651] The commenter stated that it considers it more likely to have classification difficulties between "a swap and an SBS, rather than between SBS asset classes."[652] The commenter suggested that, in order to mitigate the problem of classification between asset classes, the Commission could combine "the loan-based asset class with credit derivatives, and [allow] an SBS to be reported to either the equity or credit SDR if there is any uncertainty of a product's asset class."[653]

Two commenters agreed that SDRs should be required to support all trades in an asset class.[654] One commenter stated that "[w]ithout specific requirements related to the range of

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649 MarkitSERV, supra note 19.

650 DTCC 2, supra note 19.

651 DTCC 2, supra note 19.

652 DTCC 2, supra note 19 (giving as an example a trade constructed based on the correlation between commodities and equities).

653 DTCC 2, supra note 19.

654 MarkitSERV, supra note 19; DTCC 2, supra note 19; see also DTCC 3, supra note 19; DTCC 4, supra note 19.

products that can be reported to them, [SDRs] may be tempted to limit their operating costs by only accepting the more standardized categories of swaps [that] also tend to trade in high volumes. This would result in incomplete market coverage and an increased fragmentation of the reported data."[655] Thus, the commenter recommended that the Commission require SDRs "to accept all trades in a given asset class as a means of ensuring broad coverage while guarding against fragmentation that could result from inadequate [SDR] functionality."[656] The other commenter stated that the "requirement for an SDR to support all trades in an asset class is . . . important to reduce the complexity for reporting parties," and that the "requirement discourages an SDR from only servicing high volume products within an asset class to maximize profit, and leaving more complex (and less frequently traded) transactions to be reported by reporting parties directly to the Commission."[657]

Three commenters addressed the SDR's role with respect to verifying the accuracy of the transaction data submitted.[658] One commenter fully supported the requirement that SDRs confirm with both counterparties the accuracy of the data submitted.[659] Another commenter

655 MarkitSERV, supra note 19 (citation omitted).

656 MarkitSERV, supra note 19 (noting that "some level of data fragmentation will be unavoidable") (citation omitted).

657 DTCC 2, supra note 19; see also DTCC 3, supra note 19 (recommending that any SDR "be able to receive and manage all swaps in any asset class for which it is registered in accordance with the requirements of the Commission" because such requirement is "critical . . . for assuring that the more complex and non-standard transactions, typically the higher risk creating transactions . . . , are appropriately registered in SDRs so accurate risk and market activity profiles can be maintained"); DTCC 4, supra note 19 (stating that "no provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates" and that it "strenuously objects" to allowing SDRs accept only those SBSs that are cleared).

658 See DTCC 2, supra note 19; MarkitSERV, supra note 19; MFA 1, supra note 19.

659 MFA 1, supra note 19.

stated that "the Commission should encourage the use and reporting of trade data that has been confirmed or verified by both counterparties via an affirmation or a matching process,"[660] and that this should be "connected with" the Commission's proposed requirement that SBS dealers and major SBS participants provide trade acknowledgments and verify those trade acknowledgments.[661] This commenter suggested, however, that SDRs should be able to accept single-sided trades for real-time reporting purposes, and that any subsequently discovered discrepancies could be corrected after confirmation.[662] The third commenter recommended that "SDRs should not have additional duties with respect to verifying the accuracy of [a] submission, as there is limited data available to the SDR. The SDR may carry out certain routine functions to identify trades which may indicate erroneous data (e.g. based on size), but in general, the primary responsibility for accuracy of reported information should remain with the reporting party."[663] This commenter also recommended that the Commission determine that an SDR has satisfied its obligation where "(i) the [SBS] has been reported by a [SEF], clearing agency, designated contract market, or other regulated counterparty who has an independent obligation to maintain the accuracy of the transaction data; (ii) a confirmation has been submitted to the [SDR] to demonstrate that both counterparties have agreed to the accuracy of the swap information that was submitted to the [SDR]; or (iii) the [SBS] is deemed verified and the [SDR] has developed and implemented policies and procedures reasonably designed to provide the non-

660 MarkitSERV, supra note 19 (stating such an approach would motivate parties to ensure the accuracy of reported data because of the associated economic and legal consequences).

661 See Trade Acknowledgment Release, supra note 133.

662 MarkitSERV, supra note 19.

663 DTCC 2, supra note 19.

reporting side of the [SDR] with an opportunity to confirm the information submitted by the reporting side."[664] This same commenter stated that SDRs should "process transactions in real-time."[665]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(1) and the definition of "transaction data" under Rule 13n-5(a)(3) as proposed, with modifications.[666] The Commission is adopting the definition of "asset class" under Rule 13n-5(a)(1) as proposed, with one modification.[667]

Rule 13n-5(b)(1)(i) and the definition of "transaction data": Rule 13n-5(b)(1)(i) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the SDR, and requires the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. "Transaction data" is defined to mean all the information reported to an SDR pursuant to the Exchange Act and the rules and regulations thereunder, except for information provided pursuant to Rule 906(b) of Regulation SBSR.[668]

664 DTCC 5, supra note 19.

665 DTCC 2, supra note 19.

666 The Commission is making one technical amendment to proposed Rule 13n-5(b)(1)(ii). As proposed, the rule referenced the "policies and procedures required by paragraph (b)(1) of this section." As adopted, the rule references the "policies and procedures required by paragraph (b)(1)(i) of this section." Additionally, the Commission is renumbering the definition of "transaction data" as Rule 13n-5(a)(3) in order to alphabetize the definitions in Rule 13n-5(a). The definition of "transaction data" is also being revised from the proposal, as discussed below.

667 The definition of "asset class" is also being renumbered as Rule 13n-5(a)(1) in order to alphabetize the definitions in Rule 13n-5(a).

668 Rule 13n-5(a)(3). As proposed, the definition of "transaction data" did not include the exception for information provided pursuant to Rule 906(b) of Regulation SBSR. See

As explained in the Proposing Release, a fundamental goal of Title VII is to have all SBSs reported to SDRs.[669] Therefore, "transaction data" includes all information, including life cycle events, required to be reported to an SDR under Rule 901 of Regulation SBSR.[670] Rule 13n-5(b)(1)(i) is intended to prevent SDRs from rejecting SBSs for arbitrary or anti-competitive reasons, minimize the number of SBSs that are not accepted by an SDR, and to the extent that an SDR's policies and procedures make clear which SBSs the SDR will accept, make it easier for market participants and market infrastructures to determine whether there is an SDR that will accept a particular SBS.[671]

The Commission is revising the rule from the proposal to clarify that an SDR's policies and procedures should be reasonably designed for the reporting of "complete and accurate"

Regulation SBSR Adopting Release, supra note 13 (Rule 906(b) requiring a participant to provide information related to its ultimate parent(s) and affiliates). Because the information provided pursuant to Rule 906(b) is not tied to a particular SBS, the Commission believes that it does not make sense to tie the retention of the information to the expiration of an SBS. See Rule 13n-5(b)(4) (requiring an SDR to maintain transaction data "for not less than five years after the applicable [SBS] expires"). By adding the exception to the definition of "transaction data," the information that an SDR receives pursuant to Rule 906(b) will instead be required to be kept and preserved for not less than five years, pursuant to Rule 13n-7(b).

669 Proposing Release, 75 FR at 77327, supra note 2. See Exchange Act Section 13(m)(1)(G), 15 U.S.C. 78m(m)(1)(G), as added by Dodd-Frank Act Section 763(i) (requiring "[e]ach security-based swap (whether cleared or uncleared)" to be reported to a registered SDR).

670 A definition of "life cycle event" is included in Regulation SBSR. See Regulation SBSR Adopting Release, supra note 13 (Rule 900).

671 In a separate release relating to implementation of Dodd-Frank Act Section 763(i), the Commission is adopting additional rules requiring an SDR to have policies and procedures relating to the reporting of SBS data to the SDR. See Regulation SBSR Adopting Release, supra note 13 (Rule 907); see also id. (Rule 901(h) requiring information to be reported to an SDR "in a format required by the registered [SDR]").

transaction data to the SDR.[672] For example, an SDR's policies and procedures may not be reasonable if they do not require reporting of all the data elements required under Regulation SBSR and that the data reported be accurate.

The Commission agrees with one commenter's view that an SDR's policies and procedures should allow for the reporting of "a wide variety of SBS transactions."[673] The Commission also agrees that SDRs should be allowed to "specify the methods and channels that participants need to use to connect to [SDRs],"[674] so long as such methods and channels are reasonable. Therefore, an SDR may reject SBS data that is reported in a manner that is inconsistent with its reasonable policies and procedures.

In addition, to the extent that an SDR's policies and procedures allow SBSs to be reported to it in more than one format,[675] the SDR may need to reformat or translate the data to conform to any format and taxonomy that the Commission may adopt pursuant to Rule 13n-4(b)(5) in order to satisfy the requirement of providing direct electronic access to the

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672 See Proposing Release, 75 FR at 77307 and 77327, supra note 2 ("SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations to better monitor for systemic risk and potential market abuse" and "an SDR is useful only insofar as the data it retains is accurate"); see also MFA 1, supra note 19 (discussing the importance of SDRs maintaining accurate data).

673 See MarkitSERV, supra note 19.

674 See MarkitSERV, supra note 19.

675 See Regulation SBSR Adopting Release, supra note 13 (Rule 907(a)(2) requiring a registered SDR to establish and maintain written policies and procedures 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).

Commission.[676] For example, the SDR may need to reformat or translate terms of the transaction (e.g., scheduled termination dates, prices, or fixed or floating rate payments). The Commission notes that an SDR is not required to make persons who report SBSs to the SDR use any of the formats and taxonomies specified by the Commission. Rather, the SDR is only required to use such formats and taxonomies when providing the Commission with direct electronic access.

Rule 13n-5(b)(1)(ii) and the definition of "asset class": Rule 13n-5(b)(1)(ii) requires an SDR, if it accepts any SBS in a particular asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by Rule 13n-5(b)(1)(i). As explained in the Proposing Release, this requirement is designed to maximize the number of SBSs that are accepted by an SDR.[677] The comments that the Commission received on this rule endorsed it.[678] The Commission believes that if certain SBSs are not accepted by any SDR and are reported to the Commission instead,[679] the purpose of the Dodd-Frank Act to have centralized data on SBSs for regulators and others to access could be undermined.[680] In addition,

676 See Section VI.D.2.c.ii of this release discussing Rule 13n-4(b)(5) (requiring SDRs to provide direct electronic access to the Commission or any designee); Section VI.E.4 of this release discussing Rule 13n-5(b)(4) (requiring every SDR to maintain transaction data in a format readily accessible and usable to the Commission); and Section VI.H of this release discussing Rule 13n-8 (requiring every SDR to promptly report information to the Commission in a form and manner acceptable to the Commission).

677 Proposing Release, 75 FR at 77327, supra note 2.

678 See DTCC 2, supra note 19; MarkitSERV, supra note 19; DTCC 3, supra note 19; DTCC 4, supra note 19.

679 See Exchange Act Section 13A(a)(1), 15 U.S.C. 78m-1(a)(1) (requiring an uncleared SBS to be reported to the Commission if there is no SDR that would accept the SBS)); see also Regulation SBSR Adopting Release, supra note 13 (Rule 901(b) requiring SBSs to be reported to the Commission if there is no SDR that would accept the SBSs).

680 See also MarkitSERV, supra note 19 (stating that the requirement to accept all trades in an asset class is "a means of ensuring broad coverage while guarding against fragmentation").

the Commission agrees with one commenter that this requirement will "reduce the complexity for reporting parties."[681] The Commission also agrees with commenters' views that without this requirement, SDRs may be tempted to limit their services to standardized, high-volume SBSs.[682] Given these incentives, the requirement that an SDR accept all SBSs in a given asset class if it accepts any SBS in that asset class is meant to facilitate the aggregation of, and relevant authorities' and market participants' access to, SBS transaction data. This requirement prevents a provider of trading or clearing services to act as an SDR for only those SBSs that it trades or clears.[683] This requirement also prevents an SDR from accepting only SBSs that have been cleared.[684]

As explained in the Proposing Release, an SDR is required to accept only those SBSs that are reported in accordance with the SDR's policies and procedures required by Rule 13n-5(b)(1)(i).[685] For example, an SDR's policies and procedures could prescribe the necessary

681 See DTCC 2, supra note 19.

682 See DTCC 2, supra note 19 (stating that the requirement for an SDR to support all trades in an asset class "discourages an SDR from only servicing high volume products within an asset class to maximize profit, and leaving more complex (and less frequently traded) transactions to be reported by reporting parties directly to the Commission"); MarkitSERV, supra note 19 ("Without specific requirements related to the range of products that can be reported to them, [SDRs] may be tempted to limit their operating costs by only accepting the more standardized categories of swaps [that] also tend to trade in high volumes. This would result in incomplete market coverage and an increased fragmentation of the reported data.") (citation omitted).

683 See DTCC 4, supra note 19 (stating that "no provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates").

684 See DTCC 4, supra note 19 (stating that it "strenuously objects" to allowing SDRs to accept only those SBSs that are cleared).

685 Proposing Release, 75 FR at 77327, supra note 2. An SDR is required to disclose to market participants its criteria for providing others with access to services offered and data maintained by the SDR pursuant to Rule 13n-10(b)(1), as discussed in Section VI.I.2

security and connectivity protocols that market participants and market infrastructures must have in place prior to transmitting transaction data to the SDR. The SDR is not required to accept transaction data from market participants and market infrastructures that do not comply with these protocols; otherwise the transmission of the transaction data could compromise the SDR's automated systems.[686]

In response to the comment recommending amending the definition of "asset class" to remove the "the distinction between loan-based and credit asset classes,"[687] the Commission agrees that removing such distinction will make it easier for reporting parties when classifying a transaction. Therefore, the Commission is modifying from the proposal the definition of "asset class" in Rule 13n-5(a)(1) to mean "those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives."[688]

Where an SBS arguably could belong to more than one asset class, for example, if it has characteristics of both credit and equity derivatives, then an SDR serving either asset class

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of this release. Therefore, market participants will be made aware of an SDR's policies and procedures for reporting data.

686 To the extent that an SDR already has systems in place to accept and maintain SBSs in a particular asset class, the Commission believes that Rule 13n-5(b)(1)(ii) will not add a material incremental financial or regulatory burden to SDRs. See Proposing Release, 75 FR at 77327, supra note 2.

687 See DTCC 2, supra note 19.

688 In a separate release relating to implementation of Dodd-Frank Act Section 763(i), the Commission is adopting the same definition of "asset class." See Regulation SBSR Adopting Release, supra note 13 (Rule 900). In addition, the Commission proposed rules relating to trade acknowledgments and verifications of SBSs, which proposed a definition of "asset class" that is the same as the definition of "asset class" in the Proposing Release, 75 FR at 77369, supra note 2, and therefore differs from the definition of "asset class" being adopted in this release. See Trade Acknowledgment Release, supra note 133. The Commission expects to consider conforming the proposed definition of "asset class" in the Trade Acknowledgment Release with the definition being adopted today at a later time.

should be able to accept that SBS without then being required to accept all SBSs in the other asset class – i.e., an SDR for the credit derivative asset class could accept such an SBS without then having to accept all equity SBSs, and an SDR for the equity derivative asset class could accept the SBS without then having to accept all credit SBSs.

One commenter expressed concern about transactions that could be considered both swaps and SBSs, such as one constructed based on the correlation between commodities and equities.[689] The Commission notes that it has adopted, jointly with the CFTC, regulations applicable to mixed swaps.[690] The Commission believes that if an SDR accepts a mixed swap, then it should not be required to accept all SBSs in all asset classes to which the mixed swap belongs. For example, if a swap data repository that accepts commodity swaps accepts a mixed swap that is based on the value of both equity and commodity prices, then that swap data repository should not be required to accept all equity SBSs.

Rule 13n-5(b)(1)(iii): Rule 13n-5(b)(1)(iii) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate.[691] Rule 13n-5(b)(1)(iii) also requires every SDR to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that

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689 See DTCC 2, supra note 19.

690 See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012).

691 As proposed, Rule 13n-5(b)(1)(iii) would require the SDR's policies and procedures to be "reasonably designed to satisfy [the SDR] by reasonable means that the transaction data that has been submitted to the SDR is accurate." In adopting Rule 13n-5(b)(1)(iii), the Commission is removing the phrase "by reasonable means" to make the rule text clearer. This revision is not intended to substantively change the meaning of the rule.

transaction data.[692] These requirements, which are intended to improve data accuracy, are based on the requirement in Exchange Act Section 13(n)(5)(B) that an SDR "confirm with both counterparties to the security-based swap the accuracy of the data that was submitted."[693] As explained in the Proposing Release, the requirement is based on the premise that an SDR is useful only insofar as the data it retains is accurate.[694] Unreliable SBS data does not enhance transparency. Requiring the SDR to take steps regarding the accuracy of the transaction data submitted to it, should help ensure that the data submitted to the SDR is accurate and agreed to by both counterparties. One commenter suggested that "SDRs should not have additional duties with respect to verifying the accuracy of submission."[695] But because of the statutory requirement and the likelihood that the commenter's approach would lead to less accurate information being provided to the Commission and the marketplace, the Commission is adopting Rule 13n-5(b)(1)(iii) largely as proposed.

As proposed, the rule would require an SDR's policies and procedures to address the accuracy of the transaction data. For purposes of clarification, the rule as adopted requires that an SDR's policies and procedures address both the completeness and accuracy of the transaction data. For example, an SDR's policies and procedures may not be reasonable if they allow data

692 With regard to this requirement, proposed Rule 13n-5(b)(1)(iii) used the phrase "including clearly identifying." In adopting Rule 13n-5(b)(1)(iii), the Commission is changing "including clearly identifying" to "clearly identifies" to make the rule text clearer. This revision is not intended to substantively change the meaning of the rule.

693 15 U.S.C. 78m(n)(5)(B); see also Rule 13n-4(b)(3) (implementing same requirement).

694 Proposing Release, 75 FR at 77327, supra note 2. Accord CPSS-IOSCO Trade Repository Report, supra note 48 (the primary public policy benefit of an SDR is facilitated by the integrity of the information maintained by an SDR).

695 See DTCC 2, supra note 19; see also DTCC 5, supra note 19 (recommending that SDRs be determined to have satisfied their obligation to confirm the accuracy of data under certain circumstances).

elements required under Regulation SBSR to be blank.

The Commission understands that with respect to certain asset classes, third party service providers currently provide an electronic affirmation or matching process prior to the SBS data reaching an SDR.[696] As explained in the Proposing Release, the Commission believes that an SDR can fulfill its responsibilities under Exchange Act Section 13(n)(5)(B), Rule 13n-4(b)(3),[697] and this Rule 13n-5(b)(1)(iii) by developing reasonable policies and procedures that rely on confirmations completed by another entity, such as an SB SEF, clearing agency, or third party vendor, as long as such reliance is reasonable.[698] In order for such policies and procedures establishing reliance on a third party to be reasonable, the SDR would need to oversee and supervise the performance of the third party confirmation provider. This could include having policies and procedures in place to monitor the third party confirmation provider's compliance with the terms of any agreements and to assess the third party confirmation provider's continued fitness and ability to perform the confirmations. It could also include having the SDR or an independent auditor inspect or test the performance of the third party confirmation provider, with the SDR retaining records of such inspections or tests.[699]

For example, if an SBS is traded on an SB SEF, that SB SEF could confirm the accuracy of the transaction data with both counterparties, and the SB SEF could then report the transaction

696 See, e.g., MarkitSERV, supra note 19 (noting that commenter provides confirmation and matching services for post-trade SBS transactions).

697 Rule 13n-4(b)(3) requires SDRs to "[c]onfirm, as prescribed in Rule 13n-5, with both counterparties to the security-based swap the accuracy of the data that was submitted."

698 Proposing Release, 75 FR at 77327-8, supra note 2. See, e.g., MarkitSERV, supra note 19 (The "Commission should encourage the use and reporting of trade data that has been confirmed or verified by both counterparties via an affirmation or a matching process.").

699 Such records would have to be maintained pursuant to Rule 13n-7(b). See Section VI.G.2 of this release discussing SDR recordkeeping.

data to an SDR.[700] The SDR would not need to further substantiate the accuracy of the transaction data, as long as the SDR has a reasonable belief that the SB SEF performed an accurate confirmation. However, the SDR would not comply with Exchange Act Section 13(n)(5)(B), Rule 13n-4(b)(3), and this Rule 13n-5(b)(1)(iii) if the confirmation proves to be inaccurate and the SDR's reliance on the SB SEF for providing accurate confirmations was unreasonable (e.g., the SDR ignored a pattern of inaccuracies or red flags). In certain circumstances, such as where an SBS is transacted by two commercial end-users and is not electronically traded or cleared, and is reported to an SDR by one of those end-users, there may not be any other entity upon which the SDR can reasonably rely to perform the confirmation. In such a case, the SDR would have to contact each of the counterparties to substantiate the accuracy of the transaction data.[701]

Similarly, it would not be reasonable for an SDR to rely on a trade acknowledgment provided by one counterparty to an SBS, without verifying that the other counterparty has agreed to the trade. However, if a party to an SBS timely delivers a trade acknowledgment to both the counterparty and the SDR (or a third party confirmation provider), and the counterparty promptly sends the verification back to both the original party and the SDR (or a third party confirmation provider), then the SDR could use the trade acknowledgment and verification to fulfill its

700 See Proposing Release, 75 FR at 77328, supra note 2.

701 The Commission believes that an SDR should consider making reasonable accommodations, including consideration of any cost burdens, for a non-reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the counterparty's SBS transaction. These accommodations could, for example, include providing means for non-reporting counterparties to substantiate the accuracy of the transaction data without having to incur significant systems or technology costs.

obligations under this rule.[702]

With regard to the requirement that an SDR "clearly identif[y] the source for each trade side and the pairing method (if any) for each transaction,"[703] the Commission notes that transaction data may vary in terms of reliability and such source and pairing method may affect the reliability of the transaction data. As explained in the Proposing Release, some transaction data may be affirmed by counterparties to an SBS, but not confirmed.[704] Some transaction data may be confirmed informally by the back-offices of the counterparties, but the confirmation may not be considered authoritative. Other transaction data may go through an electronic confirmation process, which is considered authoritative by the counterparties. The Commission is adopting this requirement to enable relevant authorities to better determine the reliability of any particular transaction data maintained by an SDR. In order for an SDR's policies and procedures for satisfying itself that the transaction data that has been submitted to the SDR is complete and accurate to be reasonable, the SDR could consider documenting the processes used by third parties to substantiate the accuracy of the transaction data.

Rule 13n-5(b)(1)(iv): Rule 13n-5(b)(1)(iv) requires every SDR to promptly record the transaction data it receives. As explained in the Proposing Release, it is important that SDRs keep up-to-date records so that regulators and counterparties to SBSs will have access to accurate

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702 Although the Commission proposed rules requiring SBS dealers and major SBS participants to provide trade acknowledgment and verification of SBS transactions, it has not adopted any such rules. See Trade Acknowledgment Release, supra note 133. The Commission may address in a later release whether the procedure described above would comply with any such rules. See MarkitSERV, supra note 19 (stating that "the environment envisaged by the SBS SDR Regulation would greatly benefit from being connected with the confirmation requirement (such as the verified trade acknowledgement record)").

703 Rule 13n-5(b)(1)(iii).

704 Proposing Release, 75 FR at 77328, supra note 2.

and current information.[705] One commenter recommended that SDRs process transactions in "real-time."[706] The commenter did not define "real-time." If, by "real-time," the commenter means that SDRs should begin to record the transaction data as soon as it arrives, then the Commission believes that the rule's requirement to "promptly record the transaction data it receives" is consistent with the commenter's recommendation.

2. Positions (Rule 13n-5(b)(2))

a. Proposed Rule

Proposed Rule 13n-5(b)(2) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records. Proposed Rule 13n-5(a)(2) defined "position" as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity. The Commission requested comment regarding whether it should require SDRs to calculate market values of each position at least daily and provide them to the Commission.[707]

b. Comments on the Proposed Rule

Three commenters submitted comments relating to this proposed rule.[708] One commenter expressed the view that "position data is most valuable when aggregated among all SDRs," and

705 Proposing Release, 75 FR at 77328, supra note 2.

706 See DTCC 2, supra note 19 (stating that SDRs should "process transactions in real-time").

707 See Proposing Release, 75 FR at 77329, supra note 2.

708 See DTCC 2, supra note 19; Markit, supra note 19; Ethics Metrics, supra note 19.

therefore suggested that "one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes."[709]

None of the commenters believed that SDRs should be required to perform valuation calculations at this time. One commenter indicated, however, that providing valuations should be a long-term goal.[710] In this commenter's view, existing SDRs do not have the capability to provide valuations and they are not currently best situated to develop this capability; the short-term goal should be for SDRs to collect, and potentially report, valuations provided by the counterparties to an SBS and/or any relevant third party entities.[711] Another commenter expressed the view that "firms" should provide market values because they invest considerable resources in valuing trades and it would be difficult for an SDR to replicate these activities for all trades.[712] The commenter stated that an "SDR could contract with a market valuation service to provide some values and this would provide some independent valuation, but this will not readily extend to illiquid or structured products."[713] The commenter also stated that while mark-to-market values would be of some use to regulators, without collateral information "the values would not be useful in assessing counterparty risk exposures."[714] A third commenter stated that valuation models for counterparty credit risks and systemic risk should include independent,

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709 DTCC 2, supra note 19.

710 Markit, supra note 19 ("[W]e believe that the Commission should work to create a system where SBS SDRs play an important and even primary role not only in ensuring the accuracy of counterparties' swap valuations, but also in performing independent valuations for the counterparties.").

711 Markit, supra note 19 (recognizing that an SDR performing "independent valuations may not be practical given the highly customized and bespoke nature of many swaps").

712 DTCC 2, supra note 19.

713 DTCC 2, supra note 19.

714 DTCC 2, supra note 19.

third party data.[715]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(2) and the definition of "position" under Rule 13n-5(a)(2) as proposed. Rule 13n-5(b)(2) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records.[716] Rule 13n-5(a)(2) defines "position" as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity.[717]

As explained in the Proposing Release, position information is important to regulators for

715 Ethics Metrics, supra note 19; see also MarkitSERV, supra note 19 (describing valuations as a possible ancillary service of SDRs).

716 Position data is required to be provided by an SDR to certain entities pursuant to Exchange Act Section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G).

717 As stated in the Proposing Release, for purposes of this definition, positions aggregated by long risk would be only for the aggregate notional amount of SBSs in which a market participant has long risk of the underlying instrument, index, or reference entity. Proposing Release, 75 FR at 77326 n.102, supra note 2. Similarly, positions aggregated by short risk would be only for the aggregate notional amount of SBSs in which a market participant has short risk of the underlying instrument, index, or reference entity. For SBSs other than credit default swaps, a counterparty has long risk where the counterparty profits from an increase in the price of the underlying instrument or index, and a counterparty has short risk where the counterparty profits from a decrease in the price of the underlying instrument or index. For credit default swaps, a counterparty has long risk where the counterparty profits from a decrease in the price of the credit risk of the underlying index or reference entity, and a counterparty has short risk where the counterparty profits from an increase in the price of the credit risk of the underlying index or reference entity. As the market develops, the Commission may consider whether to require SDRs calculate positions in another manner and provide those positions to the Commission on a confidential basis.

risk, enforcement, and examination purposes.[718] In addition, having a readily available source of position information can be useful to counterparties in evaluating their own risk. As explained in the Proposing Release, in order to meet its obligation to calculate positions, an SDR could require reporting parties to report the necessary events to calculate positions, or it could have a system that will monitor for and collect such information.[719] In order for the positions to be calculated accurately, an SDR will need to promptly incorporate recently reported transaction data and collected unreported data. It is important that the SDR keep up-to-date records so that relevant authorities and parties to the SBS will have access to accurate and current information. In calculating positions, an SDR is only required to reflect SBS transactions reported to that SDR.

As explained in the Proposing Release, the definition of "position" is designed to be sufficiently specific so that SDRs are aware of the types of position calculations that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of position calculations that regulators and the industry will find important as new types of SBSs are developed.[720]

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718 Proposing Release, 75 FR at 77329, supra note 2.

719 Proposing Release, 75 FR at 77329, supra note 2.

720 Proposing Release, 75 FR at 77326, supra note 2. The Commission notes that Dodd-Frank Act Section 763(h) adds Exchange Act Section 10B, which provides, among other things, for the establishment of position limits for any person that holds SBSs. See 15 U.S.C. 78j-2. Specifically, Exchange Act Section 10B(a) provides that "[a]s a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person." Id. In addition, Exchange Act Section 10B(d) provides that the Commission may establish position reporting requirements for any person that effects transactions in SBSs, whether cleared or uncleared. Id.

While one commenter suggested that "one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes,"[721] the Commission is not mandating the aggregation of position data at one SDR. At this time, the Commission believes that it—rather than any particular registered entity—is in the best position to aggregate data across multiple registered SDRs. As described above, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that will facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission.[722] The Commission may revisit this issue as the SBS market evolves.[723]

With regard to valuations, the Commission agrees with commenters[724] that SDRs are not necessarily in the best position to calculate market valuations at this time. While, as one commenter pointed out, an SDR could contract with a market valuation service to provide some values,[725] it is not apparent how useful the valuation would be without collateral information,[726] and a valuation service could not readily provide valuations for illiquid or structured products.[727] Therefore, the Commission is not requiring SDRs to calculate market values of positions daily and to provide them to the Commission. The Commission notes that under Regulation SBSR,

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721 DTCC 2, supra note 19.

722 See Section VI.D.2.c.ii of this release discussing anticipated Commission proposal pursuant to Rule 13n-4(b)(5).

723 See Section IV of this release for further discussion of consolidating data in one SDR.

724 See DTCC 2, supra note 19; Markit, supra note 19.

725 See DTCC 2, supra note 19.

726 See DTCC 2, supra note 19 (stating that valuations without collateral information would not be useful in assessing counterparty risk exposures).

727 See DTCC 2, supra note 19 (stating that independent market valuations services could not readily value illiquid or structured products).

the counterparties are required to report to an SDR the "data elements included in the agreement between the counterparties that are necessary for a person to determine the market value of the transaction."[728] Accordingly, if necessary, the Commission could calculate some market valuations either in-house or by hiring a third party market valuation service provider. As the market develops and SDRs develop and increase their capabilities, the Commission may revisit this issue.

3. Maintain Accurate Data (Rule 13n-5(b)(3))

a. Proposed Rule

Proposed Rule 13n-5(b)(3) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate.

b. Comments on the Proposed Rule

Both commenters that submitted comments relating to this proposed rule agreed that SDRs serve an important role in collecting and maintaining accurate SBS data.[729] One commenter stated that "[e]nsuring the accuracy and quality of [data reported to SDRs] will be critical for the Commission's achievement of the regulatory goals of transparency, efficiency and systemic risk mitigation [and that] SDRs will play a pivotal role in ensuring the accuracy of [SBS] data both for public consumption and regulatory reporting purposes."[730] The commenter further noted that "[t]he existence of a number of feedback loops and distribution channels through which data will flow will enable participants to identify, test and correct inaccuracies

[728] See Regulation SBSR Adopting Release, supra note 13 (Rule 901).

[729] See DTCC 2, supra note 19; MarkitSERV, supra note 19; see also DTCC 1*, supra note 20.

[730] MarkitSERV, supra note 19.

and errors."[731] This commenter also indicated that the ability to ensure data accuracy would be influenced by the degree to which such data is utilized by industry participants in other processes. Therefore, that commenter stressed that "SDRs and their affiliates should be permitted to offer a range of ancillary services in addition to their core services of data acceptance and data storage."[732]

Another commenter stated that "the multiple bilateral reconciliations performed between the parties to a trade throughout the life of a trade (and often on an ad hoc basis or only following a dispute), could be replaced by one single reconciliation framework with a shared central record, increasing both [sic] operating efficiency as well as reducing operational risks. The Commission's suggestion for portfolio reconciliation seems well aligned with this, and this would give the direct benefit of improved bilateral portfolio reconciliation processes between the parties."[733] The commenter also stated that "[a]fter each recorded transaction is consummated, the SDR can maintain the validity of the data for that transaction by offering an asset servicing function."[734]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(3) as proposed, with one modification. Rule 13n-5(b)(3) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate. As explained in the Proposing

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731 MarkitSERV, supra note 19.

732 MarkitSERV, supra note 19.

733 DTCC 2, supra note 19. In the Proposing Release, the Commission stated that the policies and procedures required by Rule 13n-5(b)(3) "could include portfolio reconciliation." Proposing Release, 75 FR at 77330, supra note 2.

734 DTCC 1*, supra note 20.

Release, maintaining accurate records is an integral function of an SDR.[735] As further explained in the Proposing Release, maintaining accurate records requires diligence on the part of an SDR because, among other things, SBSs can be amended, assigned, or terminated and positions change upon the occurrence of new events (such as corporate actions).[736]

As proposed, the rule would require an SDR's policies and procedures to address the accuracy of the transaction data and positions. For purposes of clarification, the rule as adopted requires that an SDR's policies and procedures address both the completeness and accuracy of the transaction data and positions. For example, an SDR's policies and procedures may not be reasonable if they allow data elements required under Regulation SBSR to be blank.

The Commission agrees with one commenter that the degree to which industry participants use the data will influence the accuracy of the data, and that the ability of participants to identify, test, and correct inaccuracies and errors should be encouraged.[737] The Commission also agrees with another commenter that offering an asset servicing function may assist an SDR in maintaining the validity of transaction data and positions.[738] Therefore, the Commission supports the provision by SDRs of voluntary ancillary services, such as asset servicing, that improve the quality of the SBS data in the SDRs.[739] With regard to the comment acknowledging the value to portfolio reconciliation,[740] while portfolio reconciliation is a voluntary ancillary service, the Commission believes, consistent with its position in the

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735 Proposing Release, 75 FR at 77307 and 77329-30, supra note 2.

736 Proposing Release, 75 FR at 77330, supra note 2.

737 See MarkitSERV, supra note 19.

738 See DTCC 1*, supra note 20.

739 See Section III.C of this release discussing ancillary services.

740 See DTCC 2, supra note 19.

Proposing Release,[741] that it is a method that an SDR can use to ensure reasonably the accuracy of the transaction data and positions that the SDR maintains.

4. Data Retention (Rule 13n-5(b)(4))

a. Proposed Rule

Proposed Rule 13n-5(b)(4) would require every SDR to maintain transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. Alternatively, the Commission considered, but did not propose a rule, requiring every SDR to maintain transaction data for not less than five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater, and historical positions for not less than five years.[742] Under either alternative, SDRs would be required to maintain the transaction data and historical positions (i) in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable.[743]

b. Comments on the Proposed Rule

Four commenters submitted comments relating to this proposed rule.[744] The commenters generally agreed with the Commission's proposal that SDRs should maintain SBS data for the life of the SBS contract and a reasonable time period thereafter.[745] Commenters expressed various views on whether the Commission should require SBS data to be maintained in a

741 Proposing Release, 75 FR at 77330, supra note 2 (stating that the policies and procedures required by proposed Rule 13n-5(b)(3) "could include portfolio reconciliation").

742 See Proposing Release, 75 FR at 77330, supra note 2.

743 Proposed Rule 13n-5(b)(4).

744 See DTCC 2, supra note 19; Better Markets 1, supra note 19; ISDA Temp Rule, supra note 28; Barnard, supra note 19; see also Better Markets 2, supra note 19.

745 See, e.g., DTCC 2, supra note 19.

particular format.[746] One commenter stated that "[t]he Proposed Rule should require the retention of electronic records of transactions, including life cycle events. These should be maintained for the life of the contract in order to provide an audit trail to positions and for a reasonable retention period thereafter. An SDR's records should be in an electronically readable format (where available) that allows for application and analysis."[747] The commenter also stated that "certain aggregate data should be maintained beyond the maturity of contracts to provide public availability of time series data."[748]

One commenter to the Temporary Rule Release believed that the Commission should consider requiring SBS transaction data to be recorded and reported pursuant to a single electronic data standard because "[t]his will enable transactions to be reported in an efficient and timely manner in a form readily accessible to all concerned parties."[749] The commenter recommended using Financial products Markup Language (FpML)[750] as that standard.[751] Another commenter recommended that "the Commission require that all SDRs maintain [stored SBS data] in the same format."[752] This commenter further recommended that "the Commission specifically require the SDR to organize and index accurately the transaction data and positions so that the Commission and other users of such information are easily able to obtain the specific

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746 See DTCC 2, supra note 19; Better Markets 1, supra note 19; ISDA Temp Rule, supra note 28.

747 DTCC 2, supra note 19.

748 DTCC 2, supra note 19.

749 ISDA Temp Rule, supra note 28.

750 FpML is based on XML (eXtensible Markup Language), the standard meta-language for describing data shared between applications.

751 ISDA Temp Rule, supra note 28.

752 Better Markets 1, supra note 19; see also Better Markets 2, supra note 19 (recommending reported data be subject to uniform formatting requirements).

information that they require."[753] Another commenter stated that a "registered SDR should have flexibility to specify acceptable data formats, connectivity requirements and other protocols for submitting information. Market practice, including structure of confirmation messages and detail of economic fields, evolve over time, and the SDR should have the capability to adopt and set new formats."[754]

Another commenter recommended that data be "standardized and use a common terminology."[755] The commenter also recommended that records at SDRs be kept indefinitely because the commenter believed that there is "no technological or practical reason for limiting the retention period."[756] The commenter further recommended that "[a]ny original documents should be scanned."[757]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(4) as proposed, with two modifications. Rule 13n-5(b)(4) requires every SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. Rule 13n-5(b)(4) also requires SDRs to maintain the transaction data and historical positions (i) in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable.

Time Period: As explained in the Proposing Release, a five-year retention period is the

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753 Better Markets 1, supra note 19.

754 DTCC SBSR, supra note 27.

755 Barnard, supra note 19.

756 Barnard, supra note 19.

757 Barnard, supra note 19.

current requirement for the records of clearing agencies and other registered entities, and is the statutory requirement for SB SEFs.[758] Because an SBS transaction creates obligations that continue for a specified period of time, the Commission believes that the transaction data should be maintained for the duration of the SBS, with the five years running after the SBS expires. This requirement applies to all transaction data, including life cycle events that are reported to an SDR pursuant to Regulation SBSR.[759] The Commission believes that transaction data and position data that are older than their respective retention periods will not be materially useful to the Commission or other relevant authorities.

There may be transaction-specific identifying information assigned or used by an SDR, such as a transaction ID[760] or a time stamp,[761] that are not included in the definition of "transaction data." This identifying information should also be maintained for the same time period as the transaction data because it is necessary to understanding the transaction data. Therefore, the Commission is revising the proposed rule to require SDRs to maintain "related identifying information" for not less than five years after the applicable SBS expires. Positions are not tied to any particular SBS transaction; therefore, the Commission requires positions, as

758 Proposing Release, 75 FR at 77330, supra note 2. See also Exchange Act Rule 17a-1, 17 CFR 240.17a-1 (requiring recordkeeping for national securities exchanges, national securities associations, clearing agencies, and the Municipal Securities Rulemaking Board); Exchange Act Section 3D(d)(9), 15 U.S.C. 78c-4(d)(9) (requiring recordkeeping for SB SEFs).

759 See Regulation SBSR Adopting Release, supra note 13 (Rules 901, 905, and 906(a)); see also DTCC 2, supra note 19 (recommending requiring the retention of life cycle events).

760 See Regulation SBSR Adopting Release, supra note 13 (Rule 901(g) requiring a registered SDR to assign a transaction ID to each SBS, or establish or endorse a methodology for transaction IDs to be assigned by third parties).

761 See Regulation SBSR Adopting Release, supra note 13 (Rule 901(f) requiring a registered SDR to time stamp, to the second, its receipt of any information submitted to it pursuant to Rules 901(c), (d), (e), or (i)).

calculated pursuant to Rule 13n-5(b)(2), to be maintained for five years, similar to the record retention requirement for clearing agencies.[762]

The Commission is not adopting the alternative time period that was set forth in the Proposing Release. No comments supported the alternative time period. The Commission is not adopting one commenter's recommendation that data at SDRs be kept indefinitely[763] because the Commission believes that requiring transaction data to be maintained for not less than five years after the applicable SBS expires is more reasonable,[764] and this approach is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs.

One commenter stated that "certain aggregate data should be maintained beyond the maturity of contracts to provide public availability of time series data."[765] Because the Commission is not requiring an SDR to provide the public with historic data (aggregated or otherwise) that it previously publicly disseminated, the Commission does not believe that it is appropriate to require SDRs to maintain aggregate data for public availability. However, SDRs may find it useful to maintain such data if they intend to provide the public with data sets beyond

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762 See Exchange Act Rule 17a-1, 17 CFR 240.17a-1 (requiring clearing agencies to retain records for five years). See also Exchange Act Section 13(n)(4)(C), 15 U.S.C. 78m(n)(4)(C) (requiring "standards prescribed by the Commission under this subsection [to] be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps"). Clearing Agency Standards Release, 77 FR at 66243 n.270, supra note 138 ("Clearing agencies may destroy or otherwise dispose of records at the end of five years consistent with Exchange Act Rule 17a–6.").

763 See Barnard, supra note 19.

764 See DTCC 2, supra note 19 ("[E]lectronic records of transactions . . . should be maintained for the life of the contract . . . and for a reasonable retention period thereafter.").

765 DTCC 2, supra note 19.

the public dissemination requirements of Regulation SBSR.[766] To the extent that the Commission requires the creation of aggregate data, such as through reports requested pursuant to Rule 13n-8, the data will be for regulatory purposes. Any aggregation of data that is created by an SDR, either at the Commission's direction or voluntarily, must be retained for five years pursuant to Rule 13n-7(b).[767]

Format: As explained in the Proposing Release, the Commission believes that transaction data, including life cycle events, and positions should be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information.[768] This requirement is important to ensure that SDRs maintain the information in an organized and accessible manner so that users, including relevant authorities and counterparties, can easily obtain the data that would assist them in carrying out their appropriate functions. The Commission also believes that this requirement helps ensure that the information is maintained in a common and easily accessible language, such as a language commonly used in financial markets. The Commission agrees with one commenter's recommendation that an SDR's records should "be in an electronically readable format (where available) that allows for application and analysis,"[769] and therefore the Commission is modifying proposed Rule 13n-5(b)(4) to provide that the information must be in a format that is usable to (1) the Commission and (2) other persons with authority to access or view such

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766 See Regulation SBSR Adopting Release, supra note 13 (Rule 902).

767 See Section VI.G.2 of this release.

768 Proposing Release, 75 FR at 77330, supra note 2.

769 See DTCC 2, supra note 19 (recommending that an SDR's records "be in an electronically readable format (where available) that allows for application and analysis").

information.[770] The Commission believes that if the information is not in a usable format, then the Commission and others would not have the ability to analyze the information as needed.

Despite comments to the contrary,[771] the Commission is not establishing a specific, prescribed format in which an SDR must maintain transaction data and positions. The Commission expects that the "readily accessible and usable" requirement will be sufficient to cause the format and content of transaction data and historical positions maintained by any individual SDR to be sufficiently robust and complete for relevant persons to fully, accurately, and consistently process the data. The Commission believes that SDRs, working with market participants, will be in a better position to upgrade formats and data elements as needed. Having the Commission establish a specific format could impede the timely collection of data on new types of transactions from the SDRs.[772]

However, in order to oversee the SBS market, it will be necessary for the Commission to

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770 Rule 13n-5(b)(4). The Commission notes that this change is consistent with other Commission rules. For example, Rule 605(a)(2) of Regulation NMS, 17 CFR 242.605(a)(2), requires reports be "in a uniform, readily accessible, and usable electronic form."

771 See Better Markets 1, supra note 19 (recommending that the Commission require all SDRs to maintain stored SBS data in the same format); ISDA Temp Rule, supra note 28 (recommending that the Commission require SBS transaction data to be reported and recorded pursuant to a single electronic data standard, and using FpML as that standard); Barnard, supra note 19 (recommending that data be "standardized and use a common terminology" and that original documents be scanned); see also Better Markets 2, supra note 19 (recommending that reported data be subject to uniform formatting requirements).

772 See DTCC SBSR, supra note 27 (stating that SDRs "should have flexibility to specify acceptable data formats, connectivity requirements and other protocols for submitting information," and that SDRs "should have the capability to adopt and set new formats" as market practices evolve over time).

aggregate and analyze data across different SDRs.[773] As discussed above, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies for providing SBS data to the Commission in order to facilitate an accurate interpretation, aggregation, and analysis by the Commission of SBS data submitted to it by different SDRs.[774]

The requirement for transaction data and historical positions to be maintained in an electronic format that is non-rewriteable and non-erasable[775] is consistent with the record retention format applicable to electronic broker-dealer records.[776] As explained in the Proposing Release, this requirement would prevent the maintained information from being modified or removed without detection.[777]

The Commission is not specifically requiring that SDRs organize and index the transaction data and positions that they collect and maintain.[778] The Commission believes that

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773 See Section VI.D.2.c.ii of this release discussing aggregation of data across multiple registered SDRs by the Commission.

774 See Section VI.D.2.c.ii of this release discussing Rule 13n-4(b)(5) (direct electronic access).

775 Rule 13n-5(b)(4).

776 See Exchange Act Rule 17a-4(f)(2)(ii)(A), 17 CFR 240.17a-4(f)(2)(ii)(A). In Electronic Storage of Broker-Dealer Records, Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281 (May 12, 2003), the Commission stated, among other things, that a broker-dealer would not violate Exchange Act Rule 17a-4(f)(2)(ii)(A) "if it used an electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software control codes." The Commission incorporates this interpretation into Rule 13n-5(b)(4).

777 Proposing Release, 75 FR at 77330, supra note 2.

778 See Proposing Release, 75 FR at 77331, supra note 2 (asking whether the Commission should adopt a requirement that SDRs organize and index transaction data and positions "so that the Commission and other users of such information are easily able to obtain the specific information that they require"); Better Markets 1, supra note 19.

the requirement in Rule 13n-5(b)(4) that each SDR must maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years, in a place and format that is "readily accessible and usable to the Commission and other persons with authority to access or view such information" incorporates the requirement that the data must be organized in a way that allows the data to be readily obtained or accessed by the Commission and other appropriate persons – data is not readily accessible and usable if it is not organized in a way that allows the data to be obtained quickly and easily. Further, whether users of information maintained by an SDR, other than the Commission, are able to easily obtain such information is also addressed by Rule 13n-4(c)(1)(iii), which requires, among other things, an SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to data maintained by the SDR.[779]

With respect to the Commission's ability to obtain the specific information it requires, the Commission believes that several other statutory and regulatory requirements under the Exchange Act also address this issue. For example, the Commission will have direct electronic access to the transaction data and positions pursuant to Exchange Act Section 13(n)(5)(D)[780] and Rule 13n-4(b)(5).[781] The Commission expects to be able to query and analyze the data as

779 See Section VI.D.3.a of this release discussing Rule 13n-4(c)(1)(iii).

780 15 U.S.C. 78m(n)(5)(D).

781 See Sections VI.D.1 and VI.D.2 of this release discussing Rules 13n-4(a)(5) and 13n-4(b)(5). Rule 13n-4(b)(5) requires each SDR to provide direct electronic access to the Commission or its designees; "direct electronic access" is defined in Rule 13n-4(a)(5) to mean access, which shall be in a form and manner acceptable to the Commission, to data stored by an SDR in an electronic format and updated at the same time as the SDR's data is updated so as to provide the Commission with the ability to query or analyze the data in the same manner that the SDR can query or analyze the data.

necessary without imposing an indexing requirement at this time.[782] In addition, Rule 13n-8, discussed below, requires each SDR to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Exchange Act and the rules and regulations thereunder.[783]

5. Controls to Prevent Invalidation (Rule 13n-5(b)(5))

a. Proposed Rule

Proposed Rule 13n-5(b)(5) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[784] Both commenters seemed to agree with this proposal.[785] One commenter stated that an SDR "should be able to offer life cycle event processing and asset servicing activities" that may lead to "an update or modification to the records in the SDR," with the consent of both parties.[786]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(5) as

782 Although the Commission is not imposing an indexing requirement, SDRs are required under Regulation SBSR to utilize a transaction ID for each SBS. The transaction ID is designed to allow the Commission and other relevant persons to link related activity, such as life cycle events, to the original transaction. See Regulation SBSR Adopting Release, supra note 13 (Rule 901).

783 See Section VI.H of this release discussing Rule 13n-8.

784 See DTCC 2, supra note 19; MarkitSERV, supra note 19.

785 DTCC 2, supra note 19 (supporting "the approach that records are not invalidated by the actions of the SDR"); MarkitSERV, supra note 19.

786 DTCC 2, supra note 19.

proposed. Rule 13n-5(b)(5) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. The terms of SBSs can be the result of negotiation between the counterparties, and the Commission believes that these terms should not be modified or invalidated without the full consent of the counterparties.[787]

The Commission agrees with one commenter's view that an SDR should be able to offer life cycle event processing and asset servicing activities that may lead to an updating of the records in the SDR, with the consent of both parties.[788] In such a case, it is not the SDR that is modifying the SBS, but the parties to the SBS who are doing so (or the parties are submitting information regarding the SBS that relates to the terms of the original contract); the SDR is simply updating its records to reflect the changes to the SBS made by the parties to the SBS, or to reflect life cycle events that have occurred and the parties to the SBS agree should be reflected in the updated records of the SDR. However, whenever an SDR updates its records, it must retain the data as it existed prior to the update pursuant to Rule 13n-5(b)(4), which is discussed above.[789]

If the reporting party reports inconsistent data, such as where the reporting party reports that the SBS is a standard SBS, but also reports a non-standard provision, the SDR can correct the inconsistency if it gives appropriate notice to both parties.[790] In formulating its policies and

787 See Proposing Release, 75 FR at 77331, supra note 2.

788 See DTCC 2, supra note 19.

789 See Section VI.E.4 of this release discussing Rule 13n-5(b)(4).

790 The Commission believes that an SDR's policies and procedures would not necessarily be reasonable if they authorize the SDR to "deem" a user to have effectively consented to

procedures required by Rule 13n-5(b)(5), an SDR may want to consider providing the parties with notice of the inconsistency as soon as practicable.

6. Dispute Resolution Procedures (Rule 13n-5(b)(6))

a. Proposed Rule

Proposed Rule 13n-5(b)(6) would require every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.[791]

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[792] One commenter supported this proposed rule, stating that it is a key step in the effort to have accurate data at the SDR.[793] The commenter stated that a reporting party and a non-reporting party may disagree on the terms of a reported SBS transaction and the reporting party may refuse to correct the erroneously reported transaction information.[794] The commenter urged the Commission to

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the SDR's changes if the user merely utilizes the SDR system after such change. At a minimum, the SDR should inform both parties of the change. The Commission notes that Rule 905 of Regulation SBSR establishes procedures for correcting errors in data reported to an SDR. See Regulation SBSR Adopting Release, supra note 13 (Rule 905). Additionally, as discussed in Section VI.E.6 of this release, Rule 13n-5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

791 In a separate release, the Commission is adopting rules regarding the correction of errors in SBS information maintained by an SDR in association with requirements under Dodd-Frank Act Section 763(i). See Regulation SBSR Adopting Release, supra note 13 (Rules 905 and 907(a)(3)).

792 See DTCC 2, supra note 19; MFA 1, supra note 19; see also MFA SBSR, supra note 27.

793 MFA 1, supra note 19; see also MFA SBSR, supra note 27.

794 MFA SBSR, supra note 27.

require the SDR to review promptly the disputed data with the parties.[795] The other commenter stated that it believed that "an SDR should be in a position to identify disputes or unconfirmed data as part of its process to confirm the data with both parties. However, only the parties to a transaction can resolve any dispute as to the terms of the trade."[796] Where a trade comes through a third party service provider that "act[s] directly as an affirmation, confirmation or verification platform and already utilizes dispute resolution workflows," the commenter did "not support a Proposed Rule that would require that the SDR [build] processes to replicate these services."[797] The commenter stated that "an SDR can make the quality of the data or disputed trades visible to a firm's prudential regulator and this would act as an incentive to timely resolution."[798]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-5(b)(6) as proposed. Rule 13n-5(b)(6) requires every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. As the Commission explained in the Proposing Release, the data maintained by an SDR will be used by relevant authorities and counterparties.[799] Parties, therefore, should have the ability to dispute the accuracy of the data maintained by an SDR regarding their SBSs. SDRs providing the means to resolve disputes should enhance data

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795 MFA SBSR, supra note 27.

796 DTCC 2, supra note 19.

797 DTCC 2, supra note 19.

798 DTCC 2, supra note 19.

799 Proposing Release, 75 FR at 77331, supra note 2. In some cases, the data maintained by the SDR may be considered by the counterparties to be the legal or authoritative record of the SBS. However, this is due to the consent of the counterparties. Simply reporting an SBS to an SDR does not affect the legal terms of the SBS. See Section III.A of this release discussing the service of maintaining legally binding records.

quality and integrity.

The Commission agrees with one commenter that only the parties to a dispute can resolve it,[800] but the Commission believes that SDRs can provide processes to facilitate resolution, which would improve the quality and accuracy of SBS data. The Commission does not believe that this requirement mandates that an SDR replicate the services of third party service providers, such as providing matching platforms.[801] Having both parties verify the SBS data through a third party service provider prior to submitting it to an SDR will ensure a great deal of accuracy in the data maintained by the SDR. However, there may be instances where disputes still occur, such as where a party disagrees with a position reflected in an SDR's records, where one party realizes it mistakenly verified a transaction and the other party refuses to submit or verify a correction, or where a transaction has been amended, but one party refuses to report or verify the amendment. In such instances, the Commission believes that the SDR should provide a party with the ability to raise the dispute, and have some sort of process to resolve the dispute. As with the other SDR Rules, an SDR could rely on a third party service provider to perform the SDR's obligation to provide a dispute resolution process. If it does so, in order for such a process to be "reasonably designed," the SDR would have to oversee and supervise the performance of the third party service provider. The Commission agrees with one commenter[802] that to the extent that Rule 13n-5(b)(6) makes disputes visible to regulators, the rule should incentivize parties to resolve them. In any event, the Commission believes that the rule will further increase the quality and accuracy of SBS data.

800 See DTCC 2, supra note 19.

801 See DTCC 2, supra note 19

802 See DTCC 2, supra note 19.

7. Data Preservation After an SDR Ceases to Do Business (Rule 13n-5(b)(7))

a. Proposed Rule

Proposed Rule 13n-5(b)(7) would require an SDR, if it ceases to do business, or ceases to be registered as an SDR, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by Rule 13n-5 in the manner required by the Exchange Act and the rules and regulations thereunder for the remainder of the period required by this rule.[803]

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-5(b)(7) as proposed. Rule 13n-5(b)(7) requires an SDR, if it ceases to do business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by Rule 13n-5 in the manner required by the Exchange Act and the rules and regulations thereunder (including in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information, in an electronic format that is non-rewriteable and non-erasable, and in a manner that protects confidentiality and accuracy) for the remainder of the period required by Rule 13n-5 (i.e., not less than five years after the applicable SBS expires for transaction data and not less than five years for historical positions). As the Commission explained in the Proposing Release, given the

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[803] As noted in the Proposing Release, this proposed requirement was based on Exchange Act Rule 17a-4(g), 17 CFR 240.17a-4(g), which applies to books and records of broker-dealers. Proposing Release, 75 FR at 77332 n.128, supra note 2.

importance of the records maintained by an SDR to the functioning of the SBS market, an SDR ceasing to do business could cause serious disruptions in the market should the information it maintains becomes unavailable.[804]

8. Plan for Data Preservation (Rule 13n-5(b)(8))

a. Proposed Rule

Proposed Rule 13n-5(b)(8) would require an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n-5(b)(7).

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-5(b)(8) as proposed. Rule 13n-5(b)(8) requires an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n-5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).[805] As the Commission explained in the Proposing Release, given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, the absence of a plan to transfer information could

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804 Proposing Release, 75 FR at 77332, supra note 2.

805 In addition, Item 45 of Form SDR requires each SDR to attach as an exhibit to its Form SDR "a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as [an SDR], which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered [SDR])." This item implements Rule 13n-5(b)(8).

cause serious disruptions.[806] The Commission expects that an SDR's plan would establish procedures and mechanisms so that another entity would be in the position to maintain this information after the SDR ceases to do business or ceases to be registered pursuant to Exchange Act Section 13(n)[807] and the rules and regulations thereunder.

F. Automated Systems (Rule 13n-6)

1. Proposed Rule

The Commission proposed Exchange Act Rule 13n-6 to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security. The proposed rule was designed to be comparable to the standards applicable to SROs, including exchanges and clearing agencies,[808] and market information dissemination systems, pursuant to the Commission's Automation Review Policy ("ARP") program[809] and rules applicable to significant-volume alternative trading systems ("ATSs").[810]

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806 Proposing Release, 75 FR at 77332, supra note 2.

807 15 U.S.C. 78m(n).

808 See Automated Systems of Self-Regulatory Organizations, Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989) ("ARP I Release"); Automated Systems of Self-Regulatory Organizations, Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) ("ARP II Release") (collectively, "ARP Policy Statements").

809 See ARP II Release, 56 FR at 22491 n.4, supra note 808 (stating that the Commission's automated review policies are intended to "encompass SRO systems that disseminate transaction and quotation information"); see also ARP I Release, 54 FR at 48704, supra note 808 (discussing that "the SROs have developed and continue to enhance automated systems for the dissemination of transaction and quotation information").

810 See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Rule 301(b)(6) of Regulation ATS, 17 CFR 242.301(b)(6)). Rule 301(b)(6) has since been superseded in part by Regulation SCI, 17 CFR 242.1000 – 1007.

2. Comments on the Proposed Rule

Three commenters submitted comments relating to proposed Rule 13n-6.[811] One commenter "support[ed] the Commission's intent" behind the rule, but suggested several specific changes.[812] The commenter also stated that it "has always placed a high priority on maintaining business resiliency," including having "in place multiple fully staffed data and operations centers in diverse regions of the country, each capable of handling [the commenter's] entire business."[813] The commenter stated that it "performs both data center and operational failover tests every year" and "[d]atacenter recovery tests are performed at least six times a year in various configurations, and there are more than two dozen operational failover tests each year, ranging from a single department failover, to an operational recovery involving more than 400 staff."[814] The commenter believed that "[t]hese capabilities are fundamental to any registration as an SDR."[815] The commenter further stated that "'[g]iven the importance of SDRs to the regulatory and systemic risk oversight of the financial markets and the important role they will play in

811 See DTCC 2, supra note 19; Deutsche Temp Rule, supra note 28; ISDA, supra note 19; see also DTCC 3, supra note 19; DTCC 5, supra note 19.

812 See DTCC 2, supra note 19 (stating that business continuity provisions should include multiple redundant systems, supporting "the Commission in requiring robust operational capabilities of an SDR," and stating that SDRs should "maintain multiple levels of operational redundancy"); DTCC 3, supra note 19 (recommending that SDRs "maintain multiple levels of operational redundancy and data security"); DTCC 5, supra note 19 (recommending (1) granting an SDR flexibility to make contingency and disaster recovery plans part of a parent's or affiliate's disaster recovery operations, (2) revising proposed Rule 13n-6(b)(2) to require an external audit only once every five years when the SDR's objective review is performed by an internal department rather than every year, and (3) revising proposed Rule 13n-6(b)(3) to be less prescriptive in its time frames and grant more flexibility to an SDR for reporting outages).

813 DTCC 2, supra note 19.

814 DTCC 2, supra note 19.

815 DTCC 2, supra note 19.

providing market transparency, a lack of robust resiliency and redundancy in operations should disqualify an entity from registering as an SDR."[816]

The second commenter suggested that the Commission "take all possible steps to ensure that identifying information is protected by SDRs and the [Commission]."[817] The third commenter believed that SDRs, among other entities, should "have proper safeguards and barriers in place in order to ensure the security of data, prevent cyber-crime and safeguard against inappropriate access," and that such entities should "make the appropriate level of investment to design, implement and continually review their information barriers . . . in order to protect markets and market participants."[818] The commenter also believed that "[i]t is equally important that regulators ensure that the viability and rigor of these information barriers . . . are reviewed and audited as they are at all other market participants."[819]

3. Final Rule

After considering the comments received on this proposal, the Commission is not adopting the more specific requirements of proposed Rule 13n-6(b)(1),[820] but is instead adopting the core policies and procedures requirement. Thus, final Rule 13n-6 is consistent with, but is

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816 DTCC 2, supra note 19; see also DTCC 3, supra note 19 (recommending that "a failure to demonstrate robust resiliency, security and redundancy in operations should preclude an entity from registering as an SDR").

817 Deutsche Temp Rule, supra note 28 (stating that the Commission should use its authority under Dodd-Frank Act Section 763 to "impose strict requirements on the handling, disclosure and use by the SDRs of identifying information and on the operational and technological measures that must be employed by SDRs to protect such information from disclosure (including by way of unauthorized access)").

818 ISDA, supra note 19 ("[T]here is a real need for [SDRs] to have robust policies, procedures and systems in place to address the information barrier and privacy issue.").

819 ISDA, supra note 19.

820 Rule 13n-6 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). See 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9).

more general and flexible than, proposed Rule 13n-6. Final Rule 13n-6 provides in full that "[e]very security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security."[821] The Commission is not adopting proposed Rules 13n-6(b)(2), (3), and (4).[822]

The Commission is not adopting Rule 13n-6 as proposed because, after proposing Rule 13n-6, the Commission considered the need for an updated regulatory framework for certain systems of the U.S. securities trading markets and adopted Regulation Systems Compliance and Integrity ("Regulation SCI").[823] Regulation SCI supersedes the Commission's ARP Policy Statements and Rule 301(b)(6) of Regulation ATS (with respect to significant-volume ATSs that

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821 Rule 13n-6 is similar to the first sentence in proposed Rule 13n-6(b)(1). As adopted, the words "integrity" and "availability" have been added. The addition is consistent with, and captures concepts in, the rule as proposed, which implicitly addressed both integrity and availability. See Proposing Release, 75 FR at 77370, supra note 2 (proposing requirement that an SDR has policies and procedures that, at a minimum, (i) establish reasonable current and future capacity estimates; (ii) conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner; (iii) develop and implement reasonable procedures to review and keep current its system development and testing methodology; (iv) review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and (v) establish adequate contingency and disaster recovery plans). These edits also make Rule 13n-6 more consistent with Rule 1001(a)(1) of Regulation SCI, 17 CFR 242.1000(a)(1) (requiring each SCI entity to "establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets").

822 In addition, the Commission is not adopting proposed Rules 13n-6(a), (c), and (d) because they are not applicable without proposed Rules 13n-6(b)(2), (3), and (4).

823 See Regulation Systems Compliance and Integrity, Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014) ("Regulation SCI Adopting Release").

trade NMS stocks[824] and non-NMS stocks), on which proposed Rule 13n-6 was largely based. The Regulation SCI Adopting Release includes a discussion of comment letters addressing the application of Regulation SCI to SDRs.[825]

In light of this development, the Commission believes that Rule 13n-6, as adopted, better sets an appropriate core framework for the policies and procedures of SDRs with respect to automated systems. While this framework responds to comments about the application of Regulation SCI to SDRs and is broadly consistent with Regulation SCI, Rule 13n-6 does not apply Regulation SCI and its specific obligations to SDRs.[826] In adopting Regulation SCI, the Commission explained that it will "monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of market participants."[827] Consistent with this approach and in recognition of the importance of SDRs as the primary repositories of SBS trade information, the Commission may consider the application of any features of Regulation SCI to SDRs in the future. In addition, to the extent that an SDR may share systems with an SCI entity (e.g., an affiliated clearing agency), such systems may meet the definition of "indirect SCI systems" of the SCI entity, as defined in Regulation SCI, and certain provisions of Regulation

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824 See 17 CFR 242.600 (defining "NMS stock").

825 Regulation SCI Adopting Release, 79 FR at 72363-4, supra note 823.

826 In preparing their policies and procedures, SDRs may consider whether to incorporate aspects of Regulation SCI that may be appropriate for their particular implementation of Rule 13n-6, including where an SDR is related by virtue of its corporate structure to an entity subject to Regulation SCI.

827 Regulation SCI Adopting Release, 79 FR at 72259, supra note 823.

SCI may apply.[828]

Rule 13n-6 applies to "systems that support or are integrally related to the performance of [each SDR's] activities."[829] This includes automated systems that support or are integrally related to performing both core and ancillary services, including functions that may be required by Regulation SBSR, such as public dissemination of SBS information.[830] To the extent that an SDR uses a third party service provider to perform the SDR's functions, the SDR's policies and procedures required by Rule 13n-6 continue to apply; an SDR cannot absolve itself of its responsibilities under this rule through the use of a third party service provider.

The Commission believes that Rule 13n-6 addresses commenters' concerns about operational capabilities and protecting information.[831] With respect to comments suggesting specific substantive requirements,[832] the Commission believes that a more measured approach is to adopt a rule that requires SDRs to adopt policies and procedures reasonably designed to ensure that they have adequate levels of capacity, integrity, resiliency, availability, and security. Consistent with the comments,[833] an SDR may want to consider, in developing its policies and procedures required by Rule 13n-6, whether to include the establishment and maintenance of

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828 See Regulation SCI, 17 CFR 242.1000-1007. Rule 1000 of Regulation SCI defines "indirect SCI systems" as "any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems."

829 Rule 13n-6.

830 See Regulation SBSR Adopting Release, supra note 13; see also ARP II Release, 56 FR at 22491 n.4, supra note 808 (stating that ARP standards encompass "systems that disseminate transaction and quotation information").

831 See DTCC 2, supra note 19; Deutsche Temp Rule, supra note 28; ISDA, supra note 19.

832 See DTCC 2, supra note 19; DTCC 3, supra note 19; Deutsche Temp Rule, supra note 28.

833 See DTCC 2, supra note 19; DTCC 3, supra note 19; Deutsche Temp Rule, supra note 28.

multiple redundant systems and data and operations centers in diverse regions of the country,[834] periodic data center and operational failover tests,[835] robust operational capabilities,[836] and multiple levels of operational redundancy and data security.[837] The Commission also believes that an SDR's policies and procedures required by Rule 13n-6 can be "a part of or consistent with a parent or affiliate entity's disaster recovery operations."[838] The Commission further believes that Rule 13n-6 is consistent with one commenter's recommendation that SDRs should "have proper safeguards and barriers in place in order to ensure the security of data, prevent cyber-crime and safeguard against inappropriate access."[839] Additionally, the Commission believes that to comply with Rule 13n-6, SDRs will likely need to "make the appropriate level of investment to design, implement and continually review their information barriers . . . in order to protect markets and market participants."[840]

G. SDR Recordkeeping (Rule 13n-7)

The Commission proposed Rule 13n-7 to specify the books and records requirements applicable to SDRs. After receiving no comments on this proposal, the Commission is adopting Rule 13n-7 as proposed, with some technical modifications.

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834 See DTCC 2, supra note 19.

835 See DTCC 2, supra note 19.

836 See DTCC 2, supra note 19; Deutsche Temp Rule, supra note 28 (commenting on the need for "strict requirements . . . on the operational and technological measures . . . employed by SDRs to protect [reported data] from disclosure (including by way of unauthorized access)").

837 See DTCC 2, supra note 19; DTCC 3, supra note 19.

838 DTCC 5, supra note 19.

839 ISDA, supra note 19.

840 ISDA, supra note 19.

1. Records to be Made by SDRs (Rule 13n-7(a))

a. Proposed Rule

Proposed Rule 13n-7(a) would require every SDR to make and keep current certain books and records relating to its business.

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-7(a)(1) as proposed. Rule 13n-7(a)(1) requires every SDR to make and keep current "a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records." The Commission continues to believe that SDR recordkeeping practices may vary in ways ranging from format and presentation to the name of a record.[841] Therefore, as explained in the Proposing Release, the Commission believes that each SDR must be able to promptly explain how it makes, keeps, and titles its records.[842] To comply with this rule, an SDR may identify more than one person and list which records each person is able to explain. Because it may be burdensome for an SDR to keep this record current if it lists each person by name, an SDR may satisfy this requirement by recording the persons capable of explaining the SDR's records by either name or title.

The Commission is also adopting Rule 13n-7(a)(2) as proposed. Rule 13n-7(a)(2) requires every SDR to make and keep current "a record listing each officer, manager, or person

841 See Proposing Release, 75 FR at 77337, supra note 2.

842 Proposing Release, 75 FR at 77337, supra note 2.

performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the [Exchange] Act and the rules and regulations thereunder." This rule is intended to assist securities regulators by identifying individuals responsible for designing an SDR's compliance policies and procedures.

The purpose of both Rules 13n-7(a)(1) and 13n-7(a)(2) is to assist the Commission in its inspection and examination function.[843] These two requirements are based on Exchange Act Rules 17a-3(a)(21) and (22), respectively, which are applicable to broker-dealers.[844] It is important for the Commission's examiners to have the ability to find quickly what records are maintained in a particular office and who is responsible for establishing particular policies and procedures of an SDR.

2. Records to be Preserved by SDRs (Rule 13n-7(b))

a. Proposed Rule

Proposed Rule 13n-7(b) would require every SDR to keep and preserve copies of its documents, keep such documents for a period of not less than five years, the first two in a place that is immediately available to Commission staff, and promptly furnish such documents to Commission staff upon request.

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

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843 See Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (stating that "[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission"); see also Rule 13n-4(b)(1) (implementing same requirement).

844 17 CFR 240.17a-3(a)(21) and (22).

c. Final Rule

The Commission is adopting Rule 13n-7(b) as proposed, with one technical modification. Rule 13n-7(b)(1) requires every SDR to "keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the [Exchange] Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such." Rule 13n-7(b)(2) requires every SDR to "keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination."[845] Rule 13n-7(b)(3) requires every SDR to, "upon request of any representative of the Commission, promptly furnish[846] to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to sections (a) and (b) of this [rule]."

Rule 13n-7(b) is based on Exchange Act Rule 17a-1, which is the recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies, and

845 The Commission is making a technical modification to Rule 13n-7(b)(2) from the proposal. As proposed, the rule referred to "the staff of the Commission." As adopted, the rule instead refers to "representatives of the Commission" for consistency with other rules being adopted in this release. See Rule 13n-4(b)(1) and Rule 13n-7(b)(3) (both referring to "any representative of the Commission").

846 For purposes of Rule 13n-7(b)(3), the Commission interprets the term "promptly" to mean making reasonable efforts to produce records that are requested by Commission representatives during an examination without delay. The Commission believes that in many cases, an SDR could, and therefore will be required to, furnish records immediately or within a few hours of a request. The Commission expects that only in unusual circumstances would an SDR be permitted to delay furnishing records for more than 24 hours. Accord Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67578-67579 n.1347 (Nov. 12, 2013) (interpreting the term "prompt" in the context of Exchange Act Rule 15Ba1-8(d)).

the Municipal Securities Rulemaking Board.[847] As explained in the Proposing Release, Rule 13n-7(b) is intended to set forth the recordkeeping obligation of SDRs and thereby facilitate implementation of the broad inspection authority given to the Commission in Exchange Act Section 13(n)(2).[848] This rule includes all electronic documents and correspondence, such as data dictionaries, e-mails and instant messages, which should be furnished in their original electronic format.

3. Recordkeeping After an SDR Ceases to do Business (Rule 13n-7(c))

a. Proposed Rule

Proposed Rule 13n-7(c) would require an SDR that ceases doing business, or ceases to be registered as an SDR, to continue to preserve, maintain, and make accessible the records/data required to be collected, maintained, and preserved by Rule 13n-7 in the manner required by this rule and for the remainder of the period required by this rule.[849]

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-7(c) as proposed, with a technical modification. Rule 13n-7(c) requires an SDR that ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve,

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847 17 CFR 240.17a-1.

848 15 U.S.C. 78m(n)(2); see also Rule 13n-4(b)(1) (implementing same requirement); Proposing Release, 75 FR at 77338, supra note 2.

849 This requirement is based on Exchange Act Rule 17a-4(g), 17 CFR 240.17a-4(g), which applies to books and records of broker-dealers.

maintain, and make accessible the records and data[850] required to be collected, maintained, and preserved by Rule 13n-7 in the manner required by this rule and for the remainder of the period required by this rule. This requirement is intended to allow Commission representatives to perform effective inspections and examinations of an SDR pursuant to Exchange Act Section 13(n)(2).[851] In addition, the Commission notes that, as discussed in Section VI.B of this release regarding Rule 13n-2, an SDR that ceases to exist or do business as an SDR is required to file a withdrawal from registration on Form SDR pursuant to Rule 13n-2(b) and designate on Item 12 of Form SDR a custodian of books and records.

An SDR may wish to consider establishing contingency plans so that another entity will be in the position to maintain the SDR's records and data after the SDR ceases to do business. The Commission notes that the requirement in Rule 13n-5(b)(8) for an SDR to make and keep current a plan to ensure that the SDR's transaction data and positions are maintained after it ceases doing business or ceases to be registered[852] does not expressly extend to a plan for maintaining all of the records and data required to be maintained pursuant to Rule 13n-7, but that plan could also include such records and data.

4. Applicability (Rule 13n-7(d))

a. Proposed Rule

Proposed Rule 13n-7(d) provided that Rule 13n-7 "does not apply to data collected and maintained pursuant to Rule 13n-5."

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850 The Commission is making a technical amendment to Rule 13n-7(c) from the proposal. As proposed, the rule referred to "records/data." The rule being adopted refers to "records and data" for clarity.

851 15 U.S.C. 78m(n)(2); see also Rule 13n-4(b)(1) (implementing same requirement).

852 See Section VI.E.8 of this release discussing Rule 13n-5(b)(8).

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n-7(d) as proposed, with a technical modification. Rule 13n-7(d) states that Rule 13n-7 "does not apply to transaction data and positions collected and maintained pursuant to Rule 13n-5."[853] As explained in the Proposing Release, the purpose of this rule is to clarify that the requirements in Rule 13n-7 are designed to capture those records of an SDR other than the transaction data, positions, and market data that would be required to be maintained in accordance with Rule 13n-5, as discussed in Section VI.E of this release.[854] The requirements of Rule 13n-7 do apply to records that an SDR creates using the data required to be maintained in accordance with Rule 13n-5, such as aggregate reports.

H. Reports to be Provided to the Commission (Rule 13n-8)

The Commission proposed Rule 13n-8 to specify certain reports that an SDR would be required to provide to the Commission. After considering the two comments received on this proposal, the Commission is adopting Rule 13n-8 as proposed.

853 The Commission is making a technical modification to Rule 13n-7(d) from the proposal, changing "data" to "transaction data and positions." This is to clarify that the data that Rule 13n-7 does not apply to is limited to transaction data and positions, both of which are required to be maintained in accordance with Rule 13n-5(b)(4). Rule 13n-7 applies to other information that may be created pursuant to Rule 13n-5, but which is not required to be maintained pursuant to Rule 13n-5(b)(4). For example, in order to assure itself of compliance with Rule 13n-5(b)(1)(iv), an SDR could run tests to determine how long it takes for it to record transaction data that it receives. Data from such test would be required to be retained pursuant to Rule 13n-7, not Rule 13n-5(b)(4). The Commission clearly contemplated this distinction in the Proposing Release when it stated that Rule 13n-7(d) was proposed to clarify that Rule 13n-7 was designed to capture those records other than the data required to be maintained in accordance with proposed Rule 13n-5. <u>See</u> Proposing Release, 75 FR at 77338, <u>supra</u> note 2.

854 Proposing Release, 75 FR at 77338, <u>supra</u> note 2.

1. Proposed Rule

Proposed Rule 13n-8 would require every SDR to "promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act and the rules and regulations thereunder." This proposed rule was designed to provide the Commission with the necessary information for it to fulfill its regulatory duties.

2. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[855] One commenter stated that it "currently makes information available directly to regulators, having created a web portal for access to scheduled reports, and providing extracts from [the trade repository's] database based on parameters set by regulators . . . . Through this system, [the commenter] expects to be able to offer acceptable access to the Commission."[856] The other commenter recommended that reports "be standardized and use a common terminology."[857]

3. Final Rule

After considering the comments, the Commission is adopting Rule 13n-8 as proposed. Rule 13n-8 requires every SDR to "promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary

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855 See DTCC 2, supra note 19; Barnard, supra note 19. In addition, one commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished to the Commission pursuant to the rules in that release, which could be information similar to that reported to the Commission under Rule 13n-8, confidential under FOIA or to seek a legislative solution. See Deutsche Temp Rule, supra note 28.

856 DTCC 2, supra note 19.

857 Barnard, supra note 19.

or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act and the rules and regulations thereunder." This requirement provides flexibility to the Commission to obtain information on a case-by-case basis and in connection with fulfilling its examination function.[858]

Under Rule 13n-8, the Commission may request specific reports related to the final SDR Rules.[859] For example, in the Proposing Release, the Commission stated that it may request a report on the number of complaints an SDR has received pertaining to data integrity.[860] In addition, the Commission may request other reports in the future based upon, for example, developments in the SBS markets or a newly identified need for particular SBS information. The Commission expects that an SDR will be able to promptly report any information in its possession to the Commission pursuant to Rule 13n-8. If the report involves provision of SBS data, then the Commission could require an SDR to adhere to any formats and taxonomies

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858 One commenter describes its approach to addressing the proposed rule's requirements. See DTCC 2, supra note 19. With respect to the commenter to the Temporary Rule Release suggesting that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that release confidential under FOIA or to seek a legislative solution, the Commission anticipates that it will keep reported data that SDRs submit to the Commission (via Rule 13n-8 or any other means) confidential, subject to the provisions of applicable law. See Deutsche Temp Rule, supra note 28. Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. See 17 CFR 200.83 (regarding confidential treatment procedures under FOIA). The Commission does not intend to affirmatively seek any legislative action to protect further such information. The commenter is not precluded from doing so on its own initiative.

859 In a separate release, the Commission is adopting a rule requiring an SDR to provide the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to the SDR. See Regulation SBSR Adopting Release, supra note 13 (Rule 907(e)).

860 Proposing Release, 75 FR at 77339, supra note 2.

required pursuant to Rule 13n-4(b)(5).[861] This approach is consistent with one commenter's recommendation that reports "be standardized and use common terminology."[862]

I. Privacy of SBS Transaction Information and Disclosure to Market Participants (Rules 13n-9 and 13n-10)

1. Privacy Requirements (Rule 13n-9)

Proposed Rule 13n-9 set forth requirements to implement an SDR's statutory duty to "maintain the privacy of any and all security-based swap transaction information that the [SDR] receives from a security-based swap dealer, counterparty, or any other registered entity."[863] After considering the comments received on the proposal, the Commission is adopting the rule as proposed.

a. Proposed Rule

Proposed Rule 13n-9 would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. Such policies and procedures would be required to include, but not be limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates and nonaffiliated third parties.[864] The proposed rule would also require each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of (i) any confidential information received by the SDR; (ii) material,

861 See Section VI.D.2.c.ii of this release discussing anticipated Commission proposal pursuant to Rule 13n-4(b)(5). With regard to other types of reports, the Commission will seek to work with SDRs to develop the form and the manner for the SDRs to provide the Commission with the information it needs, while seeking to minimize the SDRs' burdens.

862 See Barnard, supra note 19.

863 See Exchange Act Section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F).

864 Proposed Rule 13n-9(b)(1).

nonpublic information; and/or (iii) intellectual property, by the SDR or any person associated with the SDR for their personal benefit or the benefit of others.[865] Such safeguards, policies, and procedures would be required to address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance of this provision.[866]

b. Comments on the Proposed Rule

Five commenters submitted comments relating to this proposed rule.[867] Two of the commenters supported the proposal.[868] One commenter "fully support[ed] the Commission's efforts to protect the privacy of any and all SBS transaction information received by an SDR" and believed that "no communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty."[869] The commenter suggested that the definition of "personally identifiable information" in proposed Rule 13n-9(a)(6) be limited to information that is not otherwise disclosed or made available to the public.[870] In making its suggestion, the commenter stated that

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865 Proposed Rule 13n-9(b)(2).

866 Id.

867 See DTCC 2, supra note 19; MFA 1, supra note 19; TriOptima, supra note 19; Deutsche Temp Rule, supra note 28; ISDA, supra note 19; see also DTCC 5, supra note 19.

868 See DTCC 2, supra note 19; MFA 1, supra note 19. The Commission received no comments on proposed Rule 13n-9(a), which set forth the definitions applicable to the rule, and is adopting each of them as proposed. See supra note 247 (discussing a general comment regarding the term "affiliate").

869 DTCC 2, supra note 19; see also DTCC 5, supra note 19.

870 DTCC 5, supra note 19.

"[b]ecause much of the information utilized to on-board participants or to identify counterparties to an [SBS] will be publicly available through websites issuing legal entity identifiers or similar identifiers, this information should not be considered confidential simply because it is required by an [SDR]."[871]

Another commenter also "agree[d] with the Commission's concerns about privacy of SBS data" and "strongly support[ed] imposing privacy requirements on [SDRs]."[872] Specifically, the commenter supported the Commission's proposed requirements related to policies and procedures reasonably designed to protect the privacy of SBS transaction information and noted that "such privacy protections will ensure that market participants utilize the services of registered [SDRs] with confidence."[873] The commenter made a number of suggestions. First, the commenter suggested that the Commission add safeguards related to "confidentiality of trading positions" to the Commission's proposed rule because disclosure of position information could reveal market participants' customized and proprietary investment strategies in which they invest heavily and "which form the foundation of their businesses."[874] Second, the commenter suggested that the Commission expand its proposed rules to include a standard of care that would require SDRs to adopt policies and procedures to ensure that any confidential information received will be used solely for the purpose of fulfilling regulatory

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871 DTCC 5, supra note 19.

872 MFA 1, supra note 19.

873 MFA 1, supra note 19 ("Specifically, we recommend adding to the information covered under [proposed Rule] 13n-9(b): (i) information related to transactions of a market participant, including the size and volume of such transactions; (ii) the identity of each market participant; and (iii) the details of any master agreement (to the extent provided) governing the relevant SBS.").

874 MFA 1, supra note 19.

obligations.[875] Third, the commenter suggested that the Commission require SDRs to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill regulatory obligations.[876] The commenter noted that "[t]hose policies and procedures should also have a mechanism in place for all [SDR representatives] to be informed of, and required to follow, the [SDR's] policies and procedures related to privacy of information received."[877] The commenter believed that such persons should be liable for any breach of an SDR's policies and procedures related to privacy of information.[878]

Another commenter suggested that "where trading counterparties have given [written authorizations] in favor of a third party service provider to access their [SBS transaction information], there is no need to have the third party service provider observe the [SDR's] privacy policies and procedures."[879] The commenter stated that "if the counterparties to a trade authorize the third party service provider to use their information, an [SDR] should not be able to restrict or limit such use through privacy policies and procedures when the owners of the

875 MFA 1, supra note 19.

876 MFA 1, supra note 19.

877 MFA 1, supra note 19.

878 MFA 1, supra note 19.

879 TriOptima, supra note 19 (stating that "establishment of clear rights and obligations governing access to [SDR] Information" is an important element in establishing "fair, secure and efficient market functioning for market participants," and believing that it would "be appropriate and helpful to the market if the SEC can clarify in the final rule that [SDRs] shall provide third party service providers, who have been authorized to access information by the counterparties to the relevant trades under Written Client Disclosure Consents, with access to [SDR] Information").

information have provided appropriate consents and authorizations."[880]

Consistent with the commenters supporting proposed Rule 13n-9, a commenter to the Temporary Rule Release stated that "market participants have legitimate interests in the protection of their confidential and identifying financial information."[881] In this regard, the commenter suggested that the Commission "take all possible steps to ensure that identifying information is protected by SDRs and the [Commission]" and that the Commission use its statutory authority under Dodd-Frank Act Section 763 to "impose strict requirements on the handling, disclosure and use by the SDRs of identifying information and on the operational and technological measures that must be employed by SDRs to protect such information from disclosure (including by way of unauthorized access)."[882]

Another commenter believed that "non-bank entities," including SDRs, should "make the appropriate level of investment to design, implement and continually review their . . . data privacy policies and procedures in order to protect markets and market participants."[883] The commenter also believed that "[i]t is equally important that regulators ensure that the viability and rigor of these . . . privacy policies are reviewed and audited as they are at all other market participants."[884]

880 TriOptima, supra note 19 (asking the Commission to "treat a third party service provider with a disclosure consent as acting as an 'agent' for the owner of the trade information and provide the third party service provider with the same type of access which the owner of such data is entitled to, subject to any restrictions set out in the disclosure consent").

881 Deutsche Temp Rule, supra note 28.

882 Deutsche Temp Rule, supra note 28.

883 ISDA, supra note 19 ("[T]here is a real need for [SDRs] to have robust policies, procedures and systems in place to address the information barrier and privacy issue.").

884 ISDA, supra note 19.

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-9 as proposed, with two minor modifications.[885] Specifically, Rule 13n-9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. The rule further provides that such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates[886] and nonaffiliated third parties.[887] As mentioned above, the Exchange Act[888] requires, and commenters supported, the Commission's imposition of privacy requirements on SDRs.[889]

Additionally, Rule 13n-9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (1) any confidential information received by the SDR, including, but not limited

885 See infra note 886 (discussing revised definition of "control") and note 890 (discussing revised definition of "nonpublic personal information").

886 See supra notes 247 and 621 (defining "affiliate" and "control"). The Commission is correcting a typographical error in the proposed definition of "control." Proposed Rule 13n-9(a)(2)(ii) referred to the right to vote 25 percent "of" more of a class of securities. See Proposing Release, 75 FR at 77371, supra note 2. As adopted, Rule 13n-9(a)(2)(ii) refers to the right to vote 25 percent "or" more of a class of securities. See also Rule 13n-4(a)(3).

887 Rule 13n-9(b)(1); see also supra note 622 (defining "nonaffiliated third party").

888 See Exchange Act Section 13(n)(5), 15 U.S.C. 78m(n)(5).

889 See DTCC 2, supra note 19; MFA 1, supra note 19 (noting that an SDR's protection of the privacy of SBS transaction information "will ensure that market participants utilize the services of [a] registered [SDR] with confidence").

to, trade data, position data, and any nonpublic personal information[890] about a market participant[891] or any of its customers; (2) material, nonpublic information; and/or (3) intellectual property, such as trading strategies or portfolio positions, by the SDR or any person associated with the SDR[892] for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance with Rule 13n-9(b)(2).[893] As stated in the Proposing Release, Rule 13n-9(b)(2) incorporates current requirements regarding the treatment of proprietary information of clearing members, which are contained in exemptive orders issued to

[890] In response to one commenter's suggestion, the Commission is revising the definition of "nonpublic personal information" from the proposal to mean (1) personally identifiable information that is not publicly available information and (2) any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information. See Rule 13n-9(a)(5); DTCC 5, supra note 19 (suggesting limiting the applicability of Rule 13n-9 to "personally identifiable information" that is not otherwise disclosed or made available to the public "[b]ecause much of the information utilized to on-board participants or to identify counterparties to an [SBS] will be publicly available through websites issuing legal entity identifiers or similar identifiers, this information should not be considered confidential simply because it is required by an [SDR]"). This revision, which limits personally identifiable information to not publicly available information, is consistent with the definition of "nonpublic personal information" in Regulation SP, 17 CFR 248.3(t). The term "personally identifiable information" is defined as any information (i) a market participant provides to an SDR to obtain service from the SDR, (ii) about a market participant resulting from any transaction involving a service between the SDR and the market participant, or (iii) the SDR obtains about a market participant in connection with providing a service to that market participant. See Rule 13n-9(a)(6).

[891] See supra note 583 (defining "market participant").

[892] See supra note 621 (defining "person associated with a security-based swap data repository").

[893] Id.

SBS clearing agencies,[894] and draws from Exchange Act Section 15(g), which requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.[895]

The Commission anticipates that as a central recordkeeper of SBS transactions, each SDR will receive proprietary and highly sensitive information, which could disclose, for instance, a market participant's trade information, trading strategy, or nonpublic personal information.[896] Rule 13n-9 is designed to ensure that an SDR has reasonable safeguards, policies, and procedures in place to protect such information from being misappropriated or

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894 See, e.g., Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps and Request for Comment, Exchange Act Release No. 63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010) ("ICE Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of clearing members to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) establishing and maintaining standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed . . . ."); Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010), and Exchange Act Release No. 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe, Limited). See also Proposing Release, 75 FR at 77339 n.171, supra note 2.

895 See 15 U.S.C. 78o(g); see also Exchange Act Section 15F(j)(5), 15 U.S.C. 78o-10(j)(5) (requiring SBS dealers and major SBS participants to "establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the [enumerated] core principles of open access and the business conduct standards").

896 See Proposing Release, 75 FR at 77339, supra note 2.

misused by the SDR or any person associated with the SDR. The Commission agrees with one commenter's view that "market participants have legitimate interests in the protection of their confidential and identifying financial information," and Rule 13n-9 sets forth requirements sufficient to protect such information from disclosure, as the commenter suggested.[897]

The Commission also believes that as part of an SDR's responsibility to have adequate oversight to ensure compliance with Rule 13n-9, an SDR's governance arrangements and organizational structure should have adequate internal controls to protect against misappropriation or misuse of a market participant's trade information, trading strategy, or nonpublic personal information.[898] For instance, an SDR could limit access to the proprietary and sensitive information by creating informational, technological, and physical barriers. Consistent with one commenter's suggestion,[899] an SDR could also limit access to the data that it maintains to only those officers, directors, employees, and agents who need to know the data to perform their job responsibilities, including responsibilities to fulfill the SDR's regulatory obligations. An SDR may want to consider limiting such access to data only to the extent that such access is justified based on the particular job responsibilities of the officers, directors, employees, or agents. In preventing the misappropriation or misuse of confidential information, material, nonpublic information, and intellectual property pursuant to Rule 13n-9(b)(2), an SDR could have controls to prevent unauthorized or unintentional access to its data. An SDR may want to consider holding its officers, directors, employees, and agents contractually liable for a

897 See Deutsche Temp Rule, supra note 28.

898 See Proposing Release, 75 FR at 77339, supra note 2.

899 See MFA 1, supra note 19.

breach of its privacy policies and procedures, as suggested by one commenter.[900] In order for an SDR to enforce effectively its written policies and procedures to protect the privacy of SBS transaction information, it is reasonable to expect that the SDR must, as one commenter noted,[901] properly convey these policies and procedures to all those subject to its privacy requirements.

Additionally, in establishing standards pertaining to the trading by persons associated with an SDR in accordance with Rule 13n-9(b)(2), the SDR should consider restricting the trading activities of individuals who have access to proprietary or sensitive information maintained by the SDR or implementing firm-wide restrictions on trading certain SBSs, as well as underlying or related investment instruments.[902] Such restrictions could include, for example, a pre-trade clearance requirement. An SDR should also have systems in place to prevent and detect insider trading by the SDR or persons associated with the SDR. Such systems could include a mechanism to monitor such persons' access to the SDR's data, their trading activities, and their e-mails.[903]

The Commission believes that to the extent that an SDR or any person associated with the SDR shares information with the SDR's affiliate or a nonaffiliated third party, the SDR's policies and procedures pursuant to Rule 13n-9(b)(1) should be reasonably designed to protect

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900 See MFA 1, supra note 19.

901 See MFA 1, supra note 19.

902 See Proposing Release, 75 FR at 77339-77340, supra note 2.

903 Cf., e.g., Janney Montgomery Scott LLC, Exchange Act Release No. 64855, 2011 SEC LEXIS 3166 (July 11, 2011) (finding, in a settled action, Exchange Act Section 15(g) violation where broker-dealer failed to monitor its proprietary trading and employee trading); Merrill Lynch, Pierce, Fenner & Smith, Inc., Exchange Act Release No. 59555, 2009 SEC LEXIS 660 (Mar. 11, 2009) (finding, in a settled action, Exchange Act Section 15(f) [subsequently renumbered as Section 15(g)] violation where broker-dealer failed to limit or monitor traders' access to the equity squawk box that broadcasts material, nonpublic information).

the privacy of the information shared.[904] One option that an SDR could choose to comply with this requirement would be to require the affiliate or nonaffiliated party to consent to being subject to the SDR's privacy policies and procedures as a condition of receiving any sensitive information from the SDR.[905]

Consistent with one commenter's view, the Commission agrees that an SDR will likely need to make an appropriate level of investment to design, implement, and periodically review its privacy policies and procedures "in order to protect markets and market participants,"[906] but that an SDR should have some flexibility to develop reasonable policies and procedures to protect the privacy of the SBS transaction information that the SDR receives. One approach, as one commenter suggested,[907] may be for an SDR's policies and procedures to require consent of counterparties prior to communication of the SBS transaction information to an SDR's affiliate or a nonaffiliated third party.[908] An SDR may, however, develop other reasonable policies and procedures to protect the privacy of the SBS transaction information.

With respect to one commenter's suggestion that the Commission add safeguards related

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904 See Proposing Release, 75 FR at 77340, supra note 2.

905 The Commission notes that CFTC Rule 49.17(e) permits a third party service provider to access swap data maintained by a swap data repository on the condition that both the swap data repository and the provider have strict confidentiality procedures that protect data and information from proper disclosure and that they execute a "confidentiality agreement." See 17 CFR 49.17(e).

906 See ISDA, supra note 19.

907 See DTCC 2, supra note 19 ("[N]o communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.").

908 The Commission notes that CFTC Rule 49.17(g) requires a swap data repository to obtain express written consent from the swap dealer, counterparty, or any other registered entity that submits the swap data maintained by the swap data repository before using that swap data for commercial or business purposes. See 17 CFR 49.17(g).

to "confidentiality of trading positions,"[909] the Commission believes that its final rule broadly covers such safeguards. Although not explicitly stated in Rule 13n-9, the Commission also believes that its definitions of "nonpublic personal information"[910] and "personally identifiable information"[911] overlap significantly with the information that the commenter recommended the rule to explicitly cover.[912] Certain information, however, will be subject to public dissemination under Regulation SBSR.[913] The commenter further suggested that SDRs should be permitted to use confidential information solely to fulfill their regulatory obligations,[914] but the Commission does not believe that it is necessary or appropriate to impose such a narrow restriction on SDRs. It could, for example, be in the public interest for SDRs to use transaction-specific confidential SBS data to generate aggregated reports for the public even though such reports are not mandated. However, any such reports must be sufficiently anonymized so that the trading positions or identities of market participants, or group of market participants, cannot be derived from the reports.

One commenter suggested that a third party service provider should not be required to observe an SDR's privacy policies and procedures if such third party service provider has received written authorization from an SBS counterparty to access its SBS transaction

909 See MFA 1, supra note 19.

910 See Rule 13n-9(a)(5).

911 See Rule 13n-9(a)(6).

912 See MFA 1, supra note 19 (recommending adding to proposed Rule 13n-9(b): (i) information related to transactions of a market participant (including a market participant's trading positions), (ii) the identity of each market participant, and (iii) details of any master agreement governing the relevant SBS that are provided to an SDR).

913 See Regulation SBSR Adopting Release, supra note 13 (Rule 902).

914 See MFA 1, supra note 19.

information.[915] The Commission believes that an SDR's obligation to provide fair, open, and not unreasonably discriminatory participation to third party service providers[916] would prohibit an SDR from unreasonably imposing its privacy policies and procedures on third party service providers. The Commission also believes that, generally, a third party service provider, acting as an agent for a counterparty, should be given the same rights to access SBS transaction information as the counterparty for which it is acting as an agent. To the extent that the counterparties to a transaction reach a confidentiality agreement between themselves limiting the information that can be provided to their agents, it is up to the parties to ensure that the authorizations they provide to the SDR are appropriately limited.[917]

With respect to one commenter's view that regulators should "ensure that the viability and rigor of [an SDR's] privacy policies are reviewed and audited as they are at all other market participants,"[918] the Commission contemplates that its review of an SDR's privacy policies and procedures will be sufficient.[919] As a general matter, the Commission will review an SDR's privacy policies and procedures for compliance with the law in a manner similar to reviews of

915 See TriOptima, supra note 19 (stating that "if the counterparties to a trade authorize the third party service provider to use their information, an [SDR] should not be able to restrict or limit such use through privacy policies and procedures when the owners of the information have provided appropriate consents and authorizations").

916 See Section VI.D.3.a of this release discussing fair, open, and not unreasonably discriminatory access.

917 To the extent that a transaction is executed anonymously on an SB SEF or exchange, when the counterparties do not know each other's identity or other reported information (e.g., the trader ID), the SDR's policies and procedures under Rule 13n-9(b) must not allow either counterparty to access this information relating to the other counterparty.

918 ISDA, supra note 19.

919 To the extent that the Commission addresses other market participants' privacy policies and procedures, it will do so in separate releases pertaining specifically to those market participants.

other registrants' privacy policies and procedures. For example, an SDR is required to file, as exhibits to Form SDR, its policies and procedures to protect the privacy of any and all SBS transaction information that the SDR receives from a market participant or any registered entity.[920] These policies and procedures are subject to the Commission's review. As discussed in Section VI.A.2 of this release, the Commission will review an SDR's application for registration on Form SDR in determining whether the SDR is able to comply with the federal securities laws and the rules and regulations thereunder. The Commission will also review an SDR's comprehensive annual amendment on Form SDR in determining whether the SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Additionally, an SDR (including its privacy policies and procedures) are subject to inspection and examination by any representative of the Commission.[921] In addition, an SDR's CCO is required to review the compliance of its policies and procedures at least on an annual basis and include a description of such compliance as well as the SDR's enforcement of its policies and procedures in the SDR's annual compliance report that is filed with the Commission.[922]

2. Disclosure Requirements (Rule 13n-10)

a. Proposed Rule

Proposed Rule 13n-10 would require each SDR to provide a disclosure document to each market participant prior to accepting any SBS data from the market participant or upon the

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920 See Item 39 of Form SDR.

921 Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (stating that "[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission").

922 See Rules 13n-11(c)(2) and 13n-11(d)(1).

market participant's request. The disclosure document would include specific information designed to enable a market participant to identify and evaluate the risks and costs associated with using the SDR's services.

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[923] One commenter agreed with proposed Rule 13n-10(b)(8), which would require disclosure of an SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates.[924] In supporting the Commission's proposed rule, another commenter "recognize[d] the importance of providing market participants with disclosure documents outlining the SDR's policies regarding member participant criteria and the safeguarding and privacy of data submitted to the SDR."[925]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-10 as proposed. The Commission is adopting the rule to enhance transparency in the SBS market, bolster market efficiency, promote standardization, and foster competition.[926] Specifically, the rule provides that before accepting any SBS data from a market participant[927] or upon a market participant's

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923 See Barnard, supra note 19; DTCC 2, supra note 19. The Commission received no comments on proposed Rule 13n-10(a), which set forth the definitions applicable to the rule, and is adopting each of them as proposed.

924 See Barnard, supra note 19.

925 DTCC 2, supra note 19.

926 Rule 13n-10 is being promulgated under Exchange Act Sections 13(n)(3), 13(n)(7)(D)(i), and 13(n)(9). See 15 U.S.C. 78m(n)(3), 78m(n)(7)(D)(i), and 78m(n)(9).

927 See supra note 583 (defining "market participant").

request, each SDR must furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the SDR's services: (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n-6, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as described in Rule 13n-9(b)(1), (5) a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's dispute resolution procedures involving market participants, as described in Rule 13n-5(b)(6), (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.[928]

As stated in the Proposing Release, these disclosure requirements are intended to promote competition and foster transparency regarding SDRs' services by enabling market participants to identify the range of services that each SDR offers and to evaluate the risks and costs associated

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[928] Rule 13n-10(b).

with using such services.[929] The Commission also believes that transparency regarding SDRs' services is particularly important in light of the complexity of OTC derivatives products and their markets, and that greater service transparency could improve market participants' confidence in an SDR and result in greater use of the SDR, which would ultimately increase market efficiency.

J. Chief Compliance Officer of Each SDR; Compliance Reports and Financial Reports (Rule 13n-11)

Proposed Rule 13n-11 set forth the requirements for an SDR's CCO, annual compliance reports, and financial reports. The Commission is adopting the rule substantially as proposed with changes in response to comments.

1. In General (Rule 13n-11(a))

a. Proposed Rule

To implement the statutory requirement for each SDR to designate an individual to serve as a CCO,[930] the Commission proposed Rule 13n-11(a), which would require each SDR to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. In addition, to promote the independence and effectiveness of the CCO, the proposed rule would require that the compensation and removal of the CCO be approved by a majority of the SDR's board.[931]

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929 Proposing Release, 75 FR at 77340, supra note 2. See also Barnard, supra note 19 (believing that the disclosure requirement in Rule 13n-10(b)(8) would formalize "the market practice and ensure that informed decisions were being made").

930 See Exchange Act Section 13(n)(6)(A), 15 U.S.C. 78m(n)(6)(A).

931 Proposed Rule 13n-11(a).

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[932] Specifically, one commenter agreed that "[w]ith respect to compensation and termination of the CCO, the Proposed Rules appropriately assign authority over those matters to the board, rather than management," but believed that "[t]he rules should go one step further and confer that authority upon the *independent* board members."[933] Additionally, the commenter suggested that "the [SDR Rules] should preclude the General Counsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO."[934] The commenter also suggested "[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities."[935] The commenter further suggested requiring a group of affiliated or controlled entities to appoint the CCO.[936]

Another commenter fully supported the intent of proposed Rule 13n-11, but also suggested that the Commission "restrict the CCO from serving as the General Counsel or other attorney within the legal department of the SDR."[937] The commenter stated that the CCO's remuneration must be designed so as to avoid potential conflicts of interest with his compliance

932 See Better Markets 1, supra note 19; Barnard, supra note 19; see also Better Markets 3, supra note 19.

933 Better Markets 1, supra note 19 (emphasis in the original); see also Better Markets 3 supra note 19 (suggesting "[t]he vesting of authority in the independent board members to oversee the hiring, compensation, and termination of the CCO").

934 Better Markets 1, supra note 19.

935 Better Markets 3, supra note 19.

936 Better Markets 3, supra note 19.

937 Barnard, supra note 19 ("[T]he CCO should have a single compliance role and no other competing role or responsibility that could create conflicts of interest or threaten [his] independence . . . .").

role.[938] The commenter further suggested that the Commission amend the rule so that "the authority and sole responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities[ ] only vests with the independent public directors or 'Independent Perspective' . . . and not the full board."[939]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-11(a) as proposed, with one modification. Rule 13n-11(a) requires that (1) each SDR identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR and (2) the compensation and removal of the CCO be approved by a majority of the SDR's board.[940] The Commission is revising the rule from the proposal to require the appointment of the CCO to be approved by the majority of the SDR's board.[941]

In the Proposing Release, the Commission asked whether there are other measures that would further enhance a CCO's independence and effectiveness that should be prescribed in a rule.[942] Two commenters suggested that the Commission require the CCO's appointment, removal, or compensation be approved by independent board members or "independent public

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938 Barnard, supra note 19.

939 Barnard, supra note 19 (believing that the suggested amendment would help ensure the CCO's independence and possibly mitigate the Commission's need to promulgate additional measures to adequately protect CCOs from undue influence or coercion).

940 See Barnard, supra note 19 (supporting the CCO's compensation to be specifically designed to avoid potential conflicts of interest with the CCO's compliance role).

941 The Commission is also revising the heading of Rule 13n-11 from the proposal to describe the scope of the rule more accurately. The proposed heading was "Designation of chief compliance officer of security-based swap data repository." As revised, the heading is broader: "Chief compliance officer of security-based swap data repository; compliance reports and financial reports."

942 Proposing Release, 75 FR at 77341, supra note 2.

directors."[943] The Commission has determined not to adopt such a requirement at this time because, as discussed in Section VI.D.3.b.iii of this release, the Commission is not requiring SDRs to have independent directors.[944] Based in part on these comments, however, the Commission believes that requiring the appointment of the CCO to be approved by a majority of the SDR's board would be another measure to enhance the CCO's independence and effectiveness. The Commission notes that the requirement that the appointment of the CCO must be approved by a majority of the SDR's board is consistent with the requirement that the designation of CCOs at investment companies must be approved by the board of directors.[945] One commenter suggested requiring a group of affiliated or controlled entities to appoint the CCO.[946] The Commission believes that this suggestion contravenes an SDR's statutory requirement to designate the CCO.[947]

The Commission is concerned that an SDR's commercial interests might discourage its CCO from making forthright disclosure to the board or senior officer about any compliance failures.[948] The Commission believes that to mitigate this potential conflict of interest, an SDR's

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943 See Better Markets 1, supra note 19 (discussing independent board members); Barnard, supra note 19 (discussing independent public directors); see also Better Markets 3, supra note 19.

944 To the extent that an SDR has independent board members or independent public directors, the SDR may want to consider requiring the appointment, removal, or compensation of the CCO be approved by the majority of independent board members or independent public directors in addition to the majority of the board.

945 See Rule 38a-1(a)(4)(i) under the Investment Company Act of 1940 ("Investment Company Act"), 17 CFR 270.38a-1(a)(4)(i). The Commission also notes that CFTC Rule 49.22(c) requires the appointment, compensation, and removal of a CCO to be approved by either a swap data repository's board or senior officer. See 17 CFR 49.22(c).

946 Better Markets 3, supra note 19.

947 See Exchange Act Section 13(n)(6)(A), 15 U.S.C. 78m(n)(6)(A).

948 See Proposing Release, 75 FR at 77341, supra note 2.

CCO should be independent from its management so as not to be conflicted in reporting or addressing any compliance failures. Accordingly, as discussed in Section VI.J.3 below, each CCO of an SDR is required to report directly to the board or its senior officer,[949] but only the board is able to approve the CCO's appointment, remove the CCO from his or her responsibilities, and approve the CCO's compensation.

Rule 13n-11(a) is intended to promote a CCO's independence and effectiveness. The Commission is not extending the applicability of this rule to an SDR's senior officer because the Commission believes that this may unnecessarily create conflicts of interest for the CCO, particularly if the CCO is subsequently responsible for reviewing the senior officer's compliance with the Exchange Act and the rules and regulations thereunder.

In promoting a CCO's independence and effectiveness, the Commission does not believe that it is necessary to adopt, as two commenters suggested,[950] a rule prohibiting a CCO from being a member of the SDR's legal department or from serving as the SDR's general counsel. To the extent that this poses a potential or existing conflict of interest, the Commission believes that an SDR's written policies and procedures can be designed to adequately identify and mitigate any associated costs.[951]

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949 See Exchange Act Section 13(n)(6)(B)(i), 15 U.S.C. 78m(n)(6)(B)(i).

950 See Barnard, supra note 19 (suggesting that the Commission "restrict the CCO from serving as the General Counsel or other attorney within the legal department of the SDR"); Better Markets 1, supra note 19 (suggesting that "the [SDR Rules] should preclude the General Counsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO").

951 As discussed in Section VI.D.3.c of this release, Rule 13n-4(c)(3)(i) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis.

With respect to one commenter's suggestion that there should be "[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities,"[952] the Commission notes that while it is not requiring such standards, Form SDR requires an SDR to provide a brief account of the CCO's prior business experience and business affiliations in the securities industry or derivatives industry.[953] In addition, as discussed above, the Commission is adopting Rule 13n-4(c)(2)(iv) to require an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.[954] To the extent that a CCO is considered to be in senior management of an SDR, Rule 13n-4(c)(2)(iv) applies to the CCO, but even if the CCO is not in senior management, the Commission does not believe that it is necessary to prescribe competency standards for CCOs by rule, in part because it is most likely that an SDR already has business incentives to retain a competent CCO in light of the SDR's exposure to liability if its CCO fails to comply with his or her statutory and regulatory responsibilities. Additionally, the Commission believes that an SDR will be in a better position to determine what its own requirements and specific needs are with respect to a CCO's background and skills, both of which may change as the SBS market evolves.

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952 See Better Markets 3, supra note 19.

953 See Item 15 of Form SDR.

954 See Section VI.D.3.b of the release discussing Rule 13n-4(c)(2)(iv).

2. Definitions (Rule 13n-11(b))

a. Proposed Rule

Proposed Rule 13n-11(b) defined the following terms: "affiliate," "board," "director," "EDGAR Filer Manual," "material change," "material compliance matter," and "tag."

b. Comments on the Proposed Rule

The Commission received no comments relating to the proposed definitions.

c. Final Rule

The Commission is adopting Rule 13n-11(b) substantially as proposed, with several modifications. Specifically, the Commission is adopting the definitions of "board," "director," "EDGAR Filer Manual," "material change," and "material compliance matter" as proposed. However, the Commission is not adopting the definition of "affiliate" because the term is not used in the final rule. To conform with adopted Rule 13n-11(f), as discussed below, the Commission is adding the definitions of "Interactive Data Financial Report" and "official filing," both of which have the same meaning as set forth in Rule 11 of Regulation S-T, which sets forth the standards for electronic filing with the Commission.[955] For consistency, the Commission is revising the definition of "tag" (including the term "tagged") from the proposal to have the same meaning as set forth in Rule 11 of Regulation S-T.[956]

Moreover, the Commission is adopting the definition of "senior officer" to mean "the chief executive officer or other equivalent officer."[957] Proposed Rule 13n-11 referenced the

955 See Rules 13n-11(b)(4) and (b)(7). The terms "Interactive Data Financial Report" and "official filing" are used in new Rule 407 of Regulation S-T, as discussed in Section VI.J.5.c of this release.

956 See Rule 13n-11(b)(9).

957 See Rule 13n-11(b)(8). The term "senior officer" is used in Rules 13n-11(c)(1) and (c)(3), as discussed in Section VI.J.3 of this release. This definition is consistent with the

"chief executive officer" in lieu of the statutory references to the "senior officer."[958] As adopted, Rule 13n-11 tracks the statutory references to "senior officer" and defines "senior officer" to include an SDR's CEO.

3. Enumerated Duties of Chief Compliance Officer (Rule 13n-11(c))

a. Proposed Rule

Proposed Rule 13n-11(c) incorporated the CCO's duties that are set forth in Exchange Act Section 13(n)(6).[959] Proposed Rule 13n-11(c) would require a CCO to (1) report directly to the board or to the SDR's CEO, (2) review the SDR's compliance with respect to its statutory and regulatory requirements and core principles, (3) in consultation with the board or the SDR's CEO, resolve any conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through certain specified means, and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule, expressing differing

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definition proposed in the CCO rules for SBS dealers, major SBS participants, and clearing agencies. See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (proposing Rule 15Fk–1(e)); Clearing Agency Standards for Operations and Governance, Exchange Act Release No. 64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (proposing Rule 3Cj-1).

958 See Exchange Act Section 13(n)(6)(B), 15 U.S.C. 78m(n)(6)(B).

959 See 15 U.S.C. 78m(n)(6).

views.[960] As discussed below, one commenter suggested a more prescriptive approach[961] while the other suggested a less prescriptive approach, but with certain clarifications.[962]

Specifically, one commenter suggested that the Commission "establish a meaningful role for" an SDR's CCO.[963] The commenter believed that "the rules should preclude the [g]eneral [c]ounsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO."[964] The commenter also believed that "the CCO should have a direct reporting line to the independent board members and should be required to meet with those independent members at least quarterly" in order for "independent members of the board to become effective partners with the CCO in promoting a culture of compliance within the SDR."[965]

The other commenter believed that as a general matter, "SDRs should have some flexibility to implement the required compliance procedures in ways consistent with their structure and business."[966] The commenter "agree[d] with the Commission that a robust internal compliance function[, including a CCO,] plays an important role in facilitating an SDR's

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960 See Better Markets 1, supra note 19; DTCC 2, supra note 19; see also Better Markets 2, supra note 19; Better Markets 3, supra note 19.

961 See Better Markets 1, supra note 19.

962 See DTCC 2, supra note 19.

963 Better Markets 2, supra note 19; see also Better Markets 3, supra note 19 ("Ensuring that market participants have CCOs with real authority and autonomy to police a firm from within is one of the most efficient and effective tools available to regulators.").

964 Better Markets 1, supra note 19.

965 Better Markets 1, supra note 19; see also Better Markets 3, supra note 19 (suggesting requirements that the CCO have direct access to the board and the CCO "meet quarterly with the Audit Committee (if there is one or non-management members of the [b]oard if there is not), in addition to annual meetings with the board and senior management").

966 DTCC 2, supra note 19.

monitoring of, and compliance with, the requirements of the Exchange Act (and rules thereunder) applicable to SDRs."[967] The commenter also "fully support[ed] Commission efforts to require the highest standards of regulatory compliance at SDRs, and believe[d that] requiring each SDR to have a CCO is an effective way to ensure compliance."[968]

The commenter, however, believed that "some of the enumerated responsibilities of [a CCO] require clarification in order to avoid an overly broad reading of those duties."[969] Specifically, the commenter suggested that the CCO's responsibilities should not, for instance, "be read to encompass responsibilities beyond those traditionally understood to be part of a compliance function (i.e., those issues that can as a matter of competence, and typically would be, handled by a compliance department)."[970] The commenter further believed that "the CCO should be responsible for establishing relevant compliance procedures, and monitoring compliance with those procedures and other applicable legal requirements" and that "the CCO should also participate in other aspects of the SDR's activities that implicate compliance or regulatory issues."[971] The commenter believed, however, that "the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business."[972] The commenter stated that the Commission "should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel. Although there may be a regulatory component to

967 DTCC 2, supra note 19.

968 DTCC 2, supra note 19.

969 DTCC 2, supra note 19.

970 DTCC 2, supra note 19.

971 DTCC 2, supra note 19.

972 DTCC 2, supra note 19.

whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors. While a CCO may have an important role to play in overall oversight and remediation of any problems, the Commission's rules should not be interpreted to impose on CCOs responsibility outside of their traditional core competencies."[973]

In suggesting that the Commission "clarify what types of conflict of interest should be within the CCO's purview," the commenter noted that "[s]ome issues, such as permissibility of dealings with related parties or entities, are properly within the CCO's functions. Other issues, such as restrictions on ownership and access, may be fundamental for the board of directors and senior management to address."[974] Additionally, the commenter stated that to the extent that the Commission's rule requires consultation with the board or senior management, "some materiality threshold would be appropriate, as not every potential conflict of interest that might be addressed by a CCO (or his or her subordinates) would need such consultation."[975]

The commenter further suggested that the Commission "clarify that the CCO's specific responsibilities related to conflicts are limited to compliance with the provisions of Exchange Act Section 13(n) and the final rules thereunder as they relate to the SBS operations of an SDR."[976] The commenter believed that "[t]he Commission should not mandate compliance responsibilities with respect to other regulatory requirements to which an SDR may be subject;

[973] DTCC 2, supra note 19.

[974] DTCC 2, supra note 19.

[975] DTCC 2, supra note 19.

[976] DTCC 2, supra note 19.

those responsibilities should be specified by the regulator imposing the other requirements."[977]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n-11(c) as proposed, with modifications. The final rule incorporates the duties of an SDR's CCO that are set forth in Exchange Act Section 13(n)(6)[978] and imposes additional requirements. Specifically, each CCO is required to comply with the following requirements: (1) report directly to the board[979] or to the SDR's senior officer,[980] (2) review the compliance of the SDR with respect to the requirements and core principles described in Exchange Act Section 13(n) and the rules and regulations thereunder, (3) in consultation with the board or the SDR's senior officer,[981] take reasonable steps to resolve any material conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) take reasonable steps to ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission under Exchange Act Section 13, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through any (a) compliance office review, (b) look-back, (c) internal or external audit finding, (d) self-reported error, or (e) validated complaint, and (7) establish and follow appropriate procedures for the

977 DTCC 2, supra note 19.

978 See 15 U.S.C. 78m(n)(6).

979 See supra note 549 (defining "board").

980 The Commission is amending proposed Rule 13n-11(c)(1) by replacing "chief executive officer" with "senior officer" to track the language of Exchange Act Section 13(n)(6)(B)(i)), 15 U.S.C. 78m(n)(6)(B)(i).

981 The Commission is amending proposed Rule 13n-11(c)(3) by replacing "chief executive officer" with "senior officer" to track the language of Exchange Act Section 13(n)(6)(B)(i)), 15 U.S.C. 78m(n)(6)(B)(i).

handling, management response, remediation, retesting, and closing of noncompliance issues. Consistent with one commenter's suggestion, the Commission believes that Rule 13n-11(c) establishes a meaningful role for CCOs.[982] However, because the Commission is not requiring SDRs to have independent directors, Rule 13n-11(c) does not, as the commenter suggested,[983] require a CCO to report directly to independent directors or meet with independent directors at least quarterly. To provide CCOs with greater flexibility in fulfilling their duties, the Commission is also not requiring, as the commenter suggested, CCOs to "meet quarterly with the Audit Committee (if there is one or non-management members of the [b]oard if there is not), in addition to annual meetings with the board and senior management."[984] The Commission expects CCOs to meet with the board, the senior officer, and others, whenever necessary to fulfill their duties.

The Commission agrees with one commenter that, in general, SDRs should have flexibility to implement the required compliance procedures in ways consistent with their structure and business.[985] In response to a commenter's request for clarification,[986] the Commission notes that generally, an SDR's CCO is not responsible for the SDR's overall or day-to-day business operation, for example, with respect to risk management and operations; nor is the CCO responsible for the decisions and actions of every director, officer, and employee of the SDR. Instead, the CCO's statutory and regulatory responsibilities generally entail, among other

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982 See Better Markets 2, supra note 19; see also Better Markets 3, supra note 19 ("Ensuring that market participants have CCOs with real authority and autonomy to police a firm from within is one of the most efficient and effective tools available to regulators.").

983 See Better Markets 1, supra note 19.

984 See Better Markets 3, supra note 19.

985 See DTCC 2, supra note 19.

986 See DTCC 2, supra note 19.

things, administering the SDR's policies and procedures required under Exchange Act Section 13 and the rules and regulations thereunder, keeping the SDR's board or senior officer apprised of significant compliance issues, advising the board or senior officer of needed changes in the SDR's policies and procedures, generally overseeing compliance with the Exchange Act and the rules and regulations thereunder, as well as remediating noncompliance at the SDR. If, in the course of administering policies and procedures required under Exchange Act Section 13 and the rules and regulations thereunder, the CCO believes that operations or risk management personnel are not in compliance with such policies and procedures or the Exchange Act and the rules and regulations thereunder relating to SBSs (e.g., with Rule 13n-9, which prohibits the misappropriation or misuse of material nonpublic information by employees), then the CCO is responsible for establishing and following procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

In the Proposing Release, the Commission stated that "a CCO should review, on an ongoing basis, the SDR's service levels, costs, pricing, and operational reliability, with the view to preventing anticompetitive practices and discrimination, and encouraging innovation and the use of the SDR."[987] With respect to one commenter's remarks regarding the scope of the CCO's responsibilities,[988] the Commission continues to believe that the CCO's administration of an SDR's policies and procedures should include, among other things, a review of the SDR's service levels, costs, pricing, and operational reliability and a determination that such service

987 Proposing Release, 75 FR at 77342, supra note 2.

988 See DTCC 2, supra note 19 (stating that "the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business.").

levels, costs, pricing, and operational reliability are reasonable.[989] The Commission recognizes, however, that oversight of certain aspects of an SDR's activities may overlap with or be within the purview of the SDR's risk management and operations personnel or other business personnel.[990] In that situation, the CCO may need to consult with business personnel to assess whether they have an appropriate justification for the reasonableness of such service levels, costs, pricing, and operational reliability.

As the Commission also noted in the Proposing Release, an SDR is not required to hire an additional person to serve as its CCO.[991] Instead, an SDR can designate an individual already employed with the SDR as its CCO. Given the critical role that a CCO is intended to play in ensuring an SDR's compliance with the Exchange Act and the rules and regulations thereunder,[992] the Commission believes that an SDR's CCO should be competent and knowledgeable regarding the federal securities laws, should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR, as necessary, and should be responsible for monitoring compliance with the SDR's policies and procedures adopted pursuant to rules under the Exchange Act. However, the Commission will not substantively review a CCO's competency, and is not requiring any

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989 See Section VI.D.3.a of this release discussing an SDR's obligation to ensure that its fees are fair and reasonable and not unreasonably discriminatory.

990 See DTCC 2, supra note 19 (stating that the Commission "should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel" and that "[a]lthough there may be a regulatory component to whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors").

991 Proposing Release, 75 FR at 77341, supra note 2.

992 See Rules 13n-11(c)(4) and (5).

particular level of competency or business experience for a CCO.

To address a concern raised by one commenter,[993] the Commission is revising Rule 13n-11(c)(3) from the proposal to clarify that the CCO must, in consultation with the board or the senior officer of the SDR, take reasonable steps to resolve any material conflicts of interest (as opposed to all conflicts of interest) that may arise.[994] Recognizing that a CCO may not be in a position to resolve certain material conflicts of interest, as suggested by the commenter,[995] the Commission is revising the rule from the proposal to specify that CCOs must take reasonable steps to resolve such conflicts, which is intended to clarify that CCOs are not required to actually resolve such conflicts. These conflicts of interest may include, for example, general conflicts of interest identified in the Commission's Rule 13n-4(c)(3), as discussed in Section VI.D.3.c of this release.

Recognizing that a CCO cannot guarantee an SDR's statutory compliance, the Commission is also revising Rule 13n-11(c)(5) from the proposal to clarify that CCOs are not required to ensure compliance with the relevant Exchange Act provisions and the rules and regulations thereunder relating to SBSs, but rather to take reasonable steps to ensure such compliance. With respect to the comment that the CCO's specific responsibilities related to conflicts should be limited to compliance with the provisions of Exchange Act Section 13(n) and

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993 See DTCC 2, supra note 19 (noting that some conflicts of interest are within a CCO's purview while other issues (e.g., restrictions on ownership and access) may be fundamental for an SDR's board or senior management to address and that a CCO would not need to consult with the board every potential conflict of interest that might be addressed by a CCO).

994 See Rule 13n-11(c)(3).

995 See DTCC 2, supra note 19.

the final rules thereunder as they relate to the SBS operations of an SDR,[996] the Commission notes that the CCO's responsibilities go beyond the provisions of Exchange Act Section 13(n), as required by the Dodd-Frank Act.[997] For example, the CCO should take reasonable steps to ensure compliance with Exchange Act Section 10(b)'s antifraud requirements.[998] However, the CCO is required to take only reasonable steps to ensure compliance with relevant Exchange Act provisions and the rules and regulations thereunder "relating to" SBSs.

4. Compliance Reports (Rules 13n-11(d) and 13n-11(e))

a. Proposed Rule

An SDR's CCO is required, under Exchange Act Section 13(n)(6)(C)(i), to annually prepare and sign a report that contains a description of the SDR's compliance with respect to the Exchange Act and the rules and regulations thereunder and each policy and procedure of the SDR (including the SDR's code of ethics and conflicts of interest policies).[999] The Commission proposed Rule 13n-11(d)(1) to incorporate this requirement and to set forth minimum requirements for what must be included in each annual compliance report.

Under proposed Rule 13n-11(d)(2), an SDR would be required to file with the Commission a financial report, as discussed further in Section VI.J.5 of this release, along with a compliance report, which must include a certification that, under penalty of law, the compliance

[996] See DTCC 2, supra note 19.

[997] See Exchange Act Section 13(n)(6)(B)(v), 15 U.S.C. 78m(n)(6)(B)(v), as added by Dodd-Frank Act Section 763(i) (requiring an SDR's CCO to "ensure compliance with [the Exchange Act] (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under [Section 13(n)]").

[998] 15 U.S.C. 78j(b).

[999] See 15 U.S.C. 78m(n)(6)(C)(i).

report is accurate and complete.[1000] The compliance report would also be required to be filed in a tagged data format in accordance with instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S-T.[1001]

In addition, proposed Rule 13n-11(e) would require a CCO to submit the annual compliance report to an SDR's board for its review prior to the submission of the report to the Commission under proposed Rule 13n-11(d)(2).

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[1002] One commenter believed that an annual compliance report "should be limited to compliance with the requirements of the Exchange Act and the policies and procedures of the SDR that relate to its activities as such with respect to SBSs (as opposed to policies and procedures that may address other regulatory requirements)."[1003] Additionally, the commenter did "not believe [that] it is appropriate to require the report to include a discussion of recommendations for material changes to the policies and procedures of the SDR as a result of the annual review (as well as the rationale for such recommendations and whether the policies or procedures will be modified as a result of such recommendations)."[1004] The commenter believed that "the inclusion of a description of any material changes to the SDR's policies and procedures, and any material compliance matters identified both since the date of the preceding compliance report, provide

1000 See proposed Rule 13n-11(d)(2).

1001 See id.; see also 17 CFR 232.301.

1002 See DTCC 2, supra note 19; Better Markets 1, supra note 19; see also Better Markets 3, supra note 19.

1003 DTCC 2, supra note 19.

1004 DTCC 2, supra note 19.

comprehensive information," and that "requiring the CCO to detail every recommendation (whether or not accepted) may chill open communication between the CCO and other SDR management."[1005] The commenter "firmly believe[d that] the annual report should be kept confidential by the Commission" and explained that "[g]iven the level of disclosure expected to be required . . . the report will likely contain confidential and proprietary business information."[1006]

The other commenter recommended that "the review and reporting should be more frequent, at least semiannually or quarterly," and that "the rules should expressly prohibit the board of an SDR from requiring the CCO to make any changes to the compliance reports."[1007] The commenter suggested that "[a]ny edits or supplements to the report sought by the board may be submitted to the Commission along with – but not as part of – the CCO's report."[1008]

c. Final Rule

After considering the comments, the Commission is adopting Rules 13n-11(d) and 13n-11(e) as proposed, each with two modifications.[1009] Specifically, Rule 13n-11(d)(1) requires that an SDR's CCO annually prepare and sign a report that contains a description of the SDR's compliance with respect to the Exchange Act and the rules and regulations thereunder and each of the SDR's policies and procedures (including the SDR's code of ethics and conflicts of

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1005 DTCC 2, supra note 19.

1006 DTCC 2, supra note 19.

1007 Better Markets 1, supra note 19; see also Better Markets 3, supra note 19 (suggesting that the Commission require "the board to review and comment on, but not edit, the CCO's annual report to the Commission").

1008 Better Markets 1, supra note 19.

1009 To conform with Rule 13n-11's heading, as adopted, the Commission is revising the heading of paragraph (d) of the rule to specify that the paragraph pertains to "[c]ompliance reports" rather than "[a]nnual reports." See supra note 941.

interest policies). One commenter suggested that the Commission limit the applicability of this rule to an SDR's activities relating to SBSs, but did not provide a rationale for such a limit.[1010] The Commission does not believe that there is a rationale for such a limit and has concluded that it is appropriate to adopt this rule, which essentially reiterates the statutory language.[1011] In addition, compliance issues at an SDR that are not related to SBSs may impact the SDR as a whole, of which the Commission should be kept apprised.

Additionally, Rule 13n-11(d)(1) requires each annual compliance report to contain, at a minimum, a description of: (1) the SDR's enforcement of its policies and procedures, (2) any material changes[1012] to the policies and procedures since the date of the preceding compliance report, (3) any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation, and (4) any material compliance matters[1013] identified since the date of the preceding compliance report. These minimum disclosure requirements are substantially similar to the Commission's requirements for annual reports filed by CCOs of investment companies.[1014] Further, these

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1010 See DTCC 2, supra note 19.

1011 See Exchange Act Section 13(n)(6)(C)(i), 15 U.S.C. 78m(n)(6)(C)(i).

1012 The term "material change" is defined as a change that a CCO would reasonably need to know in order to oversee compliance of the SDR. See Rule 13n-11(b)(5).

1013 The term "material compliance matter" is defined as any compliance matter that the board would reasonably need to know to oversee the compliance of the SDR and that involves, without limitation: (1) a violation of the federal securities laws by the SDR, its officers, directors, employees, or agents; (2) a violation of the policies and procedures of the SDR, by the SDR, its officers, directors, employees, or agents; or (3) a weakness in the design or implementation of the SDR's policies and procedures. See Rule 13n-11(b)(6).

1014 See Investment Company Act Rule 38a-1(a)(4)(iii), 17 CFR 270.38a-1(a)(4)(iii).

disclosure requirements will provide important information to Commission staff regarding any material compliance issues at an SDR and material changes or recommendations for material changes to the SDR's policies and procedures. Among other things, such information will be useful to assist Commission staff in monitoring compliance by SDRs with the relevant provisions of the Exchange Act and the rules and regulations thereunder. Thus, the Commission believes that the minimum disclosure requirements are appropriate and disagrees with one commenter's remark that it is not appropriate to require a compliance report to include a description of any recommendation for material changes to an SDR's policies and procedures as a result of an annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation.[1015]

To address a concern raised by the same commenter,[1016] the Commission notes that it is not "requiring the CCO to detail every recommendation."[1017] The rule is limited to "recommendations for material changes."[1018] The Commission believes that limiting the description required in an annual compliance report to recommendations for material changes to the SDR's policies and procedures appropriately addresses the commenter's concern. The Commission notes, however, that individual compliance matters may not be material when viewed in isolation, but may collectively suggest a material compliance matter. In addition, the

1015 See DTCC 2, supra note 19.

1016 See DTCC 2, supra note 19 (stating that "requiring the CCO to detail every recommendation (whether or not accepted) may chill open communication between the CCO and other SDR management").

1017 But see DTCC 2, supra note 19 (believing that it is not appropriate to require compliance reports to include a discussion of recommendations for material changes to an SDR's policies and procedures).

1018 Rule 13n-11(d)(1)(iii).

Commission recognizes that this rule may "chill open communication between the CCO and other SDR management," as one commenter suggested,[1019] but the Commission believes that the usefulness of the information in an SDR's annual compliance reports to the Commission, as discussed above, would justify any potential chilling of communications.

Consistent with the relevant statutory provision,[1020] the rule requires annual compliance reports. The Commission does not believe that it is necessary to require more frequent reports, as one commenter suggested, in order to assess an SDR's financial stability.[1021] CCOs, however, should consider the need for interim reviews of compliance at SDRs in response to significant compliance events, changes in business arrangements, and regulatory developments. For example, if there is an organizational restructuring of an SDR, then its CCO should consider evaluating whether its policies and procedures are adequate to guard against potential conflicts of interest. Additionally, if a new rule regarding SDRs is adopted by the Commission, then a CCO would need to take reasonable steps to ensure compliance with the rule, including reviewing the SDR's policies and procedures.

Under Rule 13n-11(d)(2), an SDR is required to file with the Commission a financial report along with the annual compliance report, and the compliance report must include a certification by the CCO that, to the best of his or her knowledge and reasonable belief,[1022] and

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1019 See DTCC 2, supra note 19.

1020 See Exchange Act Section 13(n)(6)(C)(i), 15 U.S.C. 78m(n)(6)(C)(i).

1021 See Better Markets 1, supra note 19.

1022 The Commission is revising Rule 13n-11(d)(2) from the proposal to clarify that the certification must be made by the CCO and permit the certification to be based on the best of the CCO's knowledge and reasonable belief. Accord General Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii) (requiring an attorney who signs a filing with the Commission to certify that "to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by under penalty of law, the compliance report is accurate and complete. The compliance report is also required to be filed in a tagged[1023] data format in accordance with instructions contained in the EDGAR Filer Manual,[1024] as described in Rule 301 of Regulation S-T.[1025]

Rule 13n-11(e) requires a CCO to submit the annual compliance report to the board for its review prior to the filing of the report with the Commission under Rule 13n-11(d)(2).[1026] Although the rule requires the compliance report to be submitted to the board once a year, a CCO should promptly bring serious compliance issues to the board's attention rather than wait until an annual compliance report is prepared. One commenter suggested that the Commission permit an SDR's board to submit edits or supplements to a CCO's annual compliance report, but not as part of the report.[1027] Rule 13n-11 does not prohibit a CCO from editing an annual compliance report to reflect the board's comments because the Commission believes that the CCO and the board should be working toward the same compliance goals and that prohibiting the CCO from taking the board's edits could create an adversarial atmosphere between them. As discussed above, however, an SDR could, pursuant to the conflicts of interest requirements set forth in Rule 13n-4(c)(3), consider prohibiting a board from requiring the CCO to make any changes to

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existing law or a good faith argument for the extension, modification, or reversal of existing law").

1023 See supra note 294 (defining "tag" (including the term "tagged")).

1024 See supra note 294 (defining "EDGAR Filer Manual").

1025 Rule 13n-11(d)(2); see also 17 CFR 232.301. The information in each compliance report will be tagged using an appropriate machine-readable, tagged data format to enable the efficient analysis and review of the information contained in the report.

1026 The Commission is revising Rule 13n-11(e) from the proposal to refer to the "submission" of the annual compliance report "to" the Commission as the "filing" of the report "with" the Commission. The Commission believes that using the term "filing" is more precise than the term "submission" in this context.

1027 Better Markets 1, supra note 19.

the report.[1028]

One commenter suggested that the Commission keep the annual compliance report confidential.[1029] The Commission is not providing, by rule, that the annual compliance reports are automatically granted confidential treatment, but an SDR may seek confidential treatment pursuant to Exchange Act Rule 24b-2. This approach is consistent with how the Commission generally treats the filings that it receives from its regulated entities, including exchanges and clearing agencies. The Commission may make filed annual compliance reports available on its website, except for information where confidential treatment is requested by the SDR and granted by the Commission.[1030]

5. Financial Reports and Filing of Reports (Exchange Act Rules 13n-11(f) and (g)/Rules 11, 305, and 407 of Regulation S-T)

a. Proposed Rule

Proposed Rule 13n-11(f) set forth a number of requirements relating to an SDR's financial report. First, the proposed rule would require each financial report to be a complete set of the SDR's financial statements that are prepared in conformity with U.S. generally accepted accounting principles ("GAAP") for the SDR's most recent two fiscal years.[1031] Second, the

1028 Accord Better Markets 3, supra note 19 (suggesting that the Commission require "the board to review and comment on, but not edit, the CCO's annual report to the Commission").

1029 DTCC 2, supra note 19.

1030 As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

1031 Proposed Rule 13n-11(f)(1).

proposed rule would provide that each financial report shall be audited in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB") by a registered public accounting firm that is qualified and independent in accordance with Rule 2-01 of Regulation S-X.[1032] Third, each financial report would be required to include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2-02 of Regulation S-X.[1033] Fourth, if an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information as prescribed by the Commission.[1034] Fifth, an SDR's financial reports would be required to be provided in XBRL consistent with Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S-T.[1035]

Proposed Rule 13n-11(g) would further require that annual compliance reports and financial reports be filed within 60 days after the end of the fiscal year covered by such reports.

b. Comments on the Proposed Rule

The Commission received one comment relating to this proposed rule.[1036] Specifically, one commenter suggested harmonizing Rule 13n-11(f) with the CFTC's rule by eliminating proposed Rule 13n-11(f)(2)'s requirement that each financial report be audited in accordance with the PCAOB's standards by a registered public accounting firm that is qualified and

1032 Proposed Rule 13n-11(f)(2).

1033 Proposed Rule 13n-11(f)(3).

1034 Proposed Rule 13n-11(f)(4).

1035 Proposed Rule 13n-11(f)(5); see also 17 CFR 232.405 (imposing content, format, submission, and website posting requirements for an interactive data file, as defined in Rule 11 of Regulation S-T).

1036 See DTCC 5, supra note 19.

independent unless the SDR is under a separate obligation to provide financial statements.[1037] The commenter believed that "[t]his requirement imposes an additional burden for an [SDR] and is not justified in relation to the risks that an [SDR] would pose to its members."[1038] The commenter further suggested that the Commission "consider adopting the CFTC's approach in its final [swap data repository] rules, which require [a swap data repository's] financial statements be prepared in conformity with . . . GAAP."[1039]

c. Final Rules

The Commission is adopting proposed Rules 13n-11(f) and (g) with modifications.[1040] Specifically, Rule 13n-11(f)(1) requires each financial report to be a complete set of the SDR's financial statements that are prepared in conformity with U.S. GAAP for the SDR's most recent two fiscal years.[1041] Rule 13n-11(f)(2) provides that each financial report must be audited in accordance with the PCAOB's standards by a registered public accounting firm[1042] that is

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1037 DTCC 5, supra note 19.

1038 DTCC 5, supra note 19 (noting that "[u]nlike clearing agencies or other entities supervised by the Commission, an [SDR] does not have financial exposure to its users or participants that would justify the imposition of this requirement").

1039 DTCC 5, supra note 19.

1040 To conform with the headings of Rule 13n-11 and paragraph (d) of the rule, as adopted, the Commission is revising the heading of paragraph (f) of the rule to refer to "financial reports" in a plural form.

1041 This is generally consistent with CFTC Rule 49.25(f). See 17 CFR 49.25(f); DTCC 5, supra note 19 (suggesting that the Commission adopt the CFTC's rule requiring a swap data repository's financial statements to be prepared in conformity with GAAP).

1042 The term "registered public accounting firm" is defined in Exchange Act Section 3(a)(59) to have the same meaning as in Section 2 of the Sarbanes-Oxley Act of 2002. See 15 U.S.C. 78c(a)(59). Section 2 of the Sarbanes-Oxley Act defines "registered public accounting firm" as a public accounting firm registered with the PCAOB in accordance with the Sarbanes-Oxley Act.

qualified and independent in accordance with Rule 2-01 of Regulation S-X.[1043] Pursuant to Rule 13n-11(f)(3), each financial report is required to include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2-02 of Regulation S-X.[1044]

Rule 13n-11(f)(4) further provides that if an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the SDR, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10-01(a)(2), (3), and (4) of Regulation S-X.[1045] Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees.[1046] Descriptions of significant provisions of the SDR's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the SDR shall be provided along with a five-year schedule of maturities of debt.[1047] If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the SDR have been separately disclosed in the consolidated statements, then they need not be repeated in

1043 Rule 13n-11(f)(2).

1044 Rule 13n-11(f)(3).

1045 Rule 13n-11(f)(4).

1046 Id.

1047 Id.

this schedule.[1048] Rule 13n-11(f)(4) is substantially similar to Rule 12-04 of Regulation S-X, which pertains to condensed financial information of registrants.[1049]

The Commission is revising proposed Rule 13n-11(f)(5) to require an SDR's financial reports to be provided as an official filing[1050] in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report[1051] filed in accordance with new Rule 407 of Regulation S-T. Finally, Rule 13n-11(g) provides that annual compliance reports and financial reports filed pursuant to Rules 13n-11(d) and (f) are required to be filed within 60 days after the end of the fiscal year covered by such reports.

Rule 407 of Regulation S-T

In conjunction with Rule 13n-11(f)(5), the Commission is adopting new Rule 407 of Regulation S-T, which stems from provisions in proposed Rule 13n-11(f). Rule 407 sets forth the requirements equivalent to those in Rules 405(a)(1) (except as to the requirement for website

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1048 Id.

1049 See 17 CFR 210.12-04.

1050 "Official filing" has the same meaning as set forth in Rule 11 of Regulation S-T. Rule 13n-11(b)(7). Specifically, Rule 11 of Regulation S-T defines "official filing" as "any filing that is received and accepted by the Commission, regardless of filing medium and exclusive of header information, tags and any other technical information required in an electronic filing; except that electronic identification of investment company type and inclusion of identifiers for series and class (or contract, in the case of separate accounts of insurance companies) as required by [R]ule 313 of Regulation S-T (§ 232.313) are deemed part of the official filing."

1051 "Interactive Data Financial Report" has the same meaning as set forth in Rule 11 of Regulation S-T. Rule 13n-11(b)(4). Specifically, the Commission is adding the definition of "Interactive Data Financial Report" in Rule 11 of Regulation S-T to mean "the machine-readable computer code that presents information in eXtensible Business Reporting Language (XBRL) electronic format pursuant to § 232.407." This definition is substantially the same as the definition of "Interactive Data File" in Rule 11 of Regulation S-T. However, Interactive Data Financial Reports are not considered Interactive Data Files for purposes of Rule 405 or for other rules and regulations that reference to Rule 405.

posting), (a)(2) (with modifications), (a)(3), (b), (c), (d)(1), and (e)(1) of Regulation S-T. With the exception of Rule 405(a)(2), these provisions were cross-referenced in proposed Rule 13n-11(f)(5). Thus, substantively, the requirements in new Rule 407 are the same as those proposed under proposed Rule 13n-11(f)(5), except as detailed below. The text of Rule 407 is also substantially the same as those provisions of Rule 405 that pertain to the content, format, and filing requirements of XBRL-formatted financial statements. Rule 407, however, applies to Interactive Data Financial Reports, whereas Rule 405 applies to Interactive Data Files. The Commission is adopting new Rule 407 to specify the content, format, and filing requirements for Interactive Data Financial Reports.

Although substantially similar, there are several differences between the provisions of Rule 405 that proposed Rule 13n-11(f) cross-referenced and the provisions of Rule 405 that are included in new Rule 407. As a general matter, these differences relate to modifications from the proposal that address the unique aspects of SDRs and the applicability of certain filing requirements to them.

Upon further consideration, the Commission is not adopting, in Rule 407, several provisions that the Commission had initially proposed applying to SDRs' financial reports. Rule 405(a)(1), which was cross-referenced in proposed Rule 13n-11(f)(5), requires compliance with the web site posting requirements found elsewhere in Rule 405. As adopted, Rule 407 does not have website posting requirements because the Commission believes that it is not necessary to impose such requirements on SDRs in this context. No commenters have suggested otherwise. Additionally, this is consistent with the SDR Rules not imposing any web site posting requirements on any other filings by SDRs. Rule 407 also does not require an SDR to file its financial reports consistent with Rules 405(d)(2), (3), and (4), all of which require detailed tagging of footnotes in financial statements. Additionally, Rule 407 does not require an SDR to file its financial reports consistent with Rule 405(e)(2), which requires detailed tagging of financial statement schedules. The Commission believes that block-text tags of complete footnotes and schedules in an SDR's financial reports[1052] will provide sufficient data structure for the Commission to assess and analyze effectively the SDR's financial and operational condition. Thus, the Commission believes that it is not necessary to impose additional costs on SDRs to provide detailed tagged footnotes and schedules in SDRs' financial reports. For these reasons, the Commission is not requiring SDRs to detail tag footnotes and schedules in their financial reports.

In addition, the provisions of Rule 405 that proposed Rule 13n-11(f) cross-referenced and the provisions of Rule 405 that are included in new Rule 407 differ in another way. New Rule 407(a)(2) specifies that Rule 407 applies only to SDRs filing financial reports.[1053] Specifically, new Rule 407(a)(2) states that an Interactive Data Financial Report must be filed only by an electronic filer that is required to file an Interactive Data Financial Report pursuant to Rule 13n-11(f)(5) as an exhibit to a filing of an SDR's financial report. Consistent with other documents required to be filed in a tagged data, or interactive, format,[1054] an SDR's financial report is required to be filed with the Commission in two formats. The first part of the official filing is the

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1052 See Rules 407(d) and (e) of Regulation S-T (requiring complete footnotes and schedules in financial statements to be block-text tagged).

1053 Rule 405(a)(2), on the other hand, applies to other electronic filers either required or permitted to submit an Interactive Data File.

1054 See Rule 405 of Regulation S-T, 17 CFR 232.405.

Related Official Financial Report Filing,[1055] which is in ASCII or HTML format. The second part of the official filing, the Interactive Data Financial Report, is an exhibit to the filing, which is required to be in XBRL format.[1056]

In addition to adopting new Rule 407 of Regulation S-T, the Commission is making a conforming amendment to Rule 305 of Regulation S-T to include Interactive Data Financial Reports among the list of filings to which Rule 305(a) does not apply.[1057] Rule 305(a) limits the number of characters and positions of tabular or columnar information of electronic filings with the Commission. By amending Rule 305, the Commission is treating Interactive Data Financial Reports in the same manner as it treats other XBRL filings in this context.

As mentioned above, Rule 13n-11(g) provides that annual compliance reports and financial reports are required to be filed within 60 days after the end of the fiscal year covered by such reports. The Commission anticipates developing an electronic filing system through which an SDR will be able to file annual compliance reports and financial reports shortly after the effective date of Rule 13n-11. The Commission anticipates that this electronic filing system will be through EDGAR and that it will be the same portal for SDRs to file Form SDR. If an SDR needs to file an annual compliance report and financial report prior to such time as the electronic filing system is available, then the SDR may file the reports in paper format with the

1055 The Commission is adding the definition of "Related Official Financial Report Filing" in Rule 11 of Regulation S-T to mean "the ASCII or HTML format part of the official filing with which an Interactive Data Financial Report appears as an exhibit."

1056 The Commission's proposed Rule 13n-11(f) stated that an SDR's financial report must be provided in XBRL consistent with certain provisions in Rule 405. As adopted, Rule 407 is intended to clarify that it is only the exhibit to the filing of an SDR's financial report that must be in XBRL.

1057 The Commission notes that Rule 305(a) of Regulation S-T does not apply to HTML documents. If a Related Official Financial Report Filing is filed in HTML format, then Rule 305(a) will not apply to that filing.

Commission's Division of Trading and Markets at the Commission's principal office in Washington, DC. However, doing so does not relieve the SDR from compliance with the requirement in Rule 13n-11(d)(2) to file the annual compliance report "in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual," or the requirement in Rule 13n-11(f)(5) to provide the financial report "as part of an official filing in accordance with the EDGAR Filer Manual." Therefore, when the Commission's electronic filing system is available, the SDR should file electronically any such reports that previously had been filed in paper format.

The Commission is not providing, by rule, that the financial reports are automatically granted confidential treatment, but an SDR may seek confidential treatment of certain information pursuant to Exchange Act Rule 24b-2. As stated above, this approach is consistent with how the Commission generally treats the filings that it receives from its regulated entities, including exchanges. The Commission may make filed financial reports available on its website except for information where confidential treatment is requested by the SDR and granted by the Commission.[1058]

The Commission notes that with respect to its other filers, the Commission has required, at a minimum, the financial information discussed above[1059] and, in some instances, significantly

1058 As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b-2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S-T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

1059 See, e.g., Exchange Act Rule 17a-5(d), 17 CFR 240.17a-5(d) (requiring broker-dealers to file annually audited financial statements); Article 3 of Regulation S-X, 17 CFR 210.3-01 et seq. (requiring certain financial statements to be audited by independent accountants).

more information.[1060] Additionally, as discussed in the Proposing Release, the Commission believes that it is necessary to obtain an audited annual financial report from each registered SDR to understand the SDR's financial and operational condition. It is particularly important for the Commission to have this understanding because SDRs are intended to play a pivotal role in improving the transparency and efficiency of the SBS market and because SBSs (whether cleared or uncleared) are required to be reported to a registered SDR.[1061] In its role as central recordkeeper, an SDR serves an important role as a source of data for regulators to monitor exposures, risks, and compliance with the Exchange Act and for market participants to access position information. Among other things, the Commission will need to know whether an SDR has adequate financial resources to comply with its statutory obligations or is having financial difficulties. If an SDR ultimately ceases doing business, then it could create a significant disruption in the OTC derivatives market.

With respect to one commenter's suggested deletion of the auditing requirement in Rule 13n-11(f)(2), the Commission disagrees with the commenter's view that the requirement imposes an additional burden for an SDR that is not justified in relation to the risks that an SDR would pose to its members.[1062] The Commission believes that the audit requirement will serve as an effective means to assure the reliability of the information in an SDR's financial report that is filed with the Commission. The Commission also believes that the filing of audited financial

1060 See, e.g., Exchange Act Rule 17a-5(a), 17 CFR 240.17a-5(a) (requiring broker-dealers to file monthly and quarterly Financial and Operational Combined Uniform Single (FOCUS) reports); Article 10-01(d) of Regulation S-X, 17 CFR 210.10-01(d) (requiring public companies to have their quarterly reports reviewed by independent public accountants).

1061 Proposing Release, 75 FR at 77343, supra note 2; see also Exchange Act Section 13(m)(1)(G), 15 U.S.C. 78m(m)(1)(G).

1062 See DTCC 5, supra note 19.

statements (as opposed to unaudited financial statements) is important because it would bolster market participants' confidence in the SDR and provide greater credibility to the accuracy of the information that the SDR files with the Commission.[1063] The Commission recognizes that because of the audit requirement in Rule 13n-11(f)(2), the rule may, in some instances, be more costly than the CFTC's requirement of quarterly unaudited financial statements.[1064] The Commission believes, however, that the additional burden, where it exists, is justified by the aforementioned benefits of requiring audited financial statements.

6. Additional Rule Regarding Chief Compliance Officer (Rule 13n-11(h))

In the Proposing Release, the Commission asked whether it should prohibit any officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities.[1065] In response, one commenter recommended that the Commission adopt such a prohibition.[1066] After considering the commenter's recommendation, the Commission has decided to adopt Rule 13n-11(h), which states that "[n]o officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under [Rule 13n-11]." This rule is

1063 See Revision of the Commission's Auditor Independence Requirements, Securities Act Release No. 7919 (Nov. 21, 2000), 65 FR 76008 (Dec. 5, 2000) (discussing importance of auditor independence and audited financial statements).

1064 See CFTC Rule 49.25, 17 CFR 49.25; DTCC 5, supra note 19 (suggesting that the Commission "consider adopting the CFTC's approach in its final [swap data repository] rules," regarding financial statements).

1065 Proposing Release, 75 FR at 77341, supra note 2.

1066 Better Markets 1, supra note 19; see also Better Markets 3, supra note 19 (suggesting "[e]xplicit prohibitions against attempts by officers, directors, or employees to coerce, mislead, or otherwise interfere with the CCO").

intended to advance the goals of the statute's requirements by preventing others at the SDR from seeking to improperly affect the SDR's CCO in the performance of his or her responsibilities. This rule is also intended to promote the independence of an SDR's CCO while maintaining the CCO's effectiveness by mitigating the potential conflicts of interest between the CCO and the SDR's officers, directors, and employees.

K. Exemption from Requirements Governing SDRs for Certain Non-U.S. Persons (Rule 13n-12)

1. Proposed Rule

In the Cross-Border Proposing Release, the Commission proposed, pursuant to its authority under Exchange Act Section 36,[1067] an exemption from Exchange Act Section 13(n)[1068] and the rules and regulations thereunder (collectively, the "SDR Requirements") for non-U.S. persons that perform the functions of an SDR within the United States, subject to a condition.[1069] Specifically, the Commission proposed Rule 13n-12 ("SDR Exemption"), which provides: "A non-U.S. person[1070] that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that

1067 Exchange Act Section 36 authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from certain provisions of the Exchange Act or certain rules or regulations thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm.

1068 15 U.S.C. 78m(n).

1069 Cross-Border Proposing Release, 78 FR at 31209, supra note 3.

1070 Proposed Rule 13n-12(a)(1) defines "non-U.S. person" to mean any person that is not a U.S. person. Proposed Rule 13n-12(a)(2) defines "U.S. person" by cross-reference to the definition of "U.S. person" in proposed Rule 3a71-3(a)(7). See Cross-Border Proposing Release, 78 FR at 31209, supra note 3.

each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission."[1071]

2. Comments on the Proposed Rule

The Commission received several comment letters concerning the registration and regulation of SDRs in the cross-border context, most of which were submitted prior to the Commission's proposal of Rule 13n-12. As a general matter, commenters suggested that the Commission should apply principles of international comity.[1072]

One commenter expressed concern that "the current asymmetry in the [proposed SDR

1071 Proposed Rule 13n-12(b).

1072 See DTCC 2, supra note 19 (urging the Commission, in its regulation of SDRs, to aim for regulatory comity as it has already been agreed to by ODRF and other international bodies such as CPSS and IOSCO); Foreign Banks SBSR, supra note 27 (recommending that the Commission work with foreign authorities to permit SDRs in all major jurisdictions to register with the appropriate regulators in each jurisdiction); see also Société Générale SBSR, supra note 27 (suggesting that the Commission consider international comity and public policy goals of derivatives regulation to limit its regulation of swap business and requesting that the Commission coordinate with its foreign counterparts, especially those based in Europe, to work toward an MOU on the jurisdictional reach of the derivatives rules of the U.S./European Market Infrastructure Regulation); ISDA SIFMA SBSR, supra note 27 ("The Commission should consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII."). See also DTCC CB, supra note 26 ("Given the global nature of OTC swaps and SB swaps markets, the United States should continue to promote an approach to the regulation of the swaps markets that adheres to international comity and mitigates the risk of regulatory arbitrage in market decisions. Regulations among jurisdictions must be coordinated in a manner that promotes competition, transparency, and protects the safety and soundness of these global markets. At the same time, the Commission should remain vigilant that the international framework is efficient and does not unfairly disadvantage or concentrate systemic risk in the United States.").

Rules], when compared to existing international standards, will lead to fragmentation along regional lines and prohibit global services and global data provision, which will weaken the introduction of trade repositories as a financial markets reform measure."[1073] The commenter stated that "because of the onerous standards imposed on SDRs compared to the regulatory framework of other competitive jurisdictions, the U.S. will be less attractive than other locations for the purpose of storing full global data where SDRs are actively looking to service the global regulatory community."[1074]

In addition, two commenters expressed concern about the potential impact of duplicative registration requirements imposed on SDRs.[1075] Specifically, one of these commenters remarked that the Commission's proposed rules governing SDRs "would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities" and that the Proposing Release made no "reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the non-resident SDRs."[1076] To address this concern, the commenter suggested that the Commission adopt a regime under which foreign SDRs would be deemed to comply with the SDR Requirements if the laws and regulations of the relevant foreign jurisdiction were equivalent to those of the Commission and an MOU has been entered into between the Commission and the relevant foreign authority.[1077] The commenter noted that the recommended "regime would have the following advantages: i) facilitating cooperation among authorities from different jurisdictions; ii) ensuring the mutual recognition of

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[1073] DTCC 2, supra note 19.

[1074] DTCC 2, supra note 19.

[1075] See US & Foreign Banks, supra note 24; ESMA, supra note 19.

[1076] ESMA, supra note 19.

[1077] ESMA, supra note 19.

[SDRs]; and iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one."[1078]

Recognizing that some SDRs would function solely outside of the United States and, therefore, would be regulated by an authority in another jurisdiction, commenters suggested possible approaches to the SDR registration regime. One commenter, for example, suggested that "a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains information from outside the U.S., even if such information is collected from non-U.S. swap dealer or [major security-based swap participant] registrants."[1079] Two commenters supported "cross-registration" of SDRs, whereby SDRs in all major jurisdictions may register with the appropriate regulators in each jurisdiction.[1080]

3. Final Rule

As stated above,[1081] the Commission believes that a non-U.S. person that performs the functions of an SDR within the United States is required to register with the Commission, absent

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1078 ESMA, supra note 19 (noting that a similar regulatory regime is delineated in the "European Commission's proposal for a Regulation on OTC derivatives, central counterparties and trade repositories").

1079 See US & Foreign Banks, supra note 24.

1080 Foreign Banks SBSR, supra note 27 ("Cross-registration of SDRs is not only necessary given the global nature of the swaps market, it also reduces duplicative data reporting. Cross-registration would also facilitate the creation of uniform reporting rules and procedures that would enable easy comparison of transaction data from different jurisdictions. Cross-border information sharing and cross-registration, coupled with the new standard identification codes that will be required for reporting to SDRs, would provide regulators and market participants with a comprehensive picture, thus enabling more robust surveillance and supervision of the global swaps market."); BofA SBSR, supra note 27 (noting that the Commission can ensure that it retains access to data reported to foreign SDRs by establishing a regime for cross-registration of SDRs in multiple jurisdictions).

1081 See Section III.B of this release discussing persons performing the functions of an SDR within the United States that must register with the Commission.

an exemption.[1082] After considering comments, including those urging the Commission to take into consideration the principles of international comity and mitigate the risk of regulatory arbitrage in market decisions,[1083] the Commission is adopting Rule 13n-12 as proposed, with two modifications,[1084] to provide an exemption from the SDR Requirements for certain non-U.S. persons. This rule is intended to provide legal certainty to market participants and to address commenters' concerns regarding the potential for duplicative regulatory requirements.[1085] Specifically, Rule 13n-12 states as follows: "A non-U.S. person[1086] that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that each regulator with supervisory authority over

1082 See Cross-Border Proposing Release, 78 FR at 31042, supra note 3. See also Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1) (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, are not required to register with the Commission.

1083 See DTCC 2, supra note 19; DTCC CB, supra note 26; Foreign Banks SBSR, supra note 27; Société Générale SBSR, supra note 27; and ISDA SIFMA SBSR, supra note 27.

1084 See infra note 1086 (discussing technical revision) and infra note 1087 (discussing MOU requirement).

1085 See US & Foreign Banks, supra note 24; ESMA, supra note 19.

1086 Exchange Act Rule 13n-12(a)(1), as adopted, defines "non-U.S. person" to mean any person that is not a U.S. person. Exchange Act Rule 13n-12(a)(2) defines "U.S. person" by cross-reference to the definition of "U.S. person" in Exchange Act Rule 3a71-3(a)(4)(i), 17 CFR 240.3a71-3(a)(4)(i). See Cross-Border Adopting Release, 79 FR at 47371, supra note 11 (adopting Exchange Act Rule 3a71-3(a)(4)(i)). As proposed, Rule 13n-12(a)(2) cross-referenced to "§ 240.3a71-3(a)(7)." For consistency in how cross-references are formatted in the SDR Rules, the Commission is revising from the proposal the format of the cross-reference to "Rule 3a71-3(a)(4)(i) of the Act (17 CFR 240.3a71-3(a)(4)(i))."

such non-U.S. person has entered into a memorandum of understanding[1087] or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission."

The Commission continues to believe that the SDR Exemption is necessary or appropriate in the public interest, and consistent with the protection of investors.[1088] Because the reporting requirements of Title VII and Regulation SBSR can be satisfied only if an SBS transaction is reported to an SDR that is registered with the Commission,[1089] the Commission continues to believe that the primary reason for a person subject to the reporting requirements of

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1087 Upon further consideration, the Commission is revising the proposed rule to require an MOU rather than a more specific "supervisory and enforcement" MOU. Requiring an MOU provides the Commission with the flexibility to negotiate a broad range of terms, conditions, and circumstances under which information can be shared with other relevant authorities.

1088 See Cross-Border Proposing Release, 78 FR at 31043, supra note 3.

1089 The Commission believes that the SDR Exemption addresses one commenter's view that "a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains information from outside the U.S." See US & Foreign Banks, supra note 24; see also Section III.B of this release (discussing when SDRs that are non-U.S. persons must register with the Commission). The Commission notes, however, that a non-U.S. person that performs the functions of an SDR outside the United States may choose to register with the Commission as an SDR to enable that person to accept data from persons that are reporting an SBS pursuant to the reporting requirements of Title VII and Regulation SBSR. See Exchange Act Sections 13(m)(1)(G) and 13A(a)(1), 15 U.S.C. 78m(m)(1)(G) and 78m-1(a)(1), as added by Dodd-Frank Act Sections 763(i) and 766(a); Regulation SBSR Adopting Release, supra note 13 (Rule 901 requiring all SBSs to be reported to a registered SDR or, if no SDR will accept the SBSs, the Commission). This approach is consistent with commenters' views supporting cross-registration of SDRs. See Foreign Banks SBSR, supra note 27 (suggesting cross-registration of SDRs); BofA SBSR, supra note 27 (suggesting cross-registration of SDRs). The Commission may consider also granting, pursuant to its authority under Exchange Act Section 36, 15 U.S.C. 78mm, exemptions to such non-U.S. person that registers with the Commission from certain of the SDR Requirements on a case-by-case basis. In determining whether to grant such an exemption, the Commission may consider, among other things, whether there are overlapping requirements in the Exchange Act and applicable foreign law.

Title VII and Regulation SBSR to report an SBS transaction to an SDR that is not registered with the Commission would likely be to satisfy reporting obligations that it or its counterparty has under foreign law.[1090] Such person would still be required to fulfill its reporting obligations under Title VII and Regulation SBSR by reporting its SBS transaction to an SDR that is registered with the Commission, absent other relief from the Commission,[1091] even if the transaction were also reported to a non-U.S. person that is not registered with the Commission because it is relying on the SDR Exemption. The Commission believes that this approach to the SDR Requirements appropriately balances the Commission's interest in having access to data about SBS transactions involving U.S. persons, while addressing commenters' concerns regarding the potential for duplicative regulatory requirements[1092] as well as furthering the goals of the Dodd-Frank Act.

The SDR Exemption includes a condition that each regulator with supervisory authority over the non-U.S. person that performs the functions of an SDR within the United States enters into an MOU or other arrangement with the Commission, as specified in Exchange Act Rule 13n-12(b). The Commission anticipates that in determining whether to enter into such an MOU or other arrangement with a relevant authority, the Commission will consider whether the relevant authority can keep confidential requested data that is collected and maintained by the

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1090 See Cross-Border Proposing Release, 78 FR at 31043, supra note 3.

1091 See Cross-Border Proposing Release, 78 FR at 31043, supra note 3 (discussing Regulation SBSR and substituted compliance); see also Regulation SBSR Adopting Release, supra note 13 (adopting Rule 908(c) allowing for the possibility of substituted compliance).

1092 See US & Foreign Banks, supra note 24; ESMA, supra note 19.

non-U.S. person that performs the functions of an SDR within the United States[1093] and whether the Commission will have access to data collected and maintained by such non-U.S. person.[1094] The Commission anticipates that it will consider other matters, including, for example, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction and whether an MOU or other arrangement would be in the public interest.[1095] The Commission believes that, in lieu of requiring every non-U.S. person that performs the functions of an SDR within the United States to register with the Commission, the condition in the SDR Exemption is appropriate to address the Commission's interest in having access to SBS data involving U.S. persons and U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and protecting the confidentiality of such SBS data involving U.S. persons and U.S. market participants.[1096]

1093 The Commission contemplates that the relevant authority will keep requested data that is collected and maintained by such non-U.S. person confidential in a manner that is consistent with Exchange Act Section 24 and Rule 24c-1 thereunder. See 15 U.S.C. 78x and 17 CFR 240.24c-1.

1094 The Commission contemplates that the Commission's access to data collected and maintained by such non-U.S. person will be in a manner that is consistent with Exchange Act Section 13(n)(5)(D) and Rule 13n-4(b)(5) thereunder. See Exchange Act Section 13(n)(5)(D), 15 U.S.C. 78m(n)(5)(D).

1095 The Commission has entered numerous cooperative agreements with foreign authorities. See Cooperative Arrangements with Foreign Regulators, available at http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml. Based on the Commission's experience with negotiating MOUs and other agreements with foreign authorities, the Commission believes that the MOU or agreement described in Rule 13n-12(b) could, in many cases, be negotiated in a timely manner so that the exemption provided under Rule 13n-12(b) should be available before the registration of an SDR seeking to claim the exemption would otherwise be required.

1096 Accord Société Générale SBSR, supra note 27 (requesting that the Commission coordinate with its foreign counterparts, especially those based in Europe, to work toward

With respect to one commenter's concern about "the current asymmetry in the [proposed SDR Rules] when compared to existing international standards" and "onerous standards imposed on SDRs compared to regulatory framework of other competitive jurisdictions," the Commission believes that the SDR Exemption is intended to encourage international cooperation, and thereby mitigate to some extent the concern of data fragmentation and regulatory arbitrage.[1097] The commenter, which was submitted prior to the Commission's proposal of Rule 13n-12, did not provide specific examples of international standards or regulatory frameworks for comparison with the SDR Rules, but, as discussed in Section I.D above, the Commission has taken into consideration recommendations by international bodies; Commission staff also has consulted and coordinated with foreign regulators through bilateral and multilaterial discussions.[1098]

VII. Paperwork Reduction Act

Certain provisions of the SDR Rules[1099] and Form SDR impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1100] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget ("OMB") for review when it issued the Proposing Release. The title of the new collection of information is "Form SDR and Security-

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an MOU on the jurisdictional reach of the derivatives rules of the U.S./European Market Infrastructure Regulation).

1097 See DTCC 2, supra note 19.

1098 Senior representatives of authorities with responsibility for regulation of OTC derivatives have met on a number of occasions to discuss international coordination of OTC derivatives regulations. See, e.g., Report of the OTC Derivatives Regulators Group (ODRG) on Cross-Border Implementation Issues (Mar. 31, 2014), available at http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/odrgreport033114.pdf.

1099 As noted above, "SDR Rules" means, collectively, Rules 13n-1 to 13n-12.

1100 44 U.S.C. 3501 et seq.

Based Swap Data Repository Registration, Duties, and Core Principles." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB assigned control number 3235-0719 to the new collection of information.

In the Proposing Release, the Commission solicited comment on the collection of information requirements and the accuracy of the Commission's statements.[1101] The Commission received three comments noting the importance of confidentiality.[1102] The Commission received one comment generally discussing the burden of Rule 13n-11(f)(2), which is discussed below.[1103]

The Commission also received one comment recommending that "the Commission should generally seek to avoid any divergence from the CFTC's and international regulators' frameworks that is likely to give rise to undue costs or burdens."[1104] The commenter believed

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1101 See Proposing Release, 75 FR at 77354, supra note 2.

1102 One commenter emphasized that regulators should provide confidential treatment to the annual compliance reports that SDRs provide to the Commission. DTCC 2, supra note 19. Consistent with its treatment of filings that it receives from other registrants, the Commission is not providing, by rule, that annual compliance reports are automatically granted confidential treatment, but SDRs may request confidential treatment. See Section VI.J.4.c of this release. One commenter to the Temporary Rule Release emphasized the importance of the Commission protecting information furnished to it under the rules in that release. Deutsche Temp Rule, supra note 28. A second commenter reiterated that regulators should provide confidential treatment to SBS data provided by SDRs. ESMA, supra note 19. The Commission anticipates that it will keep reported data that SDRs submit to the Commission confidential, subject to the provisions of applicable law. Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. See 17 CFR 200.83 (regarding confidential treatment procedures under FOIA).

1103 See Section VIII.D.6.c of this release discussing economic alternatives to Rule 13n-11(f)(2).

1104 IIB CB, supra note 26.

that "divergence is generally warranted only if the rule adopted by the Commission is more flexible than those adopted by others (and therefore would not preclude the voluntary adoption of consistent practices by market participants)."[1105]

None of the commenters specifically addressed the burden estimates in the Proposing Release related to the collection of information. The Commission has, however, revised the burden associated with completing Form SDR to reflect some additional material incorporated from Form SIP to accommodate SDRs' registration as SIPs and to reflect a revision to the disclosure of business affiliations.[1106] The Commission has also made a change to correct a calculation error.[1107] Other than these changes, the Commission's estimates remain unchanged from the Proposing Release.

A. Summary of Collection of Information

1. Registration Requirements, Form SDR, and Withdrawal from Registration

Rule 13n-1(b) requires an SDR to apply for registration with the Commission by filing Form SDR electronically in tagged data format in accordance with the instructions contained on the form. Under Rule 13n-1(e), each SDR is required to both designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Rule 13n-1(f) requires a non-resident SDR to (i) certify on Form SDR that the SDR

1105 IIB CB, supra note 26.

1106 See Section VII.D.1 of this release discussing the burdens associated with SDRs' registration requirements.

1107 The calculation of the burden on non-resident SDRs under Rule 13n-1(f) has been revised to correct a calculation error, which slightly reduces the burden hours incurred by non-resident SDRs. See infra note 1136 and the accompanying text.

can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. Under Rule 13n-3(a), in the event that an SDR succeeds to and continues the business of a registered SDR, the successor SDR may file an application for registration on Form SDR (and the predecessor SDR is required to file a withdrawal from registration with the Commission) within 30 days after the succession in order for the registration of the predecessor to be deemed to remain effective as the registration of the successor. Also, under Rule 13n-11(a), an SDR is required to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR.

Rule 13n-1(d) requires SDRs to file an amendment on Form SDR annually as well as when any information provided in items 1 through 17, 26, and 48 on Form SDR is or becomes inaccurate for any reason. Under Rule 13n-3(b), if an SDR succeeds to and continues the business of a registered SDR and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor SDR is permitted, within 30 days after the succession, to amend the registration of the predecessor SDR on Form SDR to reflect these changes.

Rule 13n-2(b) permits a registered SDR to withdraw from registration by filing a withdrawal from registration on Form SDR electronically in a tagged data format. The SDR must designate on Form SDR a person to serve as custodian of its books and records. When filing a withdrawal from registration on Form SDR, the SDR must update any inaccurate information.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

Rule 13n-4(b) sets out a number of duties for SDRs. Under Rules 13n-4(b)(2) and (4), SDRs are required to accept data as prescribed in Regulation SBSR[1108] and maintain that data, as required in Rule 13n-5, for each SBS reported to the SDRs. SDRs are required, pursuant to Rule 13n-4(b)(5), to provide direct electronic access to the Commission or its designees.[1109] SDRs are required, pursuant to Rule 13n-4(b)(6), to provide information in such form and at such frequency as required by Regulation SBSR. The Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies for the purposes of direct electronic access. Until such time as the Commission adopts any format or taxonomy, SDRs may provide direct electronic access to the Commission to data in the form in which SDRs maintain such data.

SDRs have an obligation under Rule 13n-4(b)(3) to confirm, as prescribed in Rule 13n-5, with both counterparties the accuracy of the information submitted to the SDRs. Under Rule 13n-4(b)(7), at such time and in such manner as may be directed by the Commission, an SDR is required to establish automated systems for monitoring, screening, and analyzing SBS data.[1110]

Rule 13n-5 establishes rules regarding SDR data collection and maintenance. Rule 13n-5(b)(1) requires every SDR to (1) establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the SDR;[1111] (2) accept all transaction data reported to it in accordance with those policies and

1108 See Regulation SBSR Adopting Release, supra note 13.

1109 See also Rule 13n-4(a)(5) (defining "direct electronic access").

1110 The Commission is not requiring SDRs to monitor, screen, and analyze SBS data maintained by the SDR at this time. See Section VI.D.2.c.iii of this release.

1111 "Transaction data" is defined in Rule 13n-5(a)(3).

procedures; (3) accept all data provided to it regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class; and (4) establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate, and clearly identifies the source for each trade side, and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data. An SDR is also required under Rule 13n-5(b)(1)(iv) to promptly record transaction data it receives.

In addition, Rule 13n-5(b) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed: (1) to calculate positions[1112] for all persons with open SBSs for which the SDR maintains records; (2) to ensure that the transaction data and positions that it maintains are complete and accurate; and (3) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

Rule 13n-5(b)(4) requires that every SDR maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information. SDRs must also maintain this data in an electronic format that is non-rewritable and non-erasable. Under Rule 13n-5(b)(7), the SDR's obligation to preserve, maintain, and make accessible the transaction data and historical positions extends to the periods required under Rule 13n-5 even if the SDR ceases to do business or to be registered pursuant to Exchange Act Section 13(n). Rule 13n-5(b)(8) requires every SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be

[1112] "Position" is defined in Rule 13n-5(a)(2).

maintained in accordance with Rule 13n-5(b)(7), including procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).

Rule 13n-6 establishes rules regarding SDR automated systems. Rule 13n-6 requires that every SDR, with respect to those systems that support or are integrally related to the performance of its activities, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

3. Recordkeeping

Rule 13n-7 requires every SDR to make and keep records, in addition to those required under Rules 13n-4(b)(4) and 13n-5. Specifically, every SDR is required, under Rule 13n-7(a)(1), to make and keep current a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the SDR maintains at that office and the information contained in those records. Every SDR is also required, under Rule 13n-7(a)(2), to make and keep current a record listing each officer, manager, or person performing similar functions of the SDR responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. Rule 13n-7(b) requires every SDR to keep and preserve at least one copy of all documents made or received by it in the course of its business as such. These records are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination. Upon the request of any representative of the Commission, pursuant to Rule 13n-7(b)(3), an SDR is required to furnish promptly to such representative copies of any documents required to be kept and preserved by the SDR pursuant to Rules 13n-7(a) and (b). Under Rule 13n-7(c), the SDR's recordkeeping obligation is extended to the periods required under Rule 13n-7 even if the SDR ceases to do business or to be registered pursuant to Exchange Act Section 13(n).

SDRs are also required to make available the books and records required by Rules 13n-1 through 13n-11 upon request by Commission representatives for inspection and examination.[1113]

4. Reports

Under Rule 13n-8, SDRs are required to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform its duties.

5. Disclosure

Rule 13n-10 describes disclosures that SDRs are required to provide to a market participant before accepting any SBS data from that market participant or upon a market participant's request. The information required in the disclosure document includes: (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n-6, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as described in Rule 13n-9(b)(1), (5) a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's

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1113 See, e.g., Rules 13n-4(b)(1) and 13n-7(b)(3).

dispute resolution procedures involving market participants, as described in Rule 13n-5(b)(6), (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

Rule 13n-4(b)(11) requires an SDR and Rule 13n-11(a) requires the board of an SDR to designate a CCO to perform the duties identified in Rule 13n-11. Under Rules 13n-11(c)(6) and (7), the CCO is responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The CCO is also required under Rules 13n-11(d), (e), and (g) to prepare and submit annual compliance reports to the SDR's board for review before they are filed with the Commission. The annual compliance reports must contain, at a minimum, a description of the SDR's enforcement of its policies and procedures, any material changes to the policies and procedures since the date of the preceding compliance report, any recommendation for material changes to the policies and procedures, and any material compliance matters identified since the date of the preceding compliance report. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual.[1114]

Rules 13n-11(f) and (g) require that financial reports be prepared and filed annually with the Commission. These financial reports must, among other things, be prepared in conformity

[1114] See 17 CFR 232.301.

with GAAP for the most recent two fiscal years of the SDR, audited by a registered public accounting firm that is qualified and independent in accordance with Rule 2-01 of Regulation S-X, and audited in accordance with standards of the Public Company Accounting Oversight Board. The financial reports must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T.[1115]

7. Other Provisions Relevant to the Collection of Information

Rule 13n-4(c)(1) sets forth the requirements for SDRs related to market access to services and data. Among other things, an SDR must: (1) establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR, as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR; and (2) establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to services offered or data maintained by the SDR and to grant that person access to those services or data if the person has been discriminated against unfairly.

Rule 13n-4(c)(2)(iv) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possesses requisite skills and expertise to fulfill their responsibilities in the management and

1115 See Section VI.J.5.c of this release discussing Rule 407 of Regulation S-T.

governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.

Rule 13n-4(c)(3) sets forth the conflicts of interest controls required of SDRs. In particular, SDRs must establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis and written policies and procedures regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives.

Rule 13n-5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

Rules 13n-4(b)(8) and 13n-9 relate to the privacy requirements for SDRs. Rule 13n-4(b)(8) requires SDRs to maintain the privacy of any and all SBS transaction information that the SDR receives from a SBS dealer, counterparty, or any registered entity as prescribed in Rule 13n-9. Rule 13n-9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Rule 13n-9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential information received by the SDR, material, nonpublic information, and/or intellectual property. At a minimum, these policies and procedures must address limiting access to such information and intellectual property, standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and adequate oversight.

B. Use of Information

1. Registration Requirements, Form SDR, and Withdrawal from Registration

As discussed above, Rules 13n-1 and 13n-3 generally require SDRs to register on Form SDR and make amendments on Form SDR when specified information on the form becomes inaccurate, as well as annually. The information collected in Form SDR is used to enhance the ability of the Commission to monitor SDRs and oversee their compliance with the federal securities laws and the rules and regulations thereunder, as well as understand their operations and organizational structure. The information will also be used to make determinations of whether to grant or institute proceedings to determine whether registration should be granted or denied.

As discussed above, Rule 13n-2 generally permits a registered SDR to withdraw from registration by filing Form SDR electronically in a tagged data format, designating a custodian of its books and records, and updating any inaccurate information contained in its most recently filed Form SDR. The information collected from an SDR withdrawing from registration is used by the Commission to monitor and oversee SDRs by ensuring that the Commission has an accurate record of registered SDRs and access to an SDR's books and records after the SDR withdraws from registration.

Also, under Rule 13n-11(a), an SDR is required to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. This information will help the Commission identify SDRs' CCOs.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

As discussed above, Rules 13n-4(b), 13n-5, and 13n-6 specify the duties of SDRs, require SDRs to collect and maintain specific data and provide that data to certain entities.[1116] The information that is collected under these provisions will help ensure an orderly and transparent SBS market as well as provide the Commission and other relevant authorities with tools to help oversee this market.

3. Recordkeeping

As discussed above, Rule 13n-7 requires an SDR to make and keep books and records relating to its business (except for the transaction data and positions collected and maintained pursuant to Rule 13n-5) for a prescribed period.[1117] The information collected under these provisions is necessary for Commission representatives to inspect and examine an SDR and to facilitate the Commission's efforts to evaluate the SDR's compliance with the federal securities laws and the rules and regulations thereunder.

4. Reports

As discussed above, Rule 13n-8 requires SDRs to provide certain reports to the Commission.[1118] The Commission will use the information collected under this provision to assist in its oversight of SDRs, which will help ensure an orderly and transparent SBS market.

5. Disclosure

As discussed above, Rule 13n-10 requires SDRs to provide certain specific disclosures to a market participant before accepting any data from that market participant or upon a market

[1116] See Sections VI.D.2.c, VI.E, VI.F.3 of this release discussing Rules 13n-4(b), 13n-5, and 13n-6, respectively.

[1117] See Section VI.G of this release discussing Rule 13n-7.

[1118] See Section VI.H.3 of this release discussing Rule 13n-8.

participant's request.[1119] These disclosures will help market participants understand the potential risks and costs associated with using an SDR's services, as well as the protections and services available to them.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

As discussed above, Rule 13n-11 requires an SDR's CCO to establish certain procedures relating to the remediation of noncompliance issues as well as prepare and sign an annual compliance report, which is filed with the Commission.[1120] Rule 13n-11 also requires that a financial report be prepared and filed with the Commission as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T. The information collected under this rule will help ensure compliance by SDRs with the federal securities laws and the rules and regulations thereunder as well as assist the Commission in overseeing SDRs.

7. Other Provisions Relevant to the Collection of Information

As discussed above, Rule 13n-4(c)(1) requires SDRs to comply with certain requirements relating to market access to services and data, including establishment of certain policies and procedures and clearly stated objective criteria. Rule 13n-4(c)(2)(iv) requires SDRs to establish, maintain, and enforce policies and procedures regarding the skills and expertise, understanding of responsibilities, and sound judgment of the SDRs' senior management and members of the board or committee that has the authority to act on behalf of the board. Rule 13n-4(c)(3) requires SDRs to establish and enforce written conflicts of interest policies and procedures; to establish, maintain, and enforce written policies and procedures reasonably designed to identify and

[1119] See Section VI.I.2.c of this release discussing Rule 13n-10.

[1120] See Section VI.J of this release discussing Rule 13n-11.

mitigate conflicts of interest on an ongoing basis; and to establish, maintain, and enforce written policies and procedures regarding their noncommercial and commercial use of transaction information. Rule 13n-5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes regarding the accuracy of the transaction data and positions that are recorded in the SDRs. Rules 13n-4(b)(8) and 13n-9 require SDRs to establish, maintain, and enforce policies, procedures, and safeguards regarding privacy and misappropriation or misuse of certain information.[1121] The information collected pursuant to these provisions will help ensure a transparent and orderly SBS market, protect market participants' privacy, and facilitate Commission oversight of SDRs.

C. Respondents

1. Registration Requirements, Form SDR, and Withdrawal from Registration

As discussed above, the registration requirements of Rules 13n-1, 13n-2, 13n-3, 13n-11(a), and Form SDR apply to every U.S. person performing the functions of an SDR and every non-U.S. person performing the functions of an SDR within the United States, absent an exemption.[1122] Commission staff is aware of seven persons that have, to date, filed applications for registration with the CFTC as swap data repositories, three of which have withdrawn their applications and four of which are provisionally registered with the CFTC. It is reasonable to estimate that a similar number of persons provisionally registered with the CFTC may seek to register with the Commission as SDRs. Therefore, the Commission continues to estimate, for PRA purposes, that ten persons may register with the Commission as SDRs. The Commission also continues to estimate, for PRA purposes, that three of the ten respondents may be non-

[1121] See Section VI.I.1.c of this release discussing Rule 13n-9.

[1122] See Section VI.K of this release discussing Rule 13n-12 ("SDR Exemption").

resident SDRs subject to the additional requirements of Rule 13n-1(f). The Commission received no comments on its estimate of the number of non-resident SDRs and continues to believe that this estimate is reasonable. Although non-resident SDRs may be able to take advantage of the SDR Exemption, the Commission conservatively estimates for PRA purposes that none of the three would rely on the exemption.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

The duties, data collection and maintenance, and direct electronic access requirements of Rules 13n-4(b), 13n-5, and 13n-6 as a general matter, apply to all SDRs, absent an exemption. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

3. Recordkeeping

The recordkeeping requirements of Rule 13n-7 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

4. Reports

The report requirement of Rule 13n-8 applies to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

5. Disclosure

The disclosure requirements of Rule 13n-10 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

The provisions regarding CCOs set forth in Rule 13n-11 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

7. Other Provisions Relevant to the Collection of Information

The remaining requirements of the SDR Rules[1123] relevant to the collection of information, specifically Rules 13n-4(c), 13n-5(b)(6), and 13n-4(b)(8) and 13n-9, apply to all SDRs, absent an exemption. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

As stated above, no commenters addressed any of these estimates.[1124]

D. Total Annual Reporting and Recordkeeping Burden

The Commission received no comments on any of the estimates provided in the Proposing Release. The Commission has, however, revised the burden associated with completing Form SDR to reflect some additional material incorporated from Form SIP to accommodate SDRs' registration as SIPs and to reflect a revision to the disclosure of business affiliations. The Commission has also made a change to correct a calculation error.[1125] Other than these changes, the Commission's estimates remain unchanged from the Proposing Release.

1. Registration Requirements, Form SDR, and Withdrawal from Registration

Rule 13n-1(b) and Rule 13n-3(a) (which relates to successor SDRs as described above) require SDRs to apply for registration using Form SDR and file the form electronically in tagged data format with the Commission in accordance with the instructions to the form.[1126] Further, Rule 13n-1(e) requires SDRs to designate an agent for service of process on Form SDR, and

1123 As noted above, "SDR Rules" means Rules 13n-1 to 13n-12.

1124 See Section VII of this release discussing comments related to the collection of information.

1125 In one minor respect, the calculation of the burden on non-resident SDRs under Rule 13n-1(f) has been revised to correct a calculation error, which slightly reduces the burden hours incurred by non-resident SDRs. See infra note 1136 and the accompanying text.

1126 See Sections VI.A and VI.C.3 of this release discussing Rule 13n-1(b) and Rule 13n-3(a), respectively.

Rule 13n-11(a) requires SDRs to identify their CCOs on Form SDR. For purposes of the PRA, the Commission initially estimated that it would take an SDR approximately 400 hours to complete the initial Form SDR with the information required, including all exhibits to Form SDR.[1127] The Commission based this estimate on the number of hours necessary to complete Form SIP because Form SDR was based on Form SIP and incorporated many of the provisions of Form SIP.[1128] The Commission continues to estimate, based on Form SIP, that it will initially take an SDR 400 hours to complete the proposed portions of Form SDR with the information required, including all exhibits thereto,[1129] and now estimates that it will take an SDR an additional 81 hours to complete Form SDR to reflect the additional burden hours discussed below.

As noted above, the Commission has revised Form SDR to incorporate certain provisions from Form SIP to allow SDRs to register as both SDRs and SIPs using Form SDR.[1130] The Commission believes that the burden of filing Form SDR should be adjusted to reflect these revisions. Because of the overlap between Form SDR and Form SIP, the Commission initially estimated that SDRs would need only one-quarter of the time to complete Form SIP, or 100

1127 See Proposing Release, 75 FR at 77348, supra note 2.

1128 See Proposing Release, 75 FR at 77348, supra note 2.

1129 The Commission calculated in 2011 that Form SIP would take 400 hours to complete. See Submission for OMB Review; Comment Request, 76 FR 30984 (May 27, 2011) (outlining the Commission's most recent calculations regarding the PRA burdens for Form SIP) ("SIP PRA Filing"). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden will be roughly equivalent.

1130 See Section VI.A.1.c of this release discussing Form SDR. See also supra note 220 discussing changes to proposed Form SDR to incorporate the additional information requested on Form SIP of applicants for registration as a SIP.

hours, when registering with the Commission as SIPs separately on Form SIP.[1131] The Commission believes that this estimate of the burden of an SDR to register as a SIP using Form SDR should be reduced to 80 hours because (1) SDRs will not have to process and file two separate forms; (2) SDRs will not have to provide duplicate information in two forms; and (3) SDRs will not have to prepare and file duplicate exhibits to two forms. The Commission believes that 80 hours represents a reasonable estimate of the additional burden hours that SDRs will incur in responding to the provisions incorporated from Form SIP into Form SDR.

Moreover, as discussed above, the Commission is revising Form SDR from the proposal by requiring disclosure of business affiliations in the "derivatives industry" rather than the "OTC derivatives industry" for an applicant's designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees.[1132] The Commission believes that SDRs will incur an additional burden in replying to this disclosure, which may require disclosure of more business affiliations than would have been disclosed under Form SDR, as proposed. The Commission believes that 1 hour represents a reasonable estimate of the additional burden hours that each SDR will incur in responding to the revised disclosure requirement.

1131 See Regulation SBSR Proposing Release, 75 FR at 75260, supra note 8 ("Any entity that is required to complete proposed Form SDR also would have to complete Form SIP. Because of the substantial overlap in the forms, much of the burden for completing Form SIP would be subsumed in completing proposed Form SDR. Therefore, the Commission preliminarily estimates that, having completed a proposed Form SDR, an entity would need only one-quarter of the time to then complete Form SIP, or 100 hours (specifically, 37.5 hours of legal compliance work and 62.5 hours of clerical compliance work).").

1132 See Section VI.A.1.c of this release discussing Form SDR.

As noted above, the Commission estimates that 10 respondents will be subject to this burden.[1133] Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs is approximately 4810 burden hours.[1134] The Commission believes that SDRs will, as a general matter, prepare Form SDR internally, except as otherwise discussed below. In the Proposing Release, the Commission solicited comments as to whether SDRs would outsource this requirement, but the Commission did not receive any comments in this regard.[1135]

Under Rule 13n-1(f), a non-resident SDR must (i) certify that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. This creates an additional burden for non-resident SDRs. The Commission estimates, based on similar requirements of Form 20-F, that this additional burden will add 1 hour and $900 in outside legal costs per respondent.[1136] As stated above, the Commission believes that there will be three respondents to

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1133 See Section VII.C.1 of this release discussing respondents to the registration requirements and Form SDR.

1134 The Commission derived its estimate from the following: (400 hours for the burden of Form SDR, as proposed) + (80 hours for the burden of responding to additional provisions incorporated from Form SIP) + (1 hour for the burden of responding to the revised disclosure of business affiliations) x 10 SDRs = 4810.

1135 See Proposing Release, 75 FR at 77348, supra note 2.

1136 Foreign Bank Exemption from the Insider Lending Prohibition of Exchange Act Section 13(k), Exchange Act Release No. 49616 (Apr. 26, 2004), 69 FR 24016, 24022 (Apr. 30, 2004) (outlining the Commission's calculations regarding the PRA burdens resulting from having to provide a legal opinion and additional disclosure required by Instruction 3 to Item 7.B to Form 20-F). The Commission calculates that the certification and opinion of counsel would result in an additional burden to non-resident SDRs of 3.25 hours, of this collection, for a total additional burden of 3 hours and $2,700 for non-resident SDRs to comply with Rule 13n-1(f).[1137]

SDRs are also required to amend Form SDR pursuant to Rule 13n-1(d) annually as well as when information in certain items is or becomes inaccurate. Amendments are also permitted in certain situations involving successor SDRs pursuant to Rule 13n-3(b).[1138] The Commission believes that these amendments represent the ongoing annual burdens of Form SDR and Rules 13n-1(d) and 13n-3(b).[1139] The Commission estimates that the ongoing annualized burden for complying with these registration amendment requirements will be approximately 12 burden

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which approximately 1 hour would be incurred by the non-resident SDRs themselves and 2.25 hours would be incurred by outside legal counsel, which would cost approximately $900 ($900 = 2.25 hours (portion of estimated burden incurred by outside legal counsel) × $400 (hourly rate for an outside attorney)). The Commission continues to estimate the hourly rate for an outside attorney at $400 per hour, based on industry sources. See Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sep. 20, 2013), 78 FR 67468, 67593 n.1538 (Nov. 12, 2013) (estimating the cost of an outside attorney to be $400 per hour). In the Proposing Release, the Commission mistakenly estimated the burden to be 3 hours incurred by each non-resident SDR (in addition to $900 incurred by each SDR in connection with hiring outside legal counsel). Proposing Release, 75 FR at 77348, supra note 2.

1137 See Section VII.C.1 of this release discussing respondents to the registration requirements and Form SDR. The base burden of 4000 hours includes resident and non-resident SDRs. The 3 hour and $2700 figures are the additional costs as a result of Rule 13n-1(f) for non-resident SDRs not already accounted for in the 4000 hour figure.

1138 See Section VI.C.3 of this release discussing Rule 13n-3(b).

1139 When estimating the burden associated with Form SIP, the Commission did not separately estimate the burden associated with amendments on Form SIP because the Commission believed that the annual burden of Form SIP encompassed the burden of amending Form SIP. SIP PRA Filing, 76 FR 30984, supra note 1129 ("This annual reporting and recordkeeping burden does not include the burden hours or cost of amending a Form SIP because the Commission has already overstated the compliance burdens by assuming that the Commission will receive one initial registration pursuant to Rule 609 on Form SIP a year.") Although the Commission is basing its estimate of the burden of Form SDR on its estimate of the burden of Form SIP, the Commission is separately estimating the burden of amendments on Form SDR.

hours for each SDR per amendment[1140] and approximately 120 burden hours for all SDRs per amendment. Rule 13n-1(d) requires one annual amendment on Form SDR as well as interim amendments on Form SDR when certain reported information therein is or becomes inaccurate or, under Rule 13n-3(b), in certain circumstances involving successor SDRs, as discussed above.[1141] When Form ADV was amended in 2010, the Commission estimated that there were 2 amendments per year for that form.[1142] The Commission believes that 2 amendments will be a reasonable estimate for the number of amendments per year to correct inaccurate information or in situations involving successor SDRs because amendments on Form ADV, like amendments on Form SDR, are required annually as well as when certain information on Form ADV becomes inaccurate.[1143] Thus, the Commission estimates that respondents will be required to file on average a total of 3 amendments per year, 2 amendments plus the required annual amendment. Therefore, the Commission estimates that each respondent will have an average annual burden of

1140 When amendments to Form ADV were proposed in 2008, the Commission estimated the hour burden for amendments to be roughly 3% of the initial burden. Amendments to Form ADV, Investment Advisers Act Release No. 2711 (Mar. 3, 2008), 73 FR 13958, 13979 (Mar. 14, 2008). In that proposal, the initial burden was calculated to be 22.25 hours per respondent and 0.75 hours per respondent for amendments. The Commission believes that a similar ratio will apply to filers of Form SDR because filers of Form ADV, like filers of Form SDR, are required to file amendments annually as well as when certain information on Form ADV becomes inaccurate. See Form ADV: General Instructions, available at http://www.sec.gov/about/forms/formadv-instructions.pdf. Thus, the Commission estimates that the annual burden of filing one amendment on Form SDR will be 3% of the 400 hour initial burden, or 12 hours.

1141 See Sections VI.A.4.c and VI.C.3 of this release discussing Rule 13n-1(d) and Rule 13n-3(b), respectively.

1142 Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010), 75 FR 49234, 49257 (Aug. 12, 2010). Although this information is based upon investment adviser statistics, the Commission believes that, for PRA purposes, the differences between investment advisers and SDRs are minimal.

1143 See Form ADV: General Instructions, available at http://www.sec.gov/about/forms/formadv-instructions.pdf.

36 hours for a total estimated average annual burden of 360 hours.[1144] The Commission believes that SDRs will conduct this work internally.

SDRs may withdraw from registration by filing a withdrawal from registration on Form SDR electronically in a tagged data format. An SDR withdrawing from registration must designate on Form SDR a person to serve as the custodian of the SDR's books and records. An SDR must also update any inaccurate information. The Commission believes that an SDR's withdrawal from registration on Form SDR will be substantially similar to its most recently filed Form SDR. The Form SDR being filed in this circumstance will therefore already be substantially complete and as a result, the burden will not be as great as the burden of filing an application for registration on Form SDR. Rather, the Commission believes that the burden of filing a withdrawal from registration on Form SDR will be akin to filing an amendment on Form SDR. Thus, the Commission estimates that the one-time burden of filing a Form SDR to withdraw from registration will be approximately 12 burden hours for each SDR and approximately 120 burden hours for all SDRs.

2. <u>SDR Duties, Data Collection and Maintenance, and Direct Electronic Access</u>

As discussed above, Rules 13n-4(b)(2) and (4), and 13n-5 require SDRs to accept and maintain data, including transaction data, received from third parties and to calculate and maintain positions.[1145] Rule 13n-4(b)(5) requires SDRs to provide direct electronic access to the Commission or its designees. Rules 13n-4(b)(3) and 13n-5(b)(1)(iii) require SDRs to confirm

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1144 The 36 hour figure is the result of the estimated burden hour per SDR per amendment (12) times the estimated number of amendments per year (3). The 360 hour figure is the result of the estimated burden per SDR (36) times the number of SDRs (10).

1145 See Sections VI.D.2.c, VI.E, and VI.F.3 of this release discussing Rules 13n-4(b)(2) and (4), 13n-5, and 13n-6, respectively.

the accuracy of the data submitted and to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy themselves that the transaction data that has been submitted to the SDRs is complete and accurate. In addition, Rule 13n-5(b)(4) requires SDRs to maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years.[1146] This obligation would continue even if an SDR ceases to be registered or ceases doing business.[1147] SDRs are required to make and keep current a plan to ensure compliance with this requirement.[1148]

The Commission estimates that the average one-time start-up burden per SDR of establishing systems compliant with all of the requirements described in this section, including the SBS data maintenance requirements of Rules 13n-5(b)(4), (7), and (8), will be 42,000 hours and $10 million in information technology costs. Based on the expected number of respondents, the Commission estimates a total start-up cost of 420,000 hours and $100 million in information technology costs. The Commission further estimates that the average ongoing annual costs of these systems to be 25,200 hours and $6 million per respondent or a total of 252,000 hours and $60 million for a total ongoing annual burden.

Each SDR is also required to establish, maintain, and enforce written policies and procedures, reasonably designed: (1) under Rule 13n-5(b)(1), for the reporting of complete and accurate transaction data to the SDR and to satisfy itself that such information is complete and

1146 This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information and is also required to be maintained in an electronic format that is non-rewritable and non-erasable.

1147 Rule 13n-5(b)(7).

1148 Rule 13n-5(b)(8).

accurate; (2) under Rule 13n-5(b)(2), to calculate positions for all persons with open SBSs for which the SDR maintains records; (3) under Rule 13n-5(b)(3), to ensure transaction data and positions that the SDR maintains are complete and accurate; (4) under Rule 13n-5(b)(5), to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR; and (5) under Rule 13n-6, with respect to those systems that support or are integrally related to the performance of the SDR's activities, to ensure that those systems provide adequate levels of capacity, integrity, resiliency, availability, and security. While these policies and procedures will vary in exact cost, the Commission estimates that they will require an average of 210 hours per respondent per policy and procedure to prepare and implement. The Commission further estimates that these policies and procedures will require a total of $100,000 for outside legal costs per SDR.[1149] In sum, the Commission estimates the initial burden for all respondents to be 10,500 hours and $1,000,000 for outside legal costs.[1150] The Commission based these estimates upon those estimates the Commission used with regards to establishing policies and procedures regarding Regulation NMS.[1151] Once these policies and procedures are established, the Commission estimates that it will take, on average, 60 hours annually to

1149 This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours of outside legal consulting per policy and procedure, times 5 policies and procedures.

1150 The 10,500 hour figure is the result of the number of hours per policy and procedure (210) times the number of policies and procedures required by these provisions (5), times the number of respondents (10). The $1,000,000 figure is the result of the outside dollar cost per respondent ($100,000) times the number of respondents (10).

1151 Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37577 (June 29, 2005) ("Regulation NMS Adopting Release"). The Commission based these estimates on those for non-SRO trading centers rather than for SRO trading centers because the Commission believes that, for PRA purposes, non-SRO trading centers' burdens are more like those that SDRs will face under the SDR Rules. Like non-SRO trading centers, SDRs are not SROs and handle data regarding trades.

maintain each of these policies and procedures per respondent, with a total estimated average annual burden of 3,000 hours for all respondents.[1152] The Commission believes that SDRs will conduct this maintenance work internally.

As discussed above, the Commission is not adopting the more specific requirements of proposed Rule 13n-6(b)(1), but is instead adopting the core policies and procedures requirement.[1153] The Commission continues to believe, however, that the 210 hour per respondent estimate for adopting policies and procedures is applicable because Rule 13n-6 continues to require SDRs to adopt policies and procedures. The Commission believes that the 210 hour estimate is a reasonable estimate because the estimate is used in other contexts to estimate the burdens of creating policies and procedures and the Commission expects that the policies and procedures required by Rule 13n-6 would result in a comparable burden to SDRs.[1154] Also as discussed above, the Commission is not adopting proposed Rules 13n-6(b)(3) and (4).[1155] Thus, the Commission is no longer including the estimated burden of those proposed rules in the overall burdens discussed in this release.

3. Recordkeeping

Every SDR is required, under Rule 13n-7(a)(1), to make and keep current a record for each office listing, by name or title, each person who, without delay, can explain the types of records the SDR maintains at that office. Also, under Rule 13n-7(a)(2), every SDR is required to make and keep current a record listing officers, managers, or persons performing similar

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1152 The 3,000 hour figure is the result of the estimated average hourly burden to maintain each policy and procedure (60), times the total number of policies and procedures required under this requirement (5), times the total number of SDRs (10).

1153 See Section VI.F.3 of this release discussing Rule 13n-6.

1154 See supra note 1151 discussing Regulation NMS.

1155 See Section VI.F.3 of this release discussing Rule 13n-6.

functions with responsibility for establishing the policies and procedures of the SDR that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. The Commission estimates that these records will create an initial burden, at a maximum, of 1 hour per respondent, for a total initial burden of 10 hours. The Commission estimates that the ongoing annual burden will be 0.17 hours (10 minutes) per respondent to keep these records current and to store these documents based on the Commission's estimates for similar requirements for broker-dealers.[1156] This results in a total ongoing annual burden of 1.7 hours. The Commission believes that SDRs will conduct this work internally.

Rule 13n-7(b) requires each SDR to keep and preserve at least one copy of all documents made or received by it in the course of its business as such, other than the transaction data and positions collected and maintained pursuant to Rule 13n-5. These records are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.[1157] Upon the request of any representative of the Commission, an SDR is required to furnish promptly documents required to be kept and preserved by it pursuant to Rules 13n-7(a) or (b) to such a representative. As discussed above, Rule 13n-7(b) is intended to set forth the recordkeeping obligations of SDRs and thereby facilitate implementation of the inspection and examination of SDRs by representatives of the Commission.[1158] Based on the Commission's experience with

1156 See Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934, Exchange Act Release No. 44992 (Oct. 26, 2001), 66 FR 55818, 55836 (Nov. 2, 2001) (regarding the collection of information pursuant to Rules 17a-3(a)(21) and (22)).

1157 This obligation will continue even if an SDR withdraws from registration or ceases doing business. See Rule 13n-7(c).

1158 See Section VI.G.2.c of this release discussing Rule 13n-7(b).

recordkeeping costs and consistent with prior burden estimates for similar provisions,[1159] the Commission estimates that this requirement will create an initial burden of 345 hours and $1800 in information technology costs per respondent, for a total initial burden of 3450 hours and $18,000 for all respondents. The Commission further estimates that the ongoing annual burden will be 279 hours per respondent and a total ongoing annual burden of 2790 hours for all respondents.

4. Reports

Under Rule 13n-8, SDRs are required to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission. For PRA purposes only, the Commission estimates that it will request these reports a maximum of once per year, per respondent. For PRA purposes only, the Commission estimates that these reports will be limited to information that will have been already compiled under the SDR Rules and thus require only 1 hour per response to compile and transmit. Thus, the Commission estimates, for PRA purposes only, that the total annual burden for these reports to be 10 hours for all respondents. The Commission believes that SDRs will conduct this work internally.

As discussed above, the Commission is not adopting proposed Rule 13n-6(b)(2).[1160] Thus, the Commission is no longer including the estimated burden of that proposed rule in the overall burdens discussed in this release.

1159 See Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 59342 (Feb. 2, 2009), 74 FR 6456, 6472 (Feb. 9, 2009).

1160 See Section VI.F.3 of this release discussing Rule 13n-6.

5. Disclosure

As discussed above, pursuant to Rule 13n-10, SDRs are required to provide certain disclosures to certain market participants.[1161] The Commission estimates that the average one-time start-up burden per SDR of preparing this disclosure document is 97.5 hours and $4,400 of external legal costs and $5,000 of external compliance consulting costs, resulting in a total initial burden of 975 hours and $94,000 for all respondents. This estimate reflects the Commission's experience with and burden estimates for similar disclosure document requirements applied to investment advisers with 1000 or fewer employees and as a result of its discussions with market participants.[1162] Because the Commission expects that SDRs will be able to provide this disclosure document electronically, the Commission expects that this requirement will result in an average annual burden, after the initial creation of the disclosure document, of 1 hour per respondent, with a total annual burden of 10 hours for all respondents. The Commission believes that SDRs will conduct this ongoing annual work internally.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

Under Rules 13n-11(c)(6) and (7), an SDR's CCO is responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. Based on the Commission's estimates regarding Regulation NMS,[1163] it estimates that on average these two provisions will

1161 See Section VI.I.2.c of this release discussing Rule 13n-10.

1162 See Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010), 75 FR 49234, 49255-49256 (Aug. 12, 2010) (finding that average initial annual burden associated with Form ADV for each medium-sized investment adviser, meaning an adviser with between 11 and 1,000 employees, to be 97.5 hours).

1163 See Regulation NMS Adopting Release, supra note 1151.

require 420 hours to implement and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and, on average, 1200 hours annually for all respondents.[1164] Also based on the estimates regarding Regulation NMS, the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required procedures as a result of this burden per respondent, for a total outside cost burden of $400,000 for all respondents.[1165]

A CCO is also required under Rules 13n-11(d), (e), and (g) to prepare and submit annual compliance reports to the SDR's board for review before the annual compliance reports are filed with the Commission. Based upon the Commission's estimates for similar annual reviews by CCOs of investment companies,[1166] the Commission estimates that these reports will require on average 5 hours per respondent per year. Thus, the Commission estimates a total annual burden of 50 hours for all respondents. The Commission believes that these costs will be internal costs.

Rules 13n-11(f) and (g) require that financial reports be prepared and filed with the Commission as an official filing in accordance with the EDGAR Filer Manual and include, as

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1164 The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

1165 $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours per policy and procedure, times 2 policies and procedures, times the number of SDRs (10).

1166 See Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 25925 (Feb. 5, 2003), 68 FR 7038, 7047 (Feb. 11, 2003).

part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T. The Commission estimates, based on its experience with entities of similar size to the respondents to this collection, that preparing and filing the financial reports will generally require on average 500 hours per respondent and cost $500,000 for independent public accounting services. Thus, the Commission estimates a total annual burden of 5000 hours and $5,000,000 for all respondents.

One commenter suggested that "[i]n an attempt to harmonize final [SDR] rules with the CFTC's final [swap data repository] rules, the Commission should consider removing Proposed Rule 240.13n–11(f)(2)'s requirement that each financial report filed with a compliance report is audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent unless the [SDR] is under a separate obligation to provide financial statements."[1167] The commenter believed that "[t]his requirement imposes an additional burden for an [SDR] and is not justified in relation to the risks that an [SDR] would pose to its members" and that "[u]nlike clearing agencies or other entities supervised by the Commission, an [SDR] does not have financial exposure to its users or participants that would justify the imposition of this requirement."[1168] The commenter suggested that the Commission consider "adopting [instead] the CFTC's approach in its final [swap data repository] rules, which require [a swap data repository's] financial statements be prepared in conformity with generally accepted accounting principles . . . ."[1169]

1167 DTCC 5, supra note 19.

1168 DTCC 5, supra note 19.

1169 DTCC 5, supra note 19.

As discussed further below, although the Commission understands that SDRs will incur costs in hiring and retaining qualified public accounting firms, the Commission believes that obtaining audited financial reports from SDRs is important given the significant role the Commission believes that SDRs will play in the SBS market.[1170] Given this significant role, the Commission believes that it is important to obtain audited financial reports from SDRs in order to determine whether or not they have sufficient financial resources to continue operations. While the Commission recognizes that Rule 13n-11(f)(2) may, in some cases, be more costly than the CFTC's requirement of quarterly unaudited financial statements, the Commission believes that the additional burden, where it exists, is justified by the benefits of requiring audited financial statements.

The compliance reports and financial reports filed with the Commission are required to be filed in a tagged data format. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[1171] and the financial reports must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T.[1172] These requirements will create an additional burden on respondents beyond the preparation of these reports. The Commission estimates, based on its experience with other tagged data initiatives, that these requirements will add a burden of an average of 54 hours and $22,772 in outside software and other costs per respondent per year, creating an estimated total annual burden of 540 hours and $227,720 for all respondents to tag

1170 See Section VIII.D.6.c of this release discussing economic alternatives to Rule 13n-11(f)(2).

1171 See 17 CFR 232.301.

1172 See Section VI.J.5.c of this release discussing Rule 407 of Regulation S-T.

the data for both the compliance reports and financial reports that are required under Rule 13n-11.

7. Other Provisions Relevant to the Collection of Information

Rule 13n-4(c)(1)(iii) requires an SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants and others that seek to connect to or link with the SDRs. For PRA purposes only, the Commission believes that this should be a lesser burden than for written policies and procedures because such criteria may not need to be as detailed or intricate as written policies and procedures. Thus, the Commission estimates that this provision will require 157.5 hours to implement, with an associated outside legal cost of $15,000 per respondent.[1173] This results in an estimate of an initial burden for this requirement for all respondents of 1575 hours and $150,000. The Commission estimates that the average annual burden will be 45 hours per respondent, for a total estimated average annual burden of 450 hours for all respondents.[1174] The Commission believes that SDRs will conduct this work internally.

1173 These numbers are based on 75% of the 210 hour and $20,000 (50 hours of outside legal costs at $400 an hour) estimates to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. See Regulation NMS Adopting Release, supra note 1151. This is based on an estimate that this requirement will create 75% of the burden of creating written policies and procedures under Regulation NMS. The Commission believes that the 75% assumption is appropriate because the Commission believes that Rule 13n-4(c)(1)(iii) imposes a lesser burden than the written policies and procedures required by other SDR Rules because it requires only written criteria and not full policies and procedures.

1174 These numbers are 75% of the 60 hour estimates of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. See Regulation NMS Adopting Release, supra note 1151. This is based on an estimate

Rule 13n-4(c)(1)(iv) requires an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. Based on the Commission's estimates regarding Regulation NMS,[1175] it estimates that, on average, this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that SDRs will incur a total of $20,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1176]

Rule 13n-4(c)(2)(iv) requires an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess

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that this requirement will create 75% of the ongoing burden of written policies and procedures under Regulation NMS. The Commission believes that the 75% assumption is appropriate because the Commission believes that Rule 13n-4(c)(1)(iii) imposes a lesser burden than the written policies and procedures required by other SDR Rules because it requires only written criteria and not full policies and procedures.

1175 See Regulation NMS Adopting Release, supra note 1151. These estimates are based on 100% of the 210 hour estimate to create one set of written policies and procedures and 100% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. The Commission believes that the 100% assumption is appropriate because Rule 13n-4(c)(1)(iv) requires written policies and procedures.

1176 This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10). The Commission believes that SDRs will use outside counsel to initially create these policies and procedures because SDRs just beginning operations may not have sufficient in-house legal staff.

requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs. Based on the Commission's estimates regarding similar requirements in Regulation NMS,[1177] it estimates that, on average, this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that SDRs will initially incur a total of $20,000 in outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1178] The Commission believes that SDRs will conduct the ongoing administration of this provision internally.

Rule 13n-4(c)(3) addresses the conflict of interest requirements governing SDRs. In particular, each SDR is required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest. This includes establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis. It also includes establishing, maintaining, and enforcing written policies and procedures regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives. Based on the Commission's estimates regarding Regulation NMS,[1179] it estimates that on average these two requirements will require 420 hours to implement and 120

1177 See Regulation NMS Adopting Release, supra note 1151.

1178 This figure is the result of an estimated $400 an hour cost for outside legal services (as noted in supra note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10).

1179 See Regulation NMS Adopting Release, supra note 1151.

hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average annually.[1180] Also based on the Regulation NMS estimates regarding policies and procedures, the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $400,000 for all respondents.[1181]

Rule 13n-5(b)(6) requires that every SDR establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. For PRA purposes only, the Commission believes that this is a greater burden than that for written policies and procedures alone because SDRs will also be required to provide facilities. Thus, the Commission estimates that Rule 13n-5(b)(6) will require 315 hours for each respondent to implement.[1182] There will likely be a need for a respondent to consult with outside legal counsel, which the Commission estimates will cost

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1180 The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

1181 This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

1182 This number is 150% of the 210 hour estimate to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. See Regulation NMS Adopting Release, supra note 1151. This is based on an estimate that Rule 13n-5(b)(6) will create 150% of the burden of creating written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

$30,000 per respondent.[1183] Thus, the Commission estimates a total initial burden for all respondents of 3150 hours and $300,000 in outside costs. The Commission estimates the ongoing average annual burden of this requirement to be 90 hours per respondent for a total of 900 hours for the estimated total annual burden for all respondents.[1184] The Commission believes that SDRs will conduct this ongoing work internally.

Rules 13n-4(b)(8) and 13n-9 address privacy requirements for SDRs. Rule 13n-4(b)(8) requires SDRs to maintain the privacy of any and all SBS transaction information that the SDR receives from a SBS dealer, counterparty, or any registered entity as prescribed in Rule 13n-9. Rule 13n-9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Based on the Commission's estimates regarding Regulation NMS,[1185] it estimates that, on average, these provisions will require 420 hours to implement and 120 hours to administer per year per

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1183 This number is 150% of the estimate of outside legal costs (50 hours) to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers, at an estimate of $400 per hour. See Regulation NMS Adopting Release, supra note 1151. This is based on an estimate that Rule 13n-5(b)(6) will create 150% of the burden of creating written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

1184 These numbers are based on 150% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. See Regulation NMS Adopting Release, supra note 1151. This is based on an estimate that Rule 13n-5(b)(6) will create 150% of the ongoing burden of written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

1185 See Regulation NMS Adopting Release, supra note 1151.

respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[1186] Also based on the Regulation NMS estimates,[1187] the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required policies and procedures as a result of these provisions per respondent for a total outside cost burden of $400,000 for all respondents.[1188]

Rule 13n-9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of (1) any confidential information received by the SDR, (2) material, nonpublic information, and/or (3) intellectual property. At a minimum, these safeguards, policies and procedures must address limiting access to that information and intellectual property, standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and adequate oversight. Based on the Commission's estimates regarding Regulation NMS,[1189] it estimates that on average this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on

1186 The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

1187 See Regulation NMS Adopting Release, supra note 1151.

1188 This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours per policy and procedure, times 2 policies and procedures, times the number of SDRs (10).

1189 See Regulation NMS Adopting Release, supra note 1151.

average, annually. Also based on the Regulation NMS estimates,[1190] the Commission estimates that SDRs will incur a total of $20,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1191]

E. Collection of Information is Mandatory

1. Registration Requirements, Form SDR, and Withdrawal from Registration

The collection of information relating to registration requirements, Form SDR, and withdrawal from registration is mandatory for all SDRs when registering with the Commission, amending their applications for registration, or withdrawing from registration.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

The collection of information relating to SDR duties, data collection and maintenance, and direct electronic access is mandatory for all SDRs, absent an exemption.[1192]

3. Recordkeeping

The collection of information relating to recordkeeping is mandatory for all SDRs, absent an exemption.

4. Reports

The collection of information relating to reports is mandatory for all SDRs, absent an exemption.

1190 See Regulation NMS Adopting Release, supra note 1151.

1191 This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in supra note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10).

1192 See Section VI.K of this release discussing the SDR Exemption.

5. Disclosure

The collection of information relating to disclosure is mandatory for all SDRs, absent an exemption.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

The collection of information relating to CCOs is mandatory for all SDRs, absent an exemption.

7. Other Provisions Relevant to the Collection of Information

The collection of information relating to other relevant provisions is mandatory for all SDRs, absent an exemption.

F. Confidentiality

As discussed above, the Commission expects that it will make any information filed on, or in an exhibit or attachment to, an application for registration on Form SDR available on its website, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1193]

As discussed above, the Commission may make any information filed on, or in an exhibit or attachment to, an amendment on Form SDR available on its website, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1194]

As discussed above, the Commission may make any information filed on, or in an exhibit or attachment to, withdrawals on Form SDR available on its website, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1195]

1193 See Section VI.A.1.c of this release discussing Form SDR.

1194 See Section VI.A.4.c of this release discussing amendments on Form SDR.

1195 See Section VI.B.3 of this release discussing withdrawal from registration.

Pursuant to Rules 13n-11(d), (f), and (g), SDRs must file an annual compliance report and financial report with the Commission. One commenter believed that the Commission should keep the annual compliance report confidential.[1196] As discussed above, the Commission is not providing, by rule, that the annual compliance reports and financial reports are automatically granted confidential treatment, but an SDR may seek confidential treatment pursuant to Exchange Act Rule 24b-2.[1197] The Commission may make filed annual compliance reports and financial reports available on its website, except in cases where confidential treatment is requested by the SDR and granted by the Commission.

G. Retention Period of Recordkeeping Requirements

Rule 13n-5(b)(4) requires that SDRs maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information and is also required to be maintained in an electronic format that is non-rewritable and non-erasable.

Pursuant to Rule 13n-7(b), an SDR is required to preserve at least one copy of all documents as shall be made or received by it in the course of its business as such, including all records required under the Exchange Act and the rules and regulations thereunder, other than the transaction data and positions collected and maintained pursuant to Rule 13n-5. These records

1196 DTCC 2, supra note 19 ("DTCC firmly believes [that] the annual [compliance] report should be kept confidential by the Commission" and explained that "[g]iven the level of disclosure expected to be required . . . the report will likely contain confidential and proprietary business information.").

1197 See Section VI.J.4.c of this release discussing compliance reports.

are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.

VIII. Economic Analysis

A. Introduction

The Commission has considered the economic implications of the SDR Rules and Form SDR as well as comments regarding the costs and benefits of the SDR Rules and Form SDR.[1198] The Commission is sensitive to the economic consequences and effects of the SDR Rules and Form SDR, including their costs and benefits. In adopting the SDR Rules and Form SDR, the Commission has analyzed their costs and benefits, as set forth below, and has been mindful of the economic consequences of its policy choices. The SDR Rules and Form SDR fulfill the mandate of the Dodd-Frank Act that the Commission adopt rules governing the registration, duties, and core principles of SDRs.

As discussed above, the SBS market developed as an opaque OTC market without centralized trading venues or dissemination of pre- or post-trade pricing and volume information.[1199] SBS dealers, as intermediaries in SBS transactions, observe order flow and have access to pricing and volume information that is generally not available to other market participants. With such access, SBS dealers generally have an informational and competitive advantage over non-dealer counterparties, granting SBS dealers some degree of market power,

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1198 See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Securities Act Release No. 9338 (July 18, 2012), 77 FR 48208, 48332 (Aug. 13, 2012) (noting that "[t]he programmatic costs and benefits associated with substantive rules applicable to [SBSs] under Title VII are being addressed in more detail in connection with the applicable rulemakings implementing Title VII").

1199 See Section II.A of this release discussing limited information currently available to market participants.

which may enable them to extract economic rents in transactions with those counterparties. This informational advantage may result in increased transaction costs for less-informed counterparties relative to a market where all participants have competitive access to information.

In addition to the advantages that an opaque SBS market may give to SBS dealers, the opacity of the SBS market as described above may also affect current participation levels in the SBS market.[1200] Certain market participants, including speculative traders who rely on proprietary trading strategies, may wish to keep their trades anonymous and may prefer to operate in an opaque SBS market. Hedgers and other market participants that do not benefit from opacity, however, may be dissuaded from participating in the SBS market by higher transaction costs and their disadvantageous informational position.

Opacity in the SBS market also limits the ability of market participants to form broad views of financial market conditions. In capital markets, pricing and volume information provide signals about liquidity and the quality of investments, including investments in reference entities underlying derivatives. In the SBS market, where pricing and volume information is not readily available, market participants may have difficulty assessing investment opportunities as well as the state of the broader market, or must form assessments with a narrower set of information than SBS dealers. In an opaque SBS market, difficulty in assessing investment opportunities and the state of the SBS market may inhibit participation in the SBS market.

While opacity may generally confer a competitive advantage to SBS dealers who observe the largest share of order flow and limit participation in the SBS market, some features of the market and market participants may offset these effects. For example, large market participants that often transact with many SBS dealers are aware of the potential information asymmetries in

1200 See Section II.B of this release.

the market. Furthermore, by virtue of their high trading volume, these participants may also observe a large share of the market, reducing the information advantage afforded to SBS dealers. SBS dealers may wish to compete for SBS business with the largest counterparties, and these participants may be able to obtain access to competitive pricing.[1201] Nevertheless, the Commission generally expects that market participants with proprietary access to information – in the case of SBS markets, SBS dealers who observe order flow – can benefit from opacity and earn economic rents from their less-informed counterparties.[1202]

It is in this context that the Commission analyzes the economic effects of the SDR Rules and Form SDR. The Commission envisions that registered SDRs will become an essential part of the infrastructure of the SBS market. Persons that meet the definition of an SDR will be required by the SDR Rules to maintain policies and procedures relating to data accuracy and maintenance, and will be further required by Regulation SBSR to publicly disseminate transaction-level data, thereby promoting post-trade transparency in the SBS market. Transparency stemming from the SDR Rules and Regulation SBSR should reduce the informational advantage of SBS dealers and promote competition among SBS dealers and other market participants.[1203] This could reduce implicit transaction costs and attract liquidity from

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1201 As described in the Cross-Border Proposing Release, the non-dealer market participants transact with four counterparties on average. Cross Border Proposing Release, 78 FR at 31126 n.1329, supra note 3. However, the largest market participants transact with as many as 50 counterparties, suggesting that dealers compete for business with these participants.

1202 See, e.g., Richard C. Green, Burton Hollifield, and Norman Schurhoff, Financial Intermediation and the Costs of Trading in an Opaque Market, 20 Review of Financial Studies 275 (2007) (estimating that, prior to the introduction of transparency measures in the municipal bond market, dealers exercised substantial market power, but that market power decreases with the size of the trade).

1203 See Section II.A of this release.

those market participants that do not benefit from opacity, providing more opportunities for market participants with hedging needs to manage their risks and providing more opportunities for market participants to access liquidity. Similarly, public dissemination of SBS pricing and volume information by SDRs pursuant to Regulation SBSR may allow market participants to incorporate information from the SBS market into their assessments of SBS and non-SBS investment opportunities, thereby promoting price efficiency and efficient capital allocation.

At the same time, increased quality and quantity of pricing and volume information and other information available to the Commission about the SBS market may enhance the Commission's ability to respond to market developments. As discussed above, DTCC-TIW voluntarily provides to the Commission data on individual CDS transactions in accordance with an agreement between the DTCC-TIW and the ODRF. In conjunction with Regulation SBSR, the SDR Rules should assist the Commission in fulfilling its regulatory mandates and legal responsibilities such as detecting market manipulation, fraud, and other market abuses by providing it with greater access to SBS information than that provided under the voluntary reporting regime. In particular, without an SDR, data on SBS transactions could be dispersed and might not be readily available to the Commission and others. SDRs may be especially critical during times of market turmoil, both by giving the Commission information to monitor risk exposures taken by individual entities or to particular referenced entities, and by promoting stability through enhanced transparency. Additionally, more available data about the SBS market should give the Commission better insight into how regulations are affecting, or may affect, the SBS market, which may allow the Commission to better craft regulations to achieve desired goals, and therefore, increase regulatory effectiveness.

In adopting the SDR Rules and Form SDR, the Commission has attempted to balance different goals. For example, data fragmentation resulting from multiple SDRs may make it more difficult for the Commission and to the extent that SBS data is made public, the public, to aggregate SBS data from multiple SDRs. The Commission could have resolved issues related to data fragmentation by designating one SDR as the recipient of the information from all other SDRs in order to provide the Commission with a consolidated location from which to access SBS data for regulatory monitoring and oversight purposes. Designating one SDR as the data consolidator, however, could discourage new market entrants, and interfere with competition. Designating one SDR as data consolidator may also impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator. Similarly, the SDR Exemption,[1204] which allows certain non-U.S. persons to perform the functions of an SDR within the United States without registering with the Commission, may reduce potentially duplicative registration and operating costs by allowing these persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction. The SDR Exemption, however, also increases the risk of data fragmentation to the extent that reporting requirements differ across jurisdictions and relevant authorities have difficulty accessing data across jurisdictions. The Commission has attempted to balance the considerations of competition, data fragmentation, and avoidance of potentially duplicative registration and operating costs in adopting the SDR Rules.

In assessing the economic impact of the SDR Rules and Form SDR, the Commission refers to the broader costs and benefits associated with the application of the rules and interpretations as "programmatic" costs and benefits. These include the costs and benefits of applying the substantive Title VII requirements to the reporting of transactions by market

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[1204] See Section VI.K of this release discussing Rule 13n-12.

participants, as well as to the functions performed by market infrastructures, including SDRs, in the global SBS market. The Commission's analysis also takes into consideration "assessment costs," which arise from current and future market participants expending effort to determine whether they are subject to the SDR Rules. Current and future market participants could incur expenses in making this determination even if they ultimately are not subject to the SDR Rules. Finally, the Commission's analysis considers "compliance costs," which are the costs that SDRs will incur in registering and complying with the SDR Rules.

B. General Comments on the Costs and Benefits of the SDR Rules

The Commission received two comments regarding the general costs and benefits of the SDR Rules.[1205]

One commenter offered general observations about the application of the SDR Rules to non-resident SDRs, maintaining that the costs of an extraterritorial application of U.S. law would be significant and not estimable beforehand, and that the Commission should consider comity and conflict with non-U.S. regulatory requirements when weighing the costs and benefits of the SDR Rules.[1206] The Commission agrees that determining the costs and benefits of the application of the SDR Rules to non-resident SDRs is difficult; nevertheless, the Commission has analyzed the economic effects of the SDR Rules below.

A second commenter recommended that "the Commission should generally seek to avoid any divergence from the CFTC's and international regulators' frameworks that is likely to give rise to undue costs or burdens."[1207] The commenter believed that "divergence is generally

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1205 See US & Foreign Banks, supra note 24; IIB CB, supra note 26.

1206 See US & Foreign Banks, supra note 24.

1207 IIB CB, supra note 26.

warranted only if the rule adopted by the Commission is more flexible than those adopted by others (and therefore would not preclude the voluntary adoption of consistent practices by market participants)."[1208] The Commission acknowledges that there are concerns regarding divergent regulatory frameworks. The economic effects that could result from divergent regulatory frameworks, as well as other comments regarding the costs and benefits of specific rules, are discussed below. The Commission notes, however, that the SDR Rules are largely consistent with the CFTC's rules. Furthermore, the Commission has consulted and coordinated with foreign regulators through bilateral and multilateral discussions and has taken these discussions into consideration in developing the SDR Rules and Form SDR.

C. Consideration of Benefits, Costs, and the Effect on Efficiency, Competition, and Capital Formation

The potential economic effects stemming from the SDR Rules can be grouped into several categories. In this section, the Commission first discusses assessment costs relating to the SDR Rules. The Commission then discusses the SDR Rules' programmatic costs and benefits, highlighting broader and more comprehensive economic effects that result when the SDR Rules are considered as a part of other rules resulting from Title VII of the Dodd Frank Act. Next, the Commission discusses the effects of the SDR Rules on efficiency, competition, and capital formation. In the next section, the Commission discusses the compliance costs relating to certain of the SDR Rules.

1. Assessment Costs

The Commission believes that persons will incur assessment costs in determining whether they fall within the statutory definition of an SDR. The Commission believes that the

[1208] IIB CB, supra note 26.

statutory definition in Exchange Act Section 3(a)(75) describes the core services or functions of an SDR. Whether a person falls within the statutory definition of an SDR is fact-specific. The Commission believes that at least 10 persons[1209] will make the assessment of whether they fall within the statutory definition of an SDR, which may result in a cost of $15,200 per person, for a total cost of $152,000 for all persons.[1210]

The Commission believes that certain non-U.S. persons may incur assessment costs in determining whether they can rely on the SDR Exemption. Under the Commission's approach, certain non-U.S. persons that perform the functions of an SDR may incur certain assessment costs in determining whether they fall within the statutory definition of an SDR, and, if so, whether they perform the functions of an SDR within the United States. If so, they may incur certain assessment costs in determining whether they can rely on the SDR Exemption.[1211]

With respect to determining the availability of the SDR Exemption for a non-U.S. person performing the function of an SDR within the United States, the Commission believes that costs

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1209 At a minimum, the Commission estimates that the same persons who will register with the Commission as SDRs will make an assessment as to whether they fall within the statutory definition of an SDR. Therefore, the Commission estimates that at least 10 persons will make this assessment. See Section VII.C.1 of this release discussing the number of respondents to the registration requirements and Form SDR.

1210 This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to assess whether a person falls within the statutory definition of an SDR. The Commission estimates that a person will assign these responsibilities to an Attorney. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $380 per hour. Thus, the total one-time estimated dollar cost is $15,200 per person and $152,000 for all persons, calculated as follows: (Compliance Attorney at $380 per hour for 40 hours) x 10 persons = $152,000.

1211 The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, may determine that they do not need to incur any assessment costs related to the Commission's approach.

would arise from confirming whether the Commission and each regulator with supervisory authority over such non-U.S. person have entered into an MOU or other arrangement. The Commission believes that because this information generally should be readily available,[1212] the cost involved in making such assessment should not exceed one hour of in-house legal or compliance staff's time or $380 per person,[1213] for an aggregate one-time cost of $7,600.[1214]

Assessment costs may also result from determining whether existing policies and procedures will satisfy the requirements of the SDR Rules. An SDR may have existing policies and procedures that it may use to comply with the SDR Rules. In order to use such policies and procedures to comply with the SDR Rules, the SDR will first have to assess whether the policies and procedures will result in compliance with the SDR Rules.

2. Programmatic Costs and Benefits

a. SDR Registration, Duties, and Core Principles

Rules 13n-1 through 13n-3 and Form SDR establish the mechanism by which SDRs must register as such pursuant to Exchange Act Section 13(n), absent an exemption. Rules 13n-4

1212 The Commission provides a list of MOUs and other arrangements on its public website, which are available at this link: http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

1213 This estimate is based on an estimated one hour of in-house legal or compliance staff's time to confirm whether the Commission and each regulator with supervisory authority over such non-U.S. person have entered into an MOU or other arrangement. The Commission estimates that an SDR will assign these responsibilities to an Attorney. Thus, the total one-time estimated dollar cost is $380 per person, calculated as follows: (Attorney at $380 per hour for 1 hour) = $380.

1214 This total is based on the assumption that as many as 20 non-U.S. persons that perform the functions of an SDR would use in-house legal or compliance staff, specifically, an Attorney, to determine whether an applicable MOU or other arrangement is in place. Thus, the total one-time estimated dollar cost for all 20 non-U.S. persons is $7,600, calculated as follows: (Attorney at $380 per hour for 1 hour) x 20 non-U.S. persons = $7,600.

through 13n-10 set forth the duties and core principles of SDRs. Rule 13n-11 sets forth the requirements for an SDR's CCO, annual compliance reports, and financial reports. Finally, Rule 13n-12 provides an exemption from registration and other requirements in certain circumstances.

The Commission believes that it and market participants will enjoy a number of programmatic benefits from the SDR Rules. For example, because the final SDR Rules require SDRs to register with and provide data to the Commission and require SDRs to take steps to facilitate accurate data collection and retention with respect to SBSs, the SDR Rules will increase the availability of SBS data relative to that in the existing voluntary disclosure system.[1215] The data provided by SDRs will provide a window into SBS transactions and allow the Commission to oversee the SBS market beyond that which is currently available. Further, the SDR Rules requiring SDRs to provide information to market participants about the nature and costs of SDRs' services are intended to provide transparency about the costs of reporting, thereby enabling market participants to make informed choices among competing SDRs. Finally, by requiring SDRs to register with the Commission, provide the Commission with access to their books and records, and submit to inspections and examinations by representatives of the Commission, the SDR Rules will allow the Commission to evaluate SDRs' compliance with the Exchange Act and the rules and regulations thereunder.

Persons that meet the definition of an SDR will also be required to comply with the public dissemination requirements of Regulation SBSR. Public dissemination is a core component of post-trade transparency in the SBS market. As discussed below, enhanced transparency should produce market-wide benefits in terms of a reduction in SBS dealers'

[1215] See Section II.B of this release discussing data that is currently available to regulators and market participants.

market power. Enhanced transparency could also lead to reduced trading costs if competitive access to information and reduced SBS dealers' market power reduce the premium that SBS dealers are able to charge for intermediating SBS transactions.[1216] Indeed, post-trade transparency has been shown to reduce implicit trading costs (i.e., the difference between the price at which a market participant can trade a security and the fundamental value of that security) in other securities markets. For example, post-trade transparency that followed the introduction of TRACE and trade reporting in the corporate bond market has been shown to lower implicit costs of trading corporate bonds.[1217] While there are differences between SBSs and corporate bonds, there are similarities to how the markets are structured – both markets evolved as dealer-centric OTC markets with limited pre- or post-trade transparency. Thus, the Commission expects that some of the benefits that result from transparency in the corporate bond market may extend to SBS markets as well.

Nevertheless, the extent to which trading cost reductions are realized could be mitigated by additional factors. Trade reporting, public dissemination, and providing direct electronic access are costly in terms of establishing and maintaining infrastructure necessary to report and store large volumes of trade-level transaction data. SDRs may be able to pass the costs of complying with the SDR Rules and public dissemination requirements onto reporting parties – e.g., SBS dealers – who, in turn, may be able to pass costs on to their customers. Therefore, the infrastructure costs associated with transparency may partially offset the trade cost benefits that could accrue through the reduction in asymmetric information and SBS dealers' market power.

1216 See Section VIII.C.3 of this release discussing the potential effects on competition, efficiency, and capital formation.

1217 See supra note 58.

Enhanced transparency could produce additional market-wide benefits by promoting stability in the SBS market, particularly during periods of market turmoil,[1218] and it should indirectly contribute to improved stability in related financial markets, including equity and bond markets.[1219] In conjunction with Regulation SBSR, the SDR Rules should assist the Commission in fulfilling its regulatory mandates and legal responsibilities such as detecting market manipulation, fraud, and other market abuses by providing it with greater access to SBS information.[1220] In particular, without an SDR, data on SBS transactions would be dispersed and would not be readily available to the Commission and others. SDRs may be especially critical during times of market turmoil, both by giving the Commission information to monitor risk exposures taken by individual entities or to particular referenced entities, and by promoting stability through enhanced transparency. Additionally, more available data about the SBS market should give the Commission a better idea of how regulations are affecting, or may affect,

1218 See Proposing Release, 75 FR at 77307, supra note 2 ("SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the SBS market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.").

1219 See Darrell Duffie, Ada Li, and Theo Lubke, Policy Perspectives of OTC Derivatives Market Infrastructure, Federal Reserve Bank of New York Staff Report No. 424 (Jan. 2010, as revised Mar. 2010) ("Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds.").

1220 See Proposing Release, 75 FR at 77307, supra note 2 ("The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market."); see also DTCC 1*, supra note 20 ("A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.").

the SBS market, which may allow the Commission to better craft regulation to achieve desired goals, and therefore, increase regulatory effectiveness.

The Commission believes that U.S. persons performing the functions of an SDR will play a key role in collecting and maintaining information regarding SBS transactions, and making available such information to the Commission and the public, all of which may affect the transparency of the SBS market within the United States.[1221] Requiring such U.S. persons to comply with the SDR Requirements will help ensure that they maintain data and make it available in a manner that advances the benefits that the requirements are intended to produce.

The information provided by SDRs to the Commission pursuant to the SDR Rules may assist it in advancing the goals of the Dodd-Frank Act. The Dodd-Frank Act was designed, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system and the SDR Rules, which implement the statute, are a necessary and important component of implementing this goal.[1222] As discussed above, an SBS transaction involves ongoing financial obligations between counterparties during the life of the transaction, which can typically span several years, and counterparties bear credit and market risk until the transaction is terminated or expires. Because large market participants may have ongoing obligations with many different counterparties, financial markets may be particularly vulnerable to instability resulting from the financial distress of a large market participant being transmitted to counterparties and others through connections in the SBS market. In extreme cases, the default of a large market participant could lead to financial distress

[1221] See Proposing Release, 75 FR at 77356, supra note 2; Cross-Border Proposing Release, 78 FR at 31184, supra note 3.

[1222] See Dodd-Frank Act, Pub. L. No. 111-203 at Preamble.

among the counterparties to SBSs, which could introduce the potential for sequential counterparty failure and create uncertainty in the SBS market, thereby reducing the willingness of market participants to extend credit. A reduction in credit may result in liquidity and valuation difficulties that could spill over into the broader financial market.

Thus, disruptions in the SBS market could potentially affect other parts of the financial system. Increasing the availability and reliability of information about the SBS market will improve the Commission's ability to oversee and regulate this market. A more complete understanding of activity in the SBS market, including information on risk and connections between counterparties, should help the Commission assess the risk in these markets and evaluate appropriate regulatory responses to market developments. Appropriate and timely regulatory responses to market developments could enhance investor protection and confidence, which may encourage greater investor participation in the SBS market.[1223]

b. Registration Requirements in the Cross-Border Context

The Commission believes that there are a number of programmatic benefits to requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission and to comply with the SDR Requirements. These requirements are intended to help ensure that all persons that perform the functions of an SDR within the United States function in a manner that will increase the transparency and further other goals of the Dodd-Frank Act.[1224] The SDR Requirements, including requirements that SDRs register with the

[1223] See Section II.A of this release discussing broad economic considerations.

[1224] See Proposing Release, 75 FR at 77354, supra note 2 (noting that "the proposed SDR rules will lead to a more robust, transparent environment for the market for SBSs"); Cross-Border Proposing Release, 78 FR at 31183, supra note 3 (discussing programmatic benefits to requiring non-U.S. persons that perform the functions of an SDR within the

Commission, retain complete records of SBS transactions, maintain the integrity and confidentiality of those records, and disseminate appropriate information to the public are intended to help ensure that the data held by SDRs is reliable and that the SDRs provide information that contributes to the transparency of the SBS market while protecting the confidentiality of information provided by market participants.[1225]

Non-U.S. persons performing the functions of an SDR within the United States also may affect the transparency of the SBS market within the United States, even if transactions involving U.S. persons or U.S. market participants are being reported to such non-U.S. persons in order to satisfy the reporting requirements of a foreign jurisdiction (and not those of Title VII). The Commission believes that, to the extent that non-U.S. persons are performing the functions of an SDR within the United States, they will likely receive data relating to transactions involving U.S. persons and other U.S. market participants. Ensuring that such data is maintained and made available in a manner consistent with the SDR Requirements would likely contribute to the transparency of the U.S. market and reduce potential confusion that may arise from discrepancies in transaction data due to, among other things, differences in the operational standards governing persons that perform the functions of an SDR in other jurisdictions (or the absence of such standards for any such persons that are not subject to any regulatory regime). Moreover, given the sensitivity of reported SBS data and the potential for market abuse and subsequent loss of liquidity in the event that a person performing the function of an SDR within the United States

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United States to register with the Commission and to comply with the SDR Requirements). See also Dodd-Frank Act, Pub. L. No. 111-203 at Preamble.

1225 See Proposing Release, 75 FR at 77307, supra note 2 (noting that SDRs "are intended to play a key role in enhancing transparency in the SBS market" and thus "it is important that SDRs are well-run and effectively regulated").

fails to maintain the privacy of such data,[1226] the Commission believes that requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission will help ensure that data relating to transactions involving U.S. persons or U.S. market participants is handled in a manner consistent with the confidentiality protections applicable to such data, thereby reducing the risk of the loss or disclosure of proprietary or other sensitive data and of market abuse arising from the misuse of such data.

As noted above, the Commission is adopting Exchange Act Rule 13n-12 to provide an exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, provided that each regulator with supervisory authority over any such non-U.S. person has entered into an MOU or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

The Commission believes that this SDR Exemption will not significantly reduce the programmatic benefits associated with the SDR Requirements. Although the approach could potentially reduce the number of persons performing the functions of an SDR that are registered with the Commission,[1227] the Commission believes that there will be little impact on reporting of transactions involving U.S. persons because data relating to transactions involving U.S. persons

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1226 See Proposing Release, 75 FR at 77307, supra note 2 ("The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market.").

1227 As of November 2014, there were several non-U.S. persons performing the functions of an SDR or intending to do so in the future. See OTC Derivatives Market Reforms Eighth Progress Report on Implementation, Financial Stability Board (Nov. 2014), available at http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf. The Commission, however, does not possess data regarding how many, if any, of these persons perform the functions of an SDR within the United States.

and U.S. market participants would still be required to be reported, pursuant to Regulation SBSR, to an SDR registered with the Commission and subject to all SDR Requirements, absent other exemptive relief from the Commission.[1228] Moreover, the SDR Exemption may have the benefit of reducing the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

Moreover, the SDR Exemption is conditioned on an MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely on the SDR Exemption. This MOU or arrangement will address the Commission's interest in having access to SBS data involving U.S. persons and other U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and in protecting the confidentiality of such data. Further, Rule 13n-12 should not impair the integrity and accessibility of SBS data. The Commission, therefore, believes that exempting certain non-U.S. persons performing the functions of an SDR within the United States, subject to the condition described above, will likely not significantly affect the programmatic benefits that the SDR Requirements are intended to achieve.[1229]

1228 See Regulation SBSR Adopting Release, supra note 13 (Rule 908(c) setting forth "substituted compliance" regime).

1229 The Commission also anticipates that non-U.S. persons that avail themselves of the SDR Exemption will be subject to the regulatory requirements of one or more foreign jurisdictions. The SDR Exemption will help ensure that such persons do not incur costs of compliance with duplicative regulatory regimes while also ensuring, through the condition that each regulator with supervisory authority enter into an MOU or other arrangement with the Commission, that they are subject to regulatory requirements that will prevent them from undermining the transparency and other purposes of the SDR Requirements by, for example, failing to protect the confidentiality of data relating to U.S. persons and other U.S. market participants.

Registering with the Commission and complying with the SDR Requirements will impose certain costs on an SDR.[1230] The Commission believes that the SDR Exemption is likely to reduce the costs for certain non-U.S. persons performing the functions of an SDR within the United States without reducing the expected benefits of the SDR Requirements.[1231] As discussed in Section VI.K.3 of this release, the Commission believes that such persons will likely be performing the functions of an SDR in order to permit persons to satisfy reporting requirements under foreign law. The exemption, if available, will allow these non-U.S. persons to continue to perform this function within the United States without incurring the costs of compliance with the SDR Rules; such non-U.S. persons may pass along their cost savings to U.S. market participants that report to the non-U.S. persons pursuant to the market participants' reporting obligations under foreign law. Additionally, the exemption may reduce the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

The Commission recognizes that conditioning the SDR Exemption may delay the availability of the SDR Exemption to certain non-U.S. persons. In some cases, the Commission may be unable to enter into an MOU or other arrangement with each regulator with supervisory

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1230 See Cross-Border Proposing Release, 78 FR at 31184-31185, supra note 3 (discussing programmatic costs of SDRs registering with the Commission and complying with the SDR Requirements).

1231 As noted above, the data currently available to the Commission does not indicate how many non-U.S. persons performing the functions of an SDR perform such functions within the United States. See supra note 1227. However, even if persons with reporting obligations under Regulation SBSR report their transactions to a non-U.S. person that performs the functions of an SDR within the United States, but is exempt from registration, they will still be required to report transactions under Regulation SBSR to an SDR registered with the Commission, absent other exemptive relief from the Commission. See Regulation SBSR Adopting Release, supra note 13 (Rule 908(c) setting forth "substituted compliance" regime).

authority over a non-U.S. person performing the functions of an SDR within the United States. The resulting delay or unavailability of the SDR Exemption may lead some of these non-U.S. persons to exit the U.S. market by, for example, restructuring their business so that they perform the functions of an SDR entirely outside the United States, potentially resulting in business disruptions in the SBS market. Despite the potential business disruptions in the SBS market that could result from the delay or unavailability of the SDR Exemption, the Commission believes that conditioning the SDR Exemption on an MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely on the exemption is important because it will help ensure the Commission's access to SBS data involving U.S. persons and other U.S. market participants that may be maintained by such non-U.S. person.

Finally, in developing its approach to the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR within the United States, the Commission considered, as an alternative to Rule 13n-12, requiring such non-U.S. persons to comply with the SDR Requirements, including registering with the Commission, as well as other requirements applicable to SDRs registered with the Commission.[1232] In such a scenario, a non-U.S. person performing the functions of an SDR within the United States would be required to register as an SDR and incur the costs associated with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.[1233] The Commission believes that the benefit of requiring all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, even where similar objectives could be achieved through

1232 See Cross-Border Proposing Release, 78 FR at 31185-31186, supra note 3 (discussing alternatives to proposed SDR Exemption).

1233 See Cross-Border Proposing Release, 78 FR at 31185-31186, supra note 3.

an exemption conditioned on an MOU or other arrangement with each regulatory authority with supervisory authority over such non-U.S. persons, would be marginal, particularly in light of the costs that such non-U.S. persons would incur in complying with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.[1234]

3. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

In developing its approach to the registration, duties, and implementation of the core principles of SDRs, the Commission has focused on meeting the goals of Title VII, including promoting financial stability and transparency in the United States financial system.[1235] The Commission has also considered the effects of its policy choices on competition, efficiency, and capital formation as mandated under Exchange Act Section 3(f).[1236] That section requires the Commission, whenever it engages in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[1237] Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[1238]

1234 See Cross-Border Proposing Release, 78 FR at 31185-31186, supra note 3.

1235 Dodd-Frank Act, Pub. L. No. 111-203 at Title VII.

1236 15 U.S.C. 78c(f).

1237 Exchange Act Section 23(a)(2), 15 U.S.C. 78w(a)(2).

1238 Exchange Act Section 23(a)(2), 15 U.S.C. 78w(a)(2).

In Section II of this release, the Commission described the baseline used to evaluate the economic impact of the SDR Rules, including the impact on efficiency, competition, and capital formation. In particular, the Commission noted that the current SBS market is characterized by information asymmetries that confer a competitive advantage on SBS dealers relative to their non-dealer counterparties who may be less informed. The Commission also noted that the opacity of the SBS market may lead to certain inefficiencies in the market relative to a transparent market, including higher transaction costs and wider spreads. Finally, the Commission noted that some of the effects described below, such as the effects on capital formation, are measured relative to a world without public dissemination requirements. That is, in evaluating the effect of the SDR Rules on capital formation, the Commission discusses how the final SDR Rules may enhance or diminish capital formation relative to the current opaque SBS market environment.

a. Potential Effects on Efficiency

Two important economic characteristics of SDRs are the high fixed costs and increasing economies of scale. Compliance with the SDR Rules necessitates large investments in information technology infrastructure, including storage infrastructure and technology for electronic reporting and access to data, which results in high fixed costs for SDRs. The Commission believes, however, that once the infrastructure for operating as an SDR and compliance with the SDR Rules is in place, the SDR's costs of accepting transactions are minimal. Consequently, an SDR exhibits increasing economies of scale in that the average total cost to the SDR per transaction reported, which includes fixed costs, diminishes with the increase in volume of trades reported as high fixed costs are spread over a larger number of trades.

As a result, viewed in terms of minimizing the average SDR-related cost per transaction, it may be efficient to limit the total number of SDRs to one per asset class. In such a case, the SDR chosen for each asset class would receive reports of all transactions in that asset class, reducing inefficient duplication of fixed costs and potentially giving that SDR a large number of transactions over which the SDR could spread its high fixed costs. Furthermore, limiting the number of SDRs to one per asset class would reduce the potential difficulties that may arise when consolidating and aggregating data from multiple SDRs.[1239] While such a limitation would resolve many of the challenges involved in aggregating SBS data, the Commission is not limiting the number of SDRs.[1240] There are competitive benefits to having multiple SDRs, as discussed below. Furthermore, the existence of multiple SDRs may reduce operational risks, such as the risk that a catastrophic event or the failure of an SDR leaves no registered SDR to which transactions can be reported, impeding the functioning of the SBS market.

Nevertheless, the Commission believes that multiple SDRs may result in certain inefficiencies relative to a market with a single SDR per asset class, as explained above.[1241] In particular, the potential reporting of transaction data to multiple SDRs may create a need to aggregate that data by the Commission and other interested parties. If aggregation of data is made difficult because identifiers or data field definitions used by different SDRs are not compatible, then the cost and time required by the Commission or any other interested party to aggregate the data would increase, and the Commission's oversight of the SBS market would be

1239 As discussed above, some commenters suggested limiting the number of SDRs to one per asset class. However, their suggestions concerning average total cost and data fragmentation extend to one SDR that serves the entire SBS market. See Section IV of this release discussing number of SDRs.

1240 See Section IV of this release discussing number of SDRs.

1241 See Sections II.A and IV of this release.

less efficient. The complications associated with aggregation could be particularly costly when aggregation is required across the same asset class and related transactions reside in different SDRs.

On the other hand, by allowing the creation of multiple SDRs, Exchange Act Section 13(n)[1242] and the SDR Rules may result in positive effects for market participants. Competition among SDRs may lead to better services and may reduce the costs of those services for market participants. As discussed above, there are currently four swap data repositories for equity or credit swaps that are provisionally registered with the CFTC and that may choose to register with the Commission as SDRs. While some swap data repositories may ultimately choose not to register and operate as an SDR, either because of regulatory requirements that govern SDRs or for other reasons, the Commission is not limiting the number of SDRs per asset class.

Furthermore, the Commission believes that the SDR Exemption may have positive effects on operational efficiency for SDRs, in terms of cost savings relative to a scenario where the SDR Exemption does not exist. The Commission believes that the exemption will allow certain non-U.S. persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction without registering with the Commission as an SDR, subject to a condition that helps ensure that the privacy of the data and the Commission's access to the data is maintained. The SDR Exemption may also reduce the incentives for SDRs to restructure their operations to avoid triggering registration requirements, thereby reducing potentially negative effects on efficiency.[1243] In particular, some persons may restructure solely

1242 15 U.S.C. 78m(n).

1243 See Section VI.K of this release discussing the SDR Exemption.

for the purposes of avoiding registration; in such restructurings, persons expend resources that could potentially be put to more productive uses.

Viewed in the context of the broader transparency goals of Title VII, the SDR Rules may provide additional informational (or price) efficiency benefits in terms of asset valuation.[1244] That is, by improving the flow of information about SBSs and the reference entities underlying SBSs, the SDR Rules may result in a market where prices of SBSs and their underlying reference entities more accurately reflect their fundamental value. The SDR Rules, together with the reporting and public dissemination requirements of Regulation SBSR, should also promote the process by which market participants seek the best available price. Increased availability of information may lead to a reduction in the spread between the price at which market participants can enter into an SBS and the fundamental value of that SBS (referred to as implicit trading costs in this release).[1245] Real-time transaction pricing and volume information provide signals to market participants about the value of their investments. Market participants may use these signals to update their assessment of the value of an investment opportunity. In contrast to an opaque market, information revealed through trades that are reported and publicly disseminated allows market participants to make more-informed assessments of asset valuations, promoting informational efficiency. This should be true for the underlying assets or reference entities as well. That is, information from SBS transactions provides signals not only about SBS valuation, but also about the value of reference assets underlying SBSs.

[1244] Informational or price efficiency refers to the degree to which asset prices reflect available information about the value of the asset. See, e.g., Eugene Fama, Efficient Capital Market II, 46(5) Journal of Finance 1575 (1991).

[1245] See Section II.A of this release.

b. Potential Effects on Competition

The Commission believes that by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the SDR Rules should promote competition among SDRs. The Commission notes that, in an analogous setting, there are currently four swap data repositories provisionally registered with the CFTC, suggesting that multiple SDRs competing in the SBS market is a likely outcome.[1246] Increased competition may lower costs for users of SDR services.

The Commission believes that because the SDR Rules do not preclude an SDR from registering with the Commission and other foreign relevant authorities, non-resident SDRs generally can take steps to comply with both their home country requirements and the SDR Rules, and therefore can register with the Commission. The Commission recognizes that a non-resident SDR will incur additional burdens in making the certification or providing the opinion of counsel required by Exchange Act Rule 13n-1(f), and that these burdens may place non-resident SDRs at a competitive disadvantage relative to resident SDRs.[1247] The Commission believes that by subjecting non-resident SDRs to the same requirements as resident SDRs in all other respects – e.g., requiring all SDRs to provide prompt access to books and records and submit to onsite inspection and examination – the SDR Rules do not give a significant competitive advantage to either resident or non-resident SDRs. As a result, the Commission believes that the SDR Rules should promote competition among SDRs both domestically and internationally.

[1246] See Section II.B of this release.

[1247] See Section VIII.D.1.b of the release discussing cost of certification and opinion of counsel.

The Commission recognizes that there may be competitive effects due to the jurisdictional divide between the CFTC and the Commission with respect to swaps and SBSs. Swap data repositories that are registered only with the CFTC may compete against SDRs that are registered only with the Commission, and vice versa, for acceptance of mixed swaps. As noted by commenters, divergent regulatory frameworks could lead to "undue costs or burdens" for SDRs and SBS market participants.[1248] To the extent that the SDR Rules contain provisions that are more burdensome than the CFTC's rules, the SDR Rules could hinder 1) an SDR registered with only the Commission from competing against a swap data repository registered with only the CFTC for acceptance of mixed swaps, and 2) an SDR registered with both the Commission and the CFTC from competing against a swap data repository registered with only the CFTC for acceptance of CFTC-regulated swaps. On the other hand, if the SDR Rules are less burdensome than the CFTC's rules, then an SDR registered with only the Commission may enjoy a competitive advantage relative to 1) a swap data repository registered with only the CFTC for acceptance of mixed swaps, and 2) an SDR registered with both the Commission and the CFTC for acceptance of SBSs.

As stated above, the Commission believes that the SDR Rules and the CFTC's final rules governing swap data repositories' registration, duties, and core principles are largely consistent.[1249] Indeed, the Commission believes that, on the whole, the SDR Rules are substantially similar to those adopted by the CFTC for swaps, and that any differences are not significant enough to reduce the ability of SEC-registered SDRs to compete against CFTC-

1248 See IIB CB, supra note 26.

1249 See Section I.D of this release.

registered swap data repositories for acceptance of mixed swaps.[1250] Thus, the Commission does not believe that the SDR Rules, as a result of the jurisdictional divide between the Commission and the CFTC, will negatively affect competition in the market for acceptance of mixed swaps.

Finally, in addition to affecting competition among SDRs, the SDR Rules have implications for competition among market participants. As discussed above, by observing order flow, SBS dealers may have access to information not available to the broader market, and therefore may enjoy a competitive advantage over their non-dealer counterparties.[1251] Because price and volume information (revealed to SBS dealers through their observation of order flow) contains signals about the value of investment opportunities, SBS dealers are able to use private information about order flow to derive more-informed assessments of current market values, allowing them to extract economic rents from less-informed counterparties.[1252] Impartial access to pricing and volume information should allow market participants to derive more-informed assessments of asset valuations, reducing SBS dealers' market power over other market participants. Additionally, price transparency should also promote competition among SBS dealers. The Commission expects that, as in other securities markets, quoted bids and offers should form and adjust according to reported, executed trades.

1250 See DTCC 2, supra note 19 (stating that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository).

1251 See Section II.A of this release.

1252 See Martin D. D. Evans and Richard K. Lyons, Exchange Rate Fundamentals and Order Flow, NBER Working Paper No. 13151 (June 2007), available at: http://128.97.165.17/media/files/evans_lyons.pdf (finding evidence, based on data regarding end-user currency trades, that transaction flows forecast future macroeconomic variables such as output growth, money growth, and inflation).

c. Potential Effects on Capital Formation

The Commission believes that compliance with the SDR Rules will promote data collection, maintenance, and recordkeeping. In conjunction with Regulation SBSR, including its public dissemination requirements, the SDR Rules will likely have a positive effect on transparency in credit markets by increasing information about the SBS market. In particular, the definition of an SDR, which identifies persons that may be required to register with the Commission and thereby required to comply with the public dissemination requirements of Regulation SBSR, and the data accuracy and maintenance requirements in the SDR Rules, should have a positive effect by making comprehensive, accurate information available to all market participants. The increased availability of information should enable persons that rely on the SBS market to meet their hedging objectives to make better decisions about capital formation in general, which may positively affect capital formation in the broader capital market. In particular, improved transparency in the SBS market should improve the quality and quantity of price information available in the SBS market, so that SBS prices more accurately reflect fundamental value and risk. Improved insight into the relationship between price and risk could attract hedgers and other market participants that do not benefit from opacity, improving liquidity and increasing opportunities for market participants to diversify and share risks through trading SBS.[1253]

Similarly, the Commission expects increased transparency in the SBS market to benefit the broader economy. Similar to the derivatives markets providing signals about the valuation of underlying reference entities, transparent SBS prices provide signals about the quality of a reference entity's business investment opportunities. Because market prices incorporate

1253 See Section II.A of this release discussing transparency in the SBS market.

information about the value of underlying investment opportunities, market participants can use their observations of price and volume to derive assessments of the profitability of a reference entity's business and investment opportunities. Furthermore, business owners and managers can use information gleaned from the SBS market – both positive and negative – to make more-informed investment decisions in physical assets and capital goods, as opposed to investment in financial assets, thereby promoting efficient resource allocation and capital formation in the real economy. Finally, transparent SBS prices may also make it easier for firms to obtain new financing for business opportunities, by providing information and reducing uncertainty about the value and profitability of a firm's investments.[1254]

The SDR Rules are intended to help the Commission perform its oversight functions in a more effective manner. For example, a more complete picture of the SBS market, including information on risk exposures and asset valuations, should allow the Commission to better assess risk in the SBS market and evaluate the effectiveness of the Commission's regulation of the SBS market. Appropriate and timely regulatory responses to market developments could enhance investor protection, and could encourage greater participation in the SBS market, thereby improving risk-sharing opportunities and efficient capital allocation. In addition, the SBS data provided by SDRs to the Commission should help it advance the goals of the Dodd-Frank Act, thereby promoting stability in the overall capital markets. Increased overall stability in the capital markets could promote investor participation, thereby increasing liquidity and capital formation.

1254 See Philip Bond, Alex Edmans, and Itay Goldstein, The Real Effects of Financial Markets, 4 Annual Review of Financial Economics 339 (2012) (reviewing the theoretical literature on the feedback between financial market prices and the real economy).

Finally, to the extent that the SDR Rules promote competition among SDRs, as discussed above, the SDR Rules may lower costs for users of SDR services.[1255] Decreased costs may promote capital formation by increasing the amount of capital available for investment by users of SDR services.

D. Costs and Benefits of Specific Rules

1. Registration Requirements, Form SDR, and Withdrawal from Registration

Rule 13n-1 and Form SDR describe the information that a person must file to register as an SDR and also provide for interim amendments and required annual amendments that must be filed within 60 days after the end of each fiscal year of the SDR and that these filings must be in a tagged data format. Each non-resident SDR is required to (i) certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. Rule 13n-2 sets forth the process by which a registered SDR would withdraw its registration or have its registration revoked or cancelled.[1256] Rule 13n-3 sets forth the registration process for a successor to a registered SDR.[1257] These rules and Form SDR are adopted pursuant to the Commission's rulemaking authority under Exchange Act Section 13(n).[1258]

1255 See Section VIII.C.3.a of this release discussing the effect of competition between SDRs on the prices of SDR services.

1256 See Sections VI.B of this release discussing Rule 13n-2.

1257 See Sections VI.C of this release discussing Rule 13n-3.

1258 See 15 U.S.C. 78m(n).

a. Benefits

The rules and Form SDR described in this section provide for the registration of SDRs, withdrawal from registration, revocation and cancellation of the registration, and successor registration of SDRs. Congress enacted the new registration requirements as part of the Dodd-Frank Act in order to increase the transparency in the SBS market. The registration process will further the Dodd-Frank Act's goals by assisting the Commission in overseeing and regulating the SBS market. The requirement that a non-resident SDR (i) certify that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that it can, as a matter of law, provide the Commission with access to the SDR's books and records and can, as a matter of law, submit to inspection and examination will allow the Commission to evaluate an SDR's ability to meet the requirements for registration and to conduct ongoing oversight.

The information required to be provided in Form SDR is necessary to enable the Commission to assess whether an applicant has the capacity to perform the duties of an SDR and to comply with the duties, core principles, and other requirements imposed on SDRs pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder.

The requirement that SDRs file Form SDR in a tagged data format will facilitate review and analysis of registration materials by Commission staff and, to the extent such materials are made public, the public This requirement is consistent with the Commission's longstanding efforts to increase transparency and the usefulness of information by requiring the data tagging of information contained in electronic filings in order to improve the accuracy of submitted information, including financial information, and facilitate its analysis.[1259]

The Commission solicited comments on the benefits associated with the registration-related rules and Form SDR.[1260] The Commission did not receive any comments specifically addressing these benefits.

b. Costs

The Commission anticipates that the primary costs to SDRs from the registration-related rules and Form SDR result from the requirement to complete Form SDR and any amendments thereto.

As discussed above, the Commission estimates that the average initial paperwork cost of SDR registration will be 481 hours per SDR and the average ongoing paperwork cost of interim and annual updated Form SDR will be 36 hours for each registered SDR.[1261] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $793,840[1262] and the

1259 See Regulation S-T, 17 CFR 232; see also Electronic Filing and Revision of Form D, Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Interactive Data to Improve Financial Reporting, Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Amendments to Rules for National Recognized Statistical Rating Organizations, Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Money Market Fund Reform, Investment Company Release No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010).

1260 See Proposing Release, 75 FR at 77355, supra note 2.

1261 See Section VII.D.1 of this release discussing the cost of SDR registration.

1262 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Clerk is $64 per hour. Thus, the total one-time estimated dollar cost of complying with the initial registration-related requirements is $79,384 per SDR and $793,840 for all SDRs, calculated as aggregate ongoing estimated dollar cost per year will be $55,440[1263] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost of filing a Form SDR to withdraw from registration will be 12 hours per SDR.[1264] Assuming that, at most, one SDR per year would withdraw, the aggregate one-time estimated dollar cost will be $4,008[1265] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost for each non-resident SDR to (i) certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records can, as a matter of law, and submit to onsite inspection and examination will be 1 hour and $900 per SDR.[1266] Assuming a maximum of three non-

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follows: (Compliance Attorney at $334 per hour for 180 hours) + (Compliance Clerk at $64 per hour for 301 hours) x (10 registrants) = $793,840.

1263 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Thus, the total estimated dollar cost of complying with the ongoing registration-related requirements is $5,544 per year per SDR and $55,440 per year for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 12 hours) + (Compliance Clerk at $64 per hour for 24 hours) x (10 registrants) = $55,440.

1264 <u>See</u> Section VII.D.1 of this release discussing the cost of filing Form SDR to withdraw from registration.

1265 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total estimated dollar cost of complying with the requirements related to withdrawal from registration is $4,008 per year per SDR and $4,008 per year for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 12 hours) x (1 SDR withdrawing) = $4,008.

1266 <u>See</u> Section VII.D.1 of this release discussing the cost of non-resident SDRs' certification on Form SDR and opinion of counsel.

resident SDRs,[1267] the aggregate one-time estimated dollar cost will be $3,840.[1268]

The Commission believes that the costs of filing Form SDR in a tagged data format beyond the costs of collecting the required information, will be minimal. The Commission does not believe that these costs will be significant, as large-scale changes will likely not be necessary for most modern data management systems to output structured data files, particularly for widely used file formats such as XML. XML is a widely used file format, and based on the Commission's understanding of current practices, it is likely that most reporting persons and third party service providers have systems in place to accommodate the use of XML.

The Commission solicited comment on the estimated costs associated with the registration-related rules and Form SDR.[1269] The Commission specifically requested comment on the estimated number of respondents that would be filing Form SDR and the initial costs associated with completing the registration form and the ongoing annual costs of completing the required amendments.[1270]

One commenter expressed concern about non-resident SDRs being subject to a stricter regime than resident SDRs because of the non-resident SDRs' obligation to provide a

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1267 See Section VII.C.1 of this release discussing the number of non-resident SDRs.

1268 The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $380 per hour. Thus, the total estimated dollar cost of complying with the requirements of Rule 13n-1(f) is $1,280 per year per SDR and $3,840 per year for all SDRs, calculated as follows: ($900 for outside legal services + (Attorney at $380 per hour for 1 hour)) x (3 non-resident registrants) = $3,840.

1269 See Proposing Release, 75 FR at 77355, supra note 2.

1270 See Proposing Release, 75 FR at 77355, supra note 2.

certification and opinion of counsel under Rule 13n-1(f).[1271] The Commission acknowledges that non-resident SDRs may incur costs in providing the certification and opinion of counsel. The Commission believes, however, that these costs may be avoided to the extent that non-resident SDRs are able to take advantage of the SDR Exemption.

The Commission did not receive any other comments on the estimated costs associated with the registration-related rules and Form SDR.[1272]

c. Alternatives

Following one commenter's suggestion, the Commission considered requiring an SDR applicant to submit its rulebook[1273] with its initial Form SDR. As discussed above, the Commission has not adopted this approach because an SDR is already required to provide policies and procedures on Form SDR, and the Commission believes that most of the information that would be contained in a rulebook would be filed as part of an SDR's policies and procedures.[1274] If an SDR's rulebook is broader than its policies and procedures, however, an SDR may submit its rulebook to the Commission to assist the Commission in better understanding the context of the SDR's policies and procedures or how the policies and procedures relate to one another.

1271 ESMA, supra note 19.

1272 Although one commenter expressed concern that non-resident SDRs would be subject to a stricter regulatory regime because of the certification and opinion of counsel requirements, the commenter did not comment specifically on the Commission's estimates of the costs of providing such an opinion. See ESMA, supra note 19.

1273 See DTCC 3, supra note 19.

1274 See Section VI.A.1.c of this release discussing rulebooks.

In accordance with one commenter's suggestion,[1275] the Commission amended Form SDR to accommodate SIP registration, as discussed above.[1276] The Commission considered requiring persons to register as an SDR and SIP on two separate forms, but determined not to do so because the costs to SDRs to make multiple filings of separate Form SDR and Form SIP would not provide any measureable benefits to the Commission.

The Commission considered, in accordance with one commenter's suggestion,[1277] adopting a joint form with the CFTC for SDR and swap data repository registration. As discussed above, the Commission believes that it is necessary to maintain separate registration so that each agency's form remains tailored to the particular needs of that agency.[1278] For example, the Commission is revising Form SDR to accommodate SIP registration, while the CFTC's form accommodates only swap data repository registration. Moreover, adopting a joint form may impose costs and cause uncertainty for dual registrants because the CFTC would be required to amend its form, which it has already adopted, at a time when the industry is still in the implementation phase and some swap data repositories are already provisionally registered with the CFTC. Finally, because the CFTC's registration form for swap data repositories is substantially similar to the Commission's Form SDR, the Commission does not anticipate that filing with each commission separately will entail a significant cost for a dual registrant. The Commission is sensitive to the potential costs imposed by duplicative forms, but believes that

1275 See DTCC 2, supra note 19; see also DTCC 3, supra note 19 (suggesting adopting a joint registration form with the CFTC that would include SIP registration).

1276 See Section VI.A.1.c of this release discussing Form SDR.

1277 See DTCC 3, supra note 19.

1278 See Section VI.A.1.c of this release discussing Form SDR.

these costs are justified by the need of having a form specifically tailored to the SDR registration scheme.

The Commission considered the request of one commenter, which is provisionally registered with the CFTC as a swap data repository, for expedited review of the commenter's application for registration as an SDR.[1279] Although it is not clear what the commenter means by "expedited review," the Commission believes that it is necessary to conduct a review of an SDR's application for registration independent of the CFTC's review of a swap data repository's application for registration. Moreover, the Commission believes that the procedures for reviewing applications for registration as an SDR that the Commission is adopting in this release provide reasonable timeframes for the Commission's review of the applications. These procedures are consistent with how the Commission reviews the applications of other registrants, such as SIPs and registered clearing agencies. The Commission believes that each SDR applicant, including an applicant who is provisionally registered with the CFTC, needs to demonstrate that it is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.

Finally, the Commission considered providing a method for temporary registration, as proposed.[1280] As discussed above, the Commission believes that the exemptive relief provided by the Commission in the Effective Date Order, which was effective on June 15, 2011, addressed

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1279 See ICE CB, supra note 26.

1280 See Proposing Release, 75 FR at 77314, supra note 2.

the primary purpose for temporary registration.[1281] The Commission also believes that the Compliance Date for the SDR Rules[1282] should provide sufficient time for SDRs to analyze and understand the final SDR Rules, to develop and test new systems required to comply with the Dodd-Frank Act's provisions governing SDRs and the SDR Rules, to prepare and file Form SDR, to demonstrate their ability to meet the criteria for registration set forth in Rule 13n-1(c)(3), and to obtain registration with the Commission.[1283] For these reasons, the Commission no longer believes that a temporary registration regime for SDRs is necessary or appropriate.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

Rules 13n-4(b)(2) – (7), 13n-5, and 13n-6 include various requirements relating to SDRs' information technology systems. Rules 13n-4(b)(2) – (7), 13n-5, and 13n-6 set forth the duties of an SDR, including an SDR's collection, maintenance, and analysis of transaction data and other records.[1284]

Under Rules 13n-4(b)(2) and (4), an SDR is required to accept data as prescribed in Regulation SBSR and maintain transaction data and related identifying information as required by Rule 13n-5(b)(4). Rule 13n-4(b)(5) states that each SDR must provide direct electronic access to the Commission or any of its designees.[1285]

1281 See Effective Date Order, 76 FR at 36306, supra note 9.

1282 See Section V.C of this release discussing the Compliance Date.

1283 See Section VI.A.3 of this release discussing temporary registration.

1284 See Sections VI.D.2.c, VI.E, and VI.F.3 of this release discussing Rules 13n-4(b)(2) and (4), 13n-5, and 13n-6, respectively.

1285 See also Exchange Act Section 13(n)(5)(D)(i), 15 U.S.C. 78m(n)(5)(D)(i) (requiring an SDR to provide direct electronic access to the Commission or any of its designees).

Rule 13n-5 establishes requirements for data collection and maintenance.[1286] Rule 13n-5(b) requires, among other things, an SDR to promptly record transaction data and to establish, maintain, and enforce written policies and procedures reasonably designed (1) for reporting complete and accurate transaction data to the SDR; (2) to satisfy itself that the transaction data submitted to it is complete and accurate; (3) to calculate positions for all persons with open SBSs for which the SDR maintains records; (4) to ensure that the transaction data and positions that it maintains are complete and accurate; and (5) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Rule 13n-5(b)(4) establishes requirements related to the formats in which and time periods for which an SDR must maintain transaction data, related identifying information, and positions. Rule 13n-5(b)(7) requires an SDR that ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n), to preserve, maintain, and make accessible the transaction data and historical positions for the remainder of the time period required by Rule 13n-5. Rule 13n-5(b)(8) requires an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n-5(b)(7).

Rule 13n-6 requires SDRs, with respect to those systems that support or are integrally related to the performance of their activities, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their systems provide adequate levels of capacity, integrity, resiliency, availability, and security.[1287]

1286 See Section VI.E of this release discussing Rule 13n-5.

1287 See Section VI.F.3 of this release discussing Rule 13n-6.

a. Benefits

The rules discussed in this section will enhance the Commission's ability to oversee the SBS market beyond that in the current voluntary reporting system. The Commission's ability to oversee the SBS market and benefits of SDRs to the market depend on the accuracy and reliability of the data maintained by SDRs. Exchange Act Section 13(n)(4)(B) specifically instructs the Commission to "prescribe data collection and maintenance standards for" SDRs.[1288] The rules related to an SDR's information technology and related policies and procedures are designed to facilitate accurate data collection and retention with respect to SBSs in order to promote transparency with respect to the SBS market.

The ability of the Commission to oversee the SBS market and detect fraudulent activity depends on the Commission having access to accurate current and historical market data. In particular, the direct electronic access requirement described in Rule 13n-4(b)(5) will permit the Commission to carry out these responsibilities in a more effective and more efficient manner. The requirement that each SDR make and keep current a plan to ensure that SBS data recorded in such SDR continues to be maintained is essential to ensure that the Commission will continue to have access to and the ability to analyze SBS data in the event that the SDR ceases to do business.

The requirements in the rules discussed in this section are likely to create benefits that will follow from providing the Commission with access to SBS market information. Pursuant to the rules discussed in this section, in conjunction with Regulation SBSR,[1289] SDRs will receive and maintain systemically important SBS transaction data from multiple market participants.

[1288] 15 U.S.C. 78m(n)(4)(B).

[1289] See Regulation SBSR Adopting Release, supra note 13.

This data will increase transparency about activity in the SBS market. In addition, this data will enhance the ability of the Commission to respond to market developments.

Benefits also may accrue from the Commission's ability to use SBS data in order to oversee the SBS market for illegal conduct. For example, data collected by SDRs will enhance the Commission's ability to detect and deter fraudulent and manipulative activity and other trading abuses in connection with the SBS market, conduct inspections and examinations to evaluate the financial responsibility and soundness of market participants, and verify compliance with the statutory requirements and duties of SDRs. This data may also help the Commission identify fraudulent or other predatory market activity. Increasing market participants' confidence that the likelihood of illegal or fraudulent activity is low and that the likelihood that they will suffer economic loss from such illegal or fraudulent activity is low will reduce the prices at which they are willing to use SBS to hedge market risks to which they are exposed, which should, in turn, encourage participation in the SBS market.

The richness of data collected by SDRs also may facilitate market analysis. For example, the Commission may review market activity through the study of SBS transactions, which may help assess the effectiveness of the Commission's regulation of the SBS market. Such reviews can inform the Commission on the need for modifications to these and other rules as the market evolves.

The Commission recognizes that these benefits may be reduced to the extent that SBS market data is fragmented across multiple SDRs. Fragmentation of SBS market data may impose costs on any user of this data associated with consolidating, reconciling, and aggregating that data. As discussed above, the Commission believes that the form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs.[1290]

SDRs also may create economic benefits for market participants by providing non-core services, such as facilitating the reporting of life cycle events, asset servicing, or payment calculations. These activities may be less costly to perform when SBS market data is centrally located and accessible.

The Commission solicited comment on the benefits related to Rules 13n-4(b)(2) – (7), 13n-5, and 13n-6.[1291] The Commission specifically requested comment on whether any additional benefits would accrue if the Commission imposed further, more specific technology-related requirements.[1292] The Commission received no comments on the estimated benefits of the rules discussed in this section.

b. Costs

The Commission anticipates that the primary costs to SDRs, particularly those that are not already registered with the CFTC or operating as trade repositories, are from the rules described in this section that relate to the cost of developing and maintaining systems to collect and store SBS transaction data. SDRs also need to develop, maintain, and enforce compliance with related policies and procedures and provide applicable training. Changes in the cost of developing and maintaining such systems are likely to be passed on to market participants; similarly, compliance costs incurred by SDRs are likely to be passed on to market participants.

As discussed above, the Commission estimates that the cost associated with creating SDR

1290 See Section VI.D.2.c.ii of this release discussing direct electronic access.

1291 See Proposing Release, 75 FR at 77357, supra note 2.

1292 See Proposing Release, 75 FR at 77357, supra note 2.

information technology systems will be 42,000 hours and $10,000,000 for each SDR and the average ongoing paperwork cost will be 25,200 hours and $6,000,000 per year for each SDR.[1293] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $210,810,000[1294] and the aggregate ongoing estimated dollar cost per year will be $126,486,000[1295] to comply with the rules. Based on Commission staff's conversations with industry representatives, the Commission estimates that the cost imposed on SDRs to provide direct electronic access to the Commission should be minimal as SDRs likely have or will establish comparable electronic access mechanisms to enable market participants to provide data to SDRs and review transactions to which such participants are parties.[1296]

1293 See Section VII.D.2 of this release discussing the costs of creating SDR information technology systems.

1294 The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $283 per hour, a Programmer Analyst is $220 per hour, and a Senior Business Analyst is $251 per hour. Thus, the total initial estimated dollar cost will be $21,081,000 per SDR and $210,810,000 for all SDRs, calculated as follows: ($10,000,000 for information technology systems + (Attorney at $380 per hour for 7,000 hours) + (Compliance Manager at $283 per hour for 8,000 hours) + (Programmer Analyst at $220 per hour for 20,000 hours) + (Senior Business Analyst at $251 per hour for 7,000 hours)) x 10 registrants = $210,810,000.

1295 The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Thus, the total ongoing estimated dollar cost will be $12,648,600 per SDR and $126,486,000 for all SDRs, calculated as follows: ($6,000,000 for information technology systems + (Attorney at $380 per hour for 4,200 hours) + (Compliance Manager at $283 per hour for 4,800 hours) + (Programmer Analyst at $220 per hour for 12,000 hours) + (Senior Business Analyst at $251 per hour for 4,200 hours)) x 10 registrants = $126,486,000.

1296 See SDR Proposing Release, 75 FR at 77357, supra note 2. Indeed, the Commission notes that one commenter, which currently operates a trade repository, stated that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository. DTCC 2, supra note 19.

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing policies and procedures necessary to comply with Rules 13n-5(b)(1), (2), (3), and (5) and 13n-6 will be 1,050 hours and $100,000 for each SDR and the average ongoing paperwork cost will be 300 hours per year for each SDR.[1297] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $4,185,300[1298] and the aggregate ongoing estimated dollar cost per year will be $965,400[1299] to comply with the rules.

The Commission believes that existing SDRs may have already developed and implemented information technology systems and related policies and procedures.[1300] Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their information technology systems and related policies and procedures to comply with the SDR Rules. Thus, such persons may experience costs in enhancing their information

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1297 See Section VII.D.2 of this release discussing the costs of developing policies and procedures necessary to comply with Rules 13n-5(b)(1), (2), (3), and (5) and 13n-6.

1298 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Systems Analyst is $260 per hour and the cost of an Operation Specialist is $125 per hour. Thus, the total initial estimated dollar cost will be $418,530 per SDR and $4,185,300 for all SDRs, calculated as follows: ($100,000 for outside legal services + (Compliance Manager at $283 per hour for 385 hours) + (Attorney at $380 per hour for 435 hours) + (Senior Systems Analyst at $260 per hour for 115 hours) + (Operations Specialist at $125 per hour for 115 hours)) x 10 registrants = $4,185,300.

1299 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and an Attorney. Thus, the total ongoing estimated dollar cost will be $96,540 per SDR and $965,400 for all SDRs, calculated as follows: ((Compliance Manager at $283 per hour for 180 hours) + (Attorney at $380 per hour for 120 hours)) x 10 registrants = $965,400.

1300 Cf. DTCC 2, supra note 19 (stating that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository).

technology systems and related policies and procedures to comply with the SDR Rules. Moreover, because the costs discussed above represent the costs of creating information technology systems and related policies and procedures without any existing information technology systems or policies and procedures in place, existing SDRs that already have information technology systems and related policies and procedures may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their technology systems and related policies and procedures into compliance with the SDR Rules, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.[1301]

Multiple SDRs may register with the Commission, potentially within the same asset class, with each SDR collecting data from a subset of market participants. While multiple SDRs per asset class will allow for market competition to decide how data is collected, it may hinder market-wide data aggregation due to coordination costs, particularly if market participants adopt incompatible reporting standards and practices. The SDR Rules do not specify a particular reporting format or structure, which may create the possibility that persons reporting to SDRs or other market participants accessing SBS data, will have to accommodate different data standards and develop different systems to accommodate each. This may result in increased costs for reporting persons and users of SBS data.

Furthermore, the costs associated with aggregating data across multiple SDRs by the Commission and other users of such data will increase to the extent that SDRs choose to use different identifying information for transactions, counterparties, and products. Data aggregation

1301 See Section VII.D.2 of this release discussing the costs of Rules 13n-4(b)(2) – (7), 13n-5, and 13n-6.

costs also could accrue to the extent that there is variation in the quality of data maintained across SDRs. Each SDR has discretion over how to implement its policies and procedures in the recording of reportable data, and variations in quality may result. Since aggregated data used for surveillance and risk monitoring requires that the underlying components are provided with the same level of accuracy, variations in the quality of data could be costly if subsequent interpretations of analysis based on the data suffer from issues of integrity. To the extent that market competition among SDRs impacts profit margins and the level of resources devoted to collecting and maintaining transaction data, there is an increased likelihood of variations in the quality of reported data, which could make the aggregation of data across multiple SDRs more difficult.

In the Proposing Release the Commission solicited comment on the costs related to Rules 13n-4(b)(2) – (7), 13n-5, and 13n-6.[1302] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the technology systems and related policies and procedures; additional costs to creating an SDR that the Commission should consider; alternatives that the Commission should consider; whether the estimates accurately reflect the cost of storing data in a convenient and usable electronic format for the required retention period; and a description and, to the extent practicable, quantification of the costs associated with any comments that are submitted.[1303] The Commission received no comments on the estimated costs of the rules discussed in this section.

1302 See Proposing Release, 75 FR at 77358, supra note 2.

1303 See Proposing Release, 75 FR at 77358, supra note 2.

c. Alternatives

Commenters suggested that an SDR's duties should include reporting SBS data to a single SDR that would consolidate the data.[1304] Specifically, one commenter recommended that the Commission "designate one SDR as the recipient of the information of the other SDRs to ensure the efficient consolidation of data."[1305] The commenter further stated that the designated SDR would need to have "the organization and governance structure that is consistent with being a financial market utility serving a vital function to the entire marketplace."[1306] The Commission recognizes, as asserted by the commenter, that fragmentation of data among SDRs would "leave to regulators the time consuming, complicated and expensive task of rebuilding complex data aggregation and reporting mechanisms."[1307] If the Commission were to designate one SDR as the data consolidator, however, such an action could be deemed as the Commission's endorsement of one regulated person over another, discourage new market entrants, and interfere with competition, resulting in a perceived government-sponsored monopoly. In addition, such a requirement would likely impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator. The Commission does not believe that, at this time, the benefits of such a requirement, in terms of saving other SDRs the costs of having to make data available to the Commission and saving the costs of consolidating the data itself, would be

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1304 See DTCC 1*, supra note 20; Better Markets 1, supra note 19; see also FINRA SBSR, supra note 27 (urging the Commission to mandate the consolidation of disseminated SBS data to the public).

1305 DTCC 1*, supra note 20; see also Better Markets 1, supra note 19 (making similar comments); DTCC 2, supra note 19 ("The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources.").

1306 DTCC 1*, supra note 20.

1307 DTCC 3, supra note 19.

substantial enough to justify this potential negative effect on competition among SDRs. The Commission, however, may revisit this issue if, for example, there is data fragmentation among SDRs that is creating substantial difficulties for relevant authorities to get a complete and accurate view of the market.

The Commission considered directing, under Rule 13n-4(b)(7), all SDRs to establish automated systems for monitoring, screening, and analyzing SBS data, a position urged by one commenter.[1308] The Commission believes that mandating automated systems for monitoring, screening, and analyzing SBS data at this time would impose an additional cost on SDRs. The Commission believes that it should avoid imposing the cost of automated systems on SDRs until the Commission can better determine what information it needs through such automated systems in addition to the information that it can obtain from SDRs through other rules applicable to SDRs, such as Rule 13n-4(b)(5).

The Commission considered requiring every SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater, as an alternative to the time period in Rule 13n-5(b)(4) (for not less than five years after the applicable SBS expires). The Commission understands, however, that the alternative time period does not fit current industry practices and therefore would be costly to implement. The five-year period is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs.

[1308] See Better Markets 1, supra note 19. Similarly, another commenter suggested that the Commission "provide additional details on the anticipated requirements in order to better manage the expectations of SDRs and wider market participants concerning their duties in this area." Barnard, supra note 19.

The Commission also considered, as an alternative to Rule 13n-5(b)(4)(i), prescribing a particular data format in which an SDR must maintain transaction data and positions, as suggested by three commenters.[1309] The Commission believes that SDRs should have the flexibility to choose their own data format, based on what works best in practice.[1310] The Commission is also concerned that a format that it mandates would eventually become outdated, necessitating either a rule change to keep pace with technological innovation or a requirement that SDRs use outdated technology. Market participants may incur the increased costs of converting their transaction data to a format that is no longer an industry standard. Although the Commission recognizes that a commonly-mandated format for all SBS data has the potential to facilitate aggregation of data across different SDRs, the Commission believes that not imposing a particular format saves SDRs the costs associated with using and implementing one data format chosen by the Commission. The Commission believes that SDRs, working with market participants, will be in the best position to choose and upgrade formats as needed.[1311] For these reasons, the Commission does not believe that mandating a particular format in which an SDR must maintain transaction data, related identifying information, and positions is, at this time, an appropriate alternative to the flexible approach of Rule 13n-5(b)(4)(i) and the lower compliance costs.

1309 See Better Markets 1, supra note 19; ISDA Temp Rule, supra note 28; Barnard, supra note 19.

1310 See Section VI.E.4.c of this release discussing Rule 13n-5(b)(4).

1311 As discussed above, when an SDR is deciding the format in which it will maintain transaction data and positions, it may want to consider whether it will need to reformat or translate the data to reflect any formats and taxonomies that the Commission may adopt pursuant to Exchange Act Section 13(n)(5)(D) and Rule 13n-4(b)(5). See Section VI.E.4.c of this release.

Finally, the Commission considered, as suggested by one commenter, requiring SDRs to keep records of data indefinitely.[1312] This commenter asserted that there was "no technological or practical reason for limiting the retention period,"[1313] but the Commission believes that given the volume of data and transactions SDRs may handle, prohibiting SDRs from ever eliminating records may result in SDRs retaining a large volume of records for which there may be little or no use. Having to maintain records secure and accessible for an indefinite period of time may impose significant costs to SDRs, particularly as storage and access technology evolves. Because the Commission believes that requiring transaction data to be maintained for not less than five years after the applicable SBS expires is more reasonable, and because that approach is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs, the Commission does not believe that risks and costs that could come with imposing an unlimited time period for retention are justified. Accordingly, the Commission is not adopting the alternative suggested by the commenter.

3. Recordkeeping

Rule 13n-7 requires an SDR to make and keep certain records relating to its business and retain a copy of records made or received by the SDR in the course of its business for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination. The rule also requires an SDR that ceases doing business or ceases to be registered as an SDR to preserve, maintain, and

1312 See Barnard, supra note 19.

1313 Barnard, supra note 19.

make accessible the records required to be collected, maintained, and preserved pursuant to the rule for the remainder of the time period required by Rule 13n-7.[1314]

a. Benefits

Rule 13n-7 is designed to further the Dodd-Frank Act's goals by enhancing the Commission's ability to oversee SDRs, which are critical components of the new regulatory scheme governing SBSs. The rule will assist the Commission in determining whether an SDR is complying with the federal securities laws and the rules and regulations thereunder. In addition, the recordkeeping requirements contained in the rule will permit the Commission to evaluate the financial responsibility and soundness of SDRs.

To the extent that the rule standardizes the business recordkeeping practices of SDRs, the Commission will be better able to perform efficient, targeted inspections and examinations with an increased likelihood of identifying improper conduct. To the extent that standardized recordkeeping requirements will allow the Commission to perform more efficient, targeted inspections and examinations, SDRs may incur less costs in responding to targeted inspections and examinations (as opposed to inspections and examinations that are broader in scope). In addition, both the Commission and SDRs should benefit from standardized recordkeeping requirements to the extent that uniform records will enable the Commission and SDRs to know what records the SDRs are required to maintain.

The Commission solicited comment on the benefits related to Rule 13n-7.[1315] The Commission did not receive any comments on the benefits related to Rule 13n-7.

1314 See Section VI.G of this release discussing Rule 13n-7.

1315 See Proposing Release, 75 FR at 77358, supra note 2.

b. Costs

As discussed above, the Commission estimates that the average initial paperwork cost associated with making, keeping and preserving certain records and developing and maintaining information technology systems to ensure compliance with the recordkeeping requirements will be 346 hours and $1,800 for each SDR and the average ongoing paperwork cost associated with compliance with the recordkeeping requirements will be 279.17 hours per year for each SDR.[1316] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $986,600[1317] and the aggregate ongoing estimated dollar cost per year will be $790,051.10[1318] to comply with Rule 13n-7.

The Commission believes that existing SDRs may already maintain business records as part of their day-to-day operations.[1319] Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their maintenance of business records to comply with Rule 13n-7. Thus, such persons may experience costs in enhancing their recordkeeping to comply with Rule 13n-7. Moreover, because the costs discussed above represent the costs of establishing a recordkeeping system without any existing recordkeeping

[1316] See Section VII.D.3 of this release discussing the cost associated with Rule 13n-7.

[1317] The Commission estimates that an SDR will assign these responsibilities primarily to a Compliance Manager as well as a Senior Systems Analyst. Thus, the total initial estimated dollar cost will be $98,660 per SDR and $986,600 for all SDRs, calculated as follows: ($1,800 in information technology costs + (Compliance Manager at $283 per hour for 300 hours) + (Senior Systems Analyst at $260 per hour for 46 hours)) x 10 registrants = $986,600.

[1318] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager. Thus, the total ongoing estimated dollar cost will be $79,005.11 per SDR and $790,051.10 for all SDRs, calculated as follows: (Compliance Manager at $283 per hour for 279.17 hours) x 10 registrants = $790,051.10.

[1319] Cf. DTCC 2, supra note 19 (stating that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository).

system in place, existing SDRs that already have a recordkeeping system may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their recordkeeping into compliance with Rule 13n-7, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.

The Commission solicited comment on the costs related to Rule 13n-7.[1320] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the recordkeeping systems and related policies and procedures, including whether currently-operating SDRs would incur different recordkeeping costs.[1321] The Commission did not receive any comments on the costs related to Rule 13n-7.

4. Reports

Rule 13n-8 requires SDRs to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform its duties.[1322]

a. Benefits

Title VII establishes a regulatory framework for the OTC derivatives market that depends on the Commission's access to information regarding the current and historical operation of the SBS market to verify compliance with the statute and to provide for effective monitoring for market abuse. In addition, specific provisions of Title VII require routine, targeted monitoring of certain types of events. Access to such information will enable the Commission to oversee the SBS market, which is critical to the continued integrity of the markets, and detect and deter

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1320 See Proposing Release, 75 FR at 77359, supra note 2.

1321 See Proposing Release, 75 FR at 77359, supra note 2.

1322 See Section VI.H.3 of this release discussing Rule 13n-8.

fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets.

The Commission solicited comment on the benefits related to the requirements contained in Rule 13n-8.[1323] The Commission did not receive any comments on the benefits related to the requirements contained in Rule 13n-8.

b. Costs

The Commission anticipates that the initial costs to SDRs from Rule 13n-8 relate to the cost of developing and maintaining systems to respond to requests for information and provide the necessary reports and establishing related policies and procedures. In addition, SDRs will need to employ staff to maintain systems to provide the requested reports as well as to respond to ad hoc requests that cannot be satisfied using such systems.[1324] The information technology costs associated with this rule are included in the overall information technology costs discussed above.[1325]

Furthermore, as discussed above, the Commission estimates that SDRs will incur costs in compiling the information requested under Rule 13n-8, which the Commission estimates will be limited to information already compiled under the SDR Rules, and thus, require only 1 hour per

1323 See Proposing Release, 75 FR at 77359, supra note 2.

1324 The Commission understands that some existing trade repositories may have dedicated personnel who are responsible for responding to and providing ad hoc report requests from relevant authorities, including the Commission. To the extent that Rule 13n-8 may result in more automated reporting, the need for such dedicated personnel resources may be reduced.

1325 See Section VIII.D.2.b of this release.

response to compile and transmit per year for each SDR.[1326] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $2,510 to comply with the rule.[1327]

The Commission solicited comment on the costs related to Rule 13n-8.[1328] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and providing the reports required under the rule.[1329] The Commission did not receive any comments on the estimated costs related to this rule.

5. Disclosure

Under Rule 13n-10, before accepting any SBS data from a market participant or upon the market participant's request, each SDR is required to furnish to the market participant a disclosure document containing certain information that reasonably will enable the market participant to identify and evaluate the risks and costs associated with using the services of the SDR.[1330] An SDR's disclosure document must include the SDR's criteria for providing others with access to services offered and data maintained by the SDR; the SDR's criteria for those seeking to connect to or link with the SDR; a description of the SDR's policies and procedures regarding safeguarding of data and operational reliability; a description of the SDR's policies and procedures reasonably designed to protect the privacy of SBS transaction information; a description of the SDR's policies and procedures regarding its non-commercial and/or

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1326 See Section VII.D.4 of this release discussing the cost associated with Rule 13n-8.

1327 The Commission estimates that an SDR will assign these responsibilities to a Senior Business Analyst. Thus, the total ongoing estimated dollar cost will be $251 per SDR and $2,510 for all SDRs, calculated as follows: (Senior Business Analyst at $251 per hour for 1 hour) x 10 registrants = $2,510.

1328 See Proposing Release, 75 FR at 77360, supra note 2.

1329 See Proposing Release, 75 FR at 77360, supra note 2.

1330 See Section VI.I.2 of this release discussing Rule 13n-10.

commercial use of SBS transaction information; a description of the SDR's dispute resolution procedures; a description of all of the SDR's services, including ancillary services; the SDR's updated schedule of dues, unbundled prices, rates, or other fees for all of its services, and any discounts or rebates; and a description of the SDR's governance arrangements.

a. Benefits

Rule 13n-10 is intended to provide certain information regarding an SDR to market participants prior to their entering into an agreement to provide SBS data to the SDR. To the extent that multiple SDRs accept data for the same asset class, the disclosure document should enable market participants to make an informed choice among SDRs. The disclosure document is necessary to inform market participants of the nature of the services provided by the SDR and the conditions and obligations that are imposed on market participants in order for them to report data to the SDR.

Rule 13n-10 is designed to further the Dodd-Frank Act's goals by providing market participants with applicable information regarding the operation of SDRs. The Commission solicited comment,[1331] but did not receive any comments on the benefits related to this rule.

b. Costs

The Commission anticipates that the primary costs to SDRs to complying with Rule 13n-10 relate to the development and dissemination of the disclosure document. As discussed above, the Commission estimates that the average initial paperwork cost associated with developing the disclosure document and related policies and procedures will be 97.5 hours and $9,400 for each SDR and the average ongoing paperwork cost will be 1 hour per year for each SDR.[1332]

1331 See Proposing Release, 75 FR at 77360, supra note 2.

1332 See Section VII.D.5 of this release discussing the cost associated with Rule 13n-10.

Assuming a maximum of ten registered SDRs, the aggregate one-time estimated dollar cost will be \$263,162.5[1333] and the aggregate ongoing estimated dollar cost per year will be \$1,735[1334] to comply with the rule.

The Commission solicited comment on the costs related to Rule 13n-10.[1335] The Commission specifically requested comment on the initial and ongoing costs associated with drafting, reviewing, and providing the required disclosure document.[1336] The Commission did not receive any comments on the costs related to this rule.

6. Chief Compliance Officer and Compliance Functions; Compliance Reports and Financial Reports

Rules 13n-4(b)(11) and 13n-11 and the amendments to Regulation S-T require each registered SDR to identify on Form SDR a person who has been designated by the board to serve as CCO whose duties include preparing an annual compliance report, which will be filed with the Commission along with a financial report.[1337] The CCO's appointment must be approved by the majority of the SDR's board and the CCO must report directly to the senior officer of the SDR or the board. As discussed above, the CCO is responsible for, among other things, establishing

1333 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Thus, the total initial estimated dollar cost will be \$26,316.25 per SDR and \$263,162.5 for all SDRs, calculated as follows: (\$4,400 for external legal costs + \$5,000 for external compliance consulting costs + (Compliance Manager at \$283 per hour for 48.75 hours) + (Compliance Clerk at \$64 per hour for 48.75 hours)) x 10 registrants = \$263,162.5.

1334 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Thus, the total ongoing estimated dollar cost will be \$173.5 per SDR and \$1,735 for all SDRs, calculated as follows: ((Compliance Manager at \$283 per hour for 0.5 hours) + (Compliance Clerk at \$64 per hour for 0.5 hours)) x 10 registrants = \$1,735.

1335 See Proposing Release, 75 FR at 77360, supra note 2.

1336 See Proposing Release, 75 FR at 77360, supra note 2.

1337 See Section VI.J of this release discussing Rule 13n-11.

procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.[1338] No officer, director, or employee may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the CCO in the performance of his or her duties under Rule 13n-11.[1339] The CCO is required to prepare and sign an annual compliance report and submit the report to the board for its review prior to the report being filed with the Commission. Finally, the annual compliance report must be filed along with the financial report, which must be prepared pursuant to Rule 13n-11(f) and filed with the Commission. The compliance report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[1340] and the financial report must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T.[1341]

a. Benefits

Rules 13n-4(b)(11) and 13n-11 are designed to help ensure that SDRs comply with the federal securities laws, including Exchange Act Section 13(n), and the rules and regulations thereunder. Although existing SDRs may already have CCOs in place, the rules will make this standard practice for all registered SDRs, as mandated by the Exchange Act.[1342]

1338 See Section VI.J.3.c of this release discussing the duties of CCOs.

1339 See Section VI.J.6 of this release discussing the prohibition of undue influence on CCOs.

1340 See 17 CFR 232.301.

1341 See Section VI.J.5.c of this release discussing Rule 407 of Regulation S-T.

1342 See Exchange Act Section 13(n)(6), 15 USC 78m(n)(6).

As a result of Rules 13n-4(b)(11) and 13n-11, the Commission believes that data and other records maintained by each SDR are more likely to be accurate and reliable. The Commission believes that strong internal compliance programs lower the likelihood of non-compliance with securities rules and regulations.[1343] The designation of a CCO, who will, among other things, take reasonable steps to ensure compliance with the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission, will help ensure that each SDR complies with the Exchange Act and the rules and regulations thereunder. The prohibition against an SDR's officer, director, or employee from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence its CCO increases the probability that the CCO's actions are based on accurate information and the compliance reports reflect the independent judgment of the CCO; however, these prohibitions may also cause some SDRs or SDR officers, directors and employees to implement additional controls in their interactions with the CCO, potentially limiting the scope or timeliness of the information made available to the CCO. To the extent that compliance with the Exchange Act and the rules and regulations thereunder results in more accurate data being maintained, publicly disseminated, and reported to the Commission, the ability of the Commission to rely on the SBS data will improve. Finally, strong compliance programs may help reduce non-compliance with the SDR Rules by SDRs; non-compliance with, for example, the privacy requirements (Rules 13n-4(b)(8) and 13n-9), have the potential of negatively impacting confidence in the overall SBS market.

1343 See DTCC 2, supra note 19 (agreeing with the Commission that "a robust internal compliance function plays an important role in facilitating an SDR's monitoring of, and compliance with, the requirements of the Exchange Act (and rules thereunder) applicable to SDRs").

Rule 13n-11(f) requires SDRs to file annual audited financial reports to the Commission. This rule will enhance the Commission's oversight of SDRs by facilitating the Commission's evaluation of an SDR's financial and managerial resources. The financial reports will also assist the Commission in assessing potential conflicts of interests of a financial nature arising from the operation of an SDR.

Benefits will also accrue from requiring SDRs to file financial reports in an interactive data format. This requirement will enable the Commission and, to the extent that the data is made public, the public to analyze the reported information more quickly, more accurately, and at a lower cost. In particular, the tagged data will make it easier to aggregate information collected from SDRs and compare across SDRs and over time, which the Commission believes is important to perform its regulatory mandate and legal responsibilities.

The Commission solicited comment on the benefits related to Rules 13n-4(b)(11) and 13n-11.[1344] The Commission specifically requested comment on the benefits that would accrue from designating a CCO who would be responsible for preparing and signing an annual compliance report and reporting annually to the board and on the benefits associated with the financial reports.[1345] The Commission did not receive any comments on the benefits of these rules.

b. Costs

The establishment of a designated CCO and compliance with the accompanying responsibilities of a CCO will impose certain costs on SDRs. As discussed above, the Commission estimates that the average initial paperwork cost associated with establishing

1344 See Proposing Release, 75 FR at 77361, supra note 2.

1345 See Proposing Release, 75 FR at 77361, supra note 2.

procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues will be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost will be 120 hours for each SDR.[1346] In addition, each SDR is required to retain a CCO in order to comply with the SDR Rules, at an annual cost of $873,000.[1347] Assuming a maximum of ten SDRs, the aggregate initial estimated dollar cost per year will be $1,802,000[1348] and the aggregate ongoing estimated dollar cost per year will be $9,130,800[1349] to comply with the rules.

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and submitting annual compliance reports to the SDR's board pursuant to Rules 13n-11(d) and (e) will be 5 hours.[1350] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $16,700 to comply with the rules.[1351]

1346 See Section VII.D.6 of this release discussing the costs of Rule 13n-11.

1347 Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a CCO is $485 per hour. Thus, the total ongoing estimated dollar cost will be $873,000 per SDR and $8,730,000 for all SDRs, calculated as follows: (CCO at $485 per hour for 1800 hours) x 10 registrants = $8,730,000.

1348 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $180,280 per SDR and $1,802,800 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $334 per hour for 420 hours)) x 10 registrants = $1,802,800.

1349 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $913,080 per SDR and $9,130,800 for all SDRs, calculated as follows: ($873,000 for a CCO + (Compliance Attorney at $334 per hour for 120 hours)) x 10 registrants = $9,130,800.

1350 See Section VII.D.6 of this release discussing the costs of Rule 13n-11.

1351 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $1,670 per SDR and

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and filing financial reports pursuant to Rule 13n-11(f) and (g) and the amendments to Regulation S-T will be 500 hours and $500,000 for each registered SDR.[1352] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $5,990,000 to comply with the rules.[1353]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with filing annual compliance and financial reports with the Commission in a tagged data format pursuant to Rules 13n-11(d), (f), and (g), and in accordance with the amendments to Regulation S-T, will be 54 hours and $22,772 for each registered SDR.[1354] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $368,120 to comply with the rules.[1355]

$16,700 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 5 hours) x 10 registrants = $16,700.

1352 See Section VII.D.6 of this release discussing the costs of Rule 13n-11.

1353 The Commission estimates that an SDR will assign these responsibilities to a Senior Accountant. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Accountant is $198 per hour. Thus, the total ongoing estimated dollar cost will be $599,000 per SDR and $5,990,000 for all SDRs, calculated as follows: ($500,000 for independent public accounting services + (Senior Accountant at $198 per hour for 500 hours)) x 10 registrants = $5,990,000.

1354 See Section VII.D.6 of this release discussing the costs of Rule 13n-11.

1355 The Commission estimates that an SDR will assign these responsibilities to a Senior Systems Analyst. Thus, the total ongoing estimated dollar cost will be $36,812 per SDR and $368,120 for all SDRs, calculated as follows: ($22,772 for information technology services + (Senior Systems Analyst at $260 per hour for 54 hours)) x 10 registrants = $368,120.

The Commission believes that existing SDRs may already maintain compliance programs that are overseen by a CCO or an individual who effectively serves as a CCO.[1356] In addition, CCOs may prepare compliance reports presented to senior management and/or the SDRs' boards as part of their current business practice. SDRs are currently not subject to regulation by the Commission, and therefore, may need to enhance their compliance programs and compliance reports to comply with Rules 13n-4(b)(11) and 13n-11. Thus, SDRs may experience costs in enhancing their compliance programs and compliance reports to comply with Rules 13n-4(b)(11) and 13n-11. Moreover, because the costs discussed above represent the costs of complying with Rules 13n-4(b)(11) and 13n-11 without any existing compliance programs in place that are overseen by a CCO or an individual who effectively serves as a CCO, existing SDRs that already maintain such compliance programs may experience initial costs lower than those estimated above. However, even if an SDR has an existing compliance program overseen by a CCO, it is possible that officers, directors, and employees concerned about the prohibition in Rule 13n-11(h) (prohibiting officers, directors, and employees of an SDR from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence the CCO) may want expanded liability insurance coverage. In response, an SDR may seek to acquire additional insurance coverage. The Commission acknowledges that it is possible, therefore, that Rule 13n-11(h) may result in liability insurance rates that are above what they would have been in the absence of the rule. The Commission is unable to estimate these costs given that it lacks specific

1356 Cf. DTCC 2, supra note 19 (stating that it "has an established compliance infrastructure for its businesses . . . which includes processes for establishing and implementing required compliance policies and procedures and overseeing adherence to those procedures and a mechanism for reporting, tracking, remediating and closing compliance issues whether self-identified or identified through internal or external examinations" and that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository) information regarding current insurance costs for SDRs, the amount of the demand that there will be for increased coverage, and thereby the potential increases associated with the rule. The Commission believes that after SDRs bring their compliance programs and compliance reports into compliance with Rules 13n-4(b)(11) and 13n-11, however, the ongoing annual costs for SDRs will likely be consistent with the estimates provided above.

The Commission solicited comment on these estimates related to Rules 13n-4(b)(11) and 13n-11.[1357] The Commission specifically requested comment on the initial and ongoing costs associated with designating a CCO and the costs associated with any personnel who may be necessary to support the CCO and create the annual compliance and financial reports.[1358] One commenter stated that it is difficult to assess the incremental costs to SDRs of implementing Rule 13n-11 regarding designation of a CCO and that even with an established compliance infrastructure, the commenter believed that "it is likely that the new requirements of Rule 13n-11 will entail additional costs, potentially including additional personnel and systems" and the "compliance responsibilities in an SDR will evolve (and likely increase) as the scope of transactions reported to that SDR increase, which may also result in additional incremental costs."[1359] The Commission agrees with the commenter's views; nevertheless the Commission has attempted to quantify the costs of compliance with the rule, as discussed above.

c. Alternatives

The Commission considered requiring that the compensation, appointment, and termination of a CCO be approved by a majority of independent board members of an SDR, a

1357 See Proposing Release, 75 FR at 77362, supra note 2.

1358 See Proposing Release, 75 FR at 77362, supra note 2.

1359 DTCC 2, supra note 19.

position urged by two commenters.[1360] As discussed above, the Commission believes that the rules that are intended to minimize an SDR's potential and existing conflicts of interest and to help ensure that SDRs meet core principles are sufficient at this time. Consequently, the Commission does not believe that requiring SDRs to have independent directors, and imposing the associated costs on SDRs, is warranted at this time. For these same reasons, the Commission does not believe that approval of a CCO's compensation, appointment, and termination by a majority of independent directors will provide substantially greater benefits than having a majority of the board approve compensation, appointment, and termination.

Similarly, the Commission considered requiring CCOs to report directly to independent directors, as suggested by one commenter.[1361] For the reasons stated above, the Commission does not believe that requiring independent directors, and therefore requiring CCOs to report to independent directors, is warranted at this time.[1362]

The Commission considered whether it should prohibit a CCO from being the general counsel of an SDR or a member of the SDR's legal department, as suggested by two commenters.[1363] The Commission is not adopting this prohibition because, as discussed above, the Commission believes that any potential conflicts of interest can be adequately addressed by

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[1360] See Better Markets 1, supra note 19 (recommending that the CCO's compensation and termination be approved by independent board members of an SDR). Similarly, one commenter suggested that only public independent directors or directors with an "Independent Perspective," and not the full board, have "the authority and sole responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities." Barnard, supra note 19.

[1361] See Better Markets 1, supra note 19.

[1362] See Section VI.D.3.b.iii of this release discussing prescriptive governance requirements and limitations.

[1363] See Better Markets 1, supra note 19; Barnard, supra note 19.

the SDR's conflicts of interest policies and procedures, which are required to be established under Rule 13n-4(c)(3).[1364] The Commission believes that SDRs should have flexibility in appointing their CCOs and that these conflicts of interest provisions are sufficient to mitigate any risks from not adopting the prohibition suggested by the commenter. Further, the Commission believes that imposing such a prohibition could impose additional costs on SDRs by requiring that they employ two different persons as general counsel and CCO, each position with its own compensation.

The Commission considered reducing the amount of information required on the annual compliance report. For example, the Commission could have not required any discussion of recommendations for material changes to policies and procedures, as suggested by one commenter.[1365] The Commission believes, however, that the benefits of obtaining all of the information required by Rule 13n-11(d) justify any burdens associated with providing such information on the annual compliance report. The information will assist Commission staff in assessing an SDR's compliance with the federal securities laws and the rules and regulations thereunder, and information about recommendations for material changes to an SDR's policies and procedures may alert the staff to material compliance issues at an SDR. Moreover, only recommendations for material changes will have to be described, which will impose a lesser burden than requiring disclosure of every recommendation.

The Commission considered, as suggested by one commenter,[1366] harmonizing with the CFTC's approach[1367] and not adopting Rule 13n-11(f)(2)'s requirement that each financial report

[1364] See Section VI.J.1.c of this release discussing Rule 13n-11(a).

[1365] See DTCC 2, supra note 19.

[1366] See DTCC 5, supra note 19.

be audited in accordance with the PCAOB's standards by a registered public accounting firm that is qualified and independent. Although the Commission understands that SDRs will incur costs in hiring and retaining qualified public accounting firms, the Commission believes that obtaining audited financial reports from SDRs is important given the significant role the Commission believes that SDRs will play in the SBS market. The Commission believes that SDRs will provide transparency to, and increase the efficiency of, the SBS market. The Commission believes that SDRs will also be an important source of market data for regulators. Given the critical nature of their role in the marketplace, the Commission believes that it is important to obtain audited financial reports from SDRs in order to determine whether or not they have sufficient financial resources to continue operations. While the Commission recognizes that Rule 13n-11(f)(2) may, in some cases, be more costly than the CFTC's requirement of quarterly unaudited financial statements, the Commission believes that the additional burden, where it exists, is justified by the benefits of requiring audited financial reports.

Finally, the Commission considered one commenter's suggestion that there should be "[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities."[1368] The Commission believes that, as discussed above, such standards do not need to be adopted by rule, but rather that SDRs should have flexibility in determining what standards their CCOs should meet.[1369] The Commission believes that SDRs are in the best position to judge the competency of their CCOs and select them accordingly.

1367 See CFTC Rule 49.25, 17 CFR 49.25.

1368 See Better Markets 3, supra note 19.

1369 See Section VI.J.1.c of this release discussing Rule 13n-11(a).

7. Other Policies and Procedures Relating to an SDR's Business

The SDR Rules require SDRs to develop and maintain various policies and procedures.[1370] Rules 13n-4(b)(8) and 13n-9 require each SDR to comply with certain requirements pertaining to the privacy of SBS transaction information.[1371] Rule 13n-4(c) requires each SDR to comply with certain core principles pertaining to market access to services and data, governance arrangements, and conflicts of interest, including developing policies and procedures related to these core principles.[1372] Rule 13n-5(b)(6) requires SDRs to establish procedures and provide facilities to effectively resolve disputes.[1373]

a. Benefits

The privacy requirements set forth in Rules 13n-4(b)(8) and 13n-9 are intended to safeguard transaction information provided to SDRs by market participants. These privacy requirements make it less likely that the transaction information that market participants are required to report will expose their trading strategies or unhedged positions, which could subject them to predatory trading.

Rule 13n-4(c)(1), which relates to market access to services and data, requires that SDRs impose fair, reasonable, and consistently applied fees and maintain objective access and participation criteria. This rule is designed to help ensure that SDRs do not engage in anticompetitive behavior and assuming that the SDR Rules promote competition among SDRs, that the cost of an SDR's core and ancillary services that are passed on to market participants are

[1370] See Section VIII.D.2 of this release discussing the cost and benefits associated with the policies and procedures that SDRs must develop and maintain with respect to their information systems.

[1371] See Section VI.I.1 of this release discussing Rule 13n-9.

[1372] See Section VI.D.3 of this release discussing Rule 13n-4(c).

[1373] See Section VI.E.6 of this release discussing Rule 13n-5(b)(6).

competitive. Furthermore, the Commission believes that by requiring each SDR to permit market participants to access specific services offered by the SDR separately, Rule 13n-4(c)(1)(ii) may promote efficiency to the extent that it saves market participants from having to purchase ancillary services that they do not want and will not use as a condition to using an SDR's data collection and maintenance services. Rule 13n-4(c)(1)(ii) may also promote efficiency and lower costs to the extent that it promotes competition among SDRs and among SDRs and third party service providers offering ancillary services.

The governance requirements in Rule 13n-4(c)(2) are designed to reduce conflicts of interest in the management of SDRs. In addition, by requiring fair representation of market participants on the board with the opportunity to participate in the process for nominating directors and the right to petition for alternative candidates, the rule will help reduce the likelihood that an incumbent market participant will exert undue influence on the board.

While the above requirements are designed to prevent and constrain potential conflicts of interest, Rule 13n-4(c)(3) directly addresses conflicts of interest through targeted policies and procedures and an obligation to establish a process for resolving conflicts of interest. This rule will help mitigate the possibility that SDRs' business practices and internal structures might disadvantage a particular group of market participants.

The requirement in Rule 13n-5(b)(6) is designed to help ensure that SDRs maintain accurate records relating to SBSs.[1374] In addition to helping to ensure the accuracy of data

[1374] See Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B) (requiring an SDR to "[c]onfirm, as prescribed in Rule 13n-5, with both counterparties to the [SBS] the accuracy of the data that was submitted"); Exchange Act Section 13(n)(5)(C), 15 U.S.C. 78m(n)(5)(C) (requiring SDRs to maintain SBS data).

maintained by SDRs, the requirement will provide a facility through which market participants could correct inaccuracies in SBS data regarding transactions to which they are a party.

Collectively, the rules described in this section will help ensure that SDRs operate consistently with the objectives set forth in the Exchange Act by providing fair, open, and not unreasonably discriminatory access to market participants without taking advantage of the SDRs' access to transaction data that market participants are required to report to the SDRs.

The Commission solicited comment on the benefits related to Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9.[1375] Other than one commenter noting that Rule 13n-5(b)(6) is a key step in the effort to have accurate data at SDRs,[1376] the Commission did not receive any comments on the estimated benefits of these rules.

b. Costs

The Commission anticipates that the costs to SDRs from Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9 will derive primarily from the costs of establishing, maintaining, and enforcing the required policies and procedures.

The governance requirements in Rule 13n-4(c)(2) could impose costs resulting from educating senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBSs, which could slow management or board processes at least initially. Existing SDRs may experience lower costs, however, to the extent that they have already educated senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBSs.

1375 See Proposing Release, 75 FR at 77363, supra note 2.

1376 MFA 1, supra note 19; see also MFA SBSR, supra note 27.

The requirement in Rule 13n-5(b)(6) will also impose costs on SDRs because SDRs are required to establish procedures and provide facilities through which market participants can challenge the accuracy of the transaction data and positions recorded in the SDRs.

Rule 13n-4(c)(1)(ii) may also impose costs on SDRs by requiring SDRs to offer services separately. If SDRs would otherwise bundle their ancillary services with their data collection and maintenance services, or vice versa, then the requirement that they offer services separately may impose costs on SDRs. These costs include the cost of building the infrastructure to offer services separately, the potential losses of economies of scope in providing bundled services, and lost revenue from fees for services that market participants would otherwise be required to purchase. Similarly, the rule may impose costs on third party service providers that would be prevented from bundling their services with the services of an SDR.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n-4(c)(1) will be 367.5 hours and $35,000 and the average ongoing cost will be 105 hours per year for each SDR.[1377] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,465,550[1378] and the aggregate ongoing estimated dollar cost per year will be $320,890[1379] to comply with the rule.

1377 See Section VII.D.7 of this release discussing costs of Rules 13n-4(c)(1)(iii) and (iv).

1378 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Thus, the total initial estimated dollar cost will be $146,555 per SDR and $1,465,550 for all SDRs, calculated as follows: ($35,000 for outside legal services + (Compliance Manager at $283 per hour for 135 hours) + (Attorney at $380 per hour for 152.5 hours) + (Senior Systems Analyst at $260 per hour for 40 hours) + (Operations Specialist at $125 per hour for 40 hours)) x 10 registrants = $1,465,550.

1379 The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Thus, the total ongoing estimated dollar cost will be $32,089 per SDR and $320,890 for all SDRs, As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n-4(c)(2) will be 210 hours and $20,000 for each SDR and the average ongoing paperwork cost will be 60 hours per year for each SDR.[1380] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $901,400[1381] and the aggregate ongoing estimated dollar cost per year will be $200,400[1382] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n-4(c)(3) will be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost will be 120 hours per year for each SDR.[1383] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,802,800[1384] and the aggregate ongoing estimated dollar cost per year will be $400,800[1385] to comply with the rule.

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calculated as follows: ((Compliance Manager at $283 per hour for 38 hours) + (Attorney at $380 per hour for 45 hours) + (Senior Systems Analyst at $260 per hour for 11 hours) + (Operations Specialist at $125 per hour for 11 hours)) x 10 registrants = $320,890.

1380 See Section VII.D.7 of this release discussing costs of Rule 13n-4(c)(2)(iv).

1381 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $90,140 per SDR and $901,400 for all SDRs, calculated as follows: ($20,000 for outside legal services + (Compliance Attorney at $334 per hour for 210 hours)) x 10 registrants = $901,400.

1382 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $20,040 per SDR and $200,400 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 60 hours) x 10 registrants = $200,400.

1383 See Section VII.D.7 of this release discussing costs of Rule 13n-4(c)(3).

1384 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $180,280 per SDR and $1,802,800 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $334 per hour for 420 hours)) x 10 registrants = $1,802,800.

1385 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $40,080 per SDR and $400,800 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 120 hours) x 10 registrants = $400,800.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n-5(b)(6) will be 315 hours and $30,000 for each SDR and the average ongoing paperwork cost will be 90 hours per year for each SDR.[1386] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,352,100[1387] and the aggregate ongoing estimated dollar cost per year will be $300,600[1388] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rules 13n-4(b)(8) and 13n-9 will be 630 hours and $60,000 for each SDR and the average ongoing paperwork cost will be 180 hours per year for each SDR.[1389] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $2,704,200[1390] and the aggregate ongoing estimated dollar cost per year will be $601,200[1391] to comply with the rules.

The Commission solicited comment on the costs related to Rules 13n-4(c), 13n-5(b)(6),

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1386 See Section VII.D.7 of this release discussing costs of Rule 13n-5(b)(6).

1387 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $135,210 per SDR and $1,352,100 for all SDRs, calculated as follows: ($30,000 for outside legal services + (Compliance Attorney at $334 per hour for 315 hours)) x 10 registrants = $1,352,100.

1388 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $30,060 per SDR and $300,600 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 90 hours) x 10 registrants = $300,600.

1389 See Section VII.D.7 of this release discussing costs of Rules 13n-4(b)(8), 13n-9(b)(1), and 13n-9(b)(2).

1390 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $270,420 per SDR and $2,704,200 for all SDRs, calculated as follows: ($60,000 for outside legal services + (Compliance Attorney at $334 per hour for 630 hours)) x 10 registrants = $2,704,200.

1391 The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $60,120 per SDR and $601,200 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 180 hours) x 10 registrants = $601,200.

13n-4(b)(8), and 13n-9.[1392] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the policies and procedures required by the rules, particularly as the costs apply to persons currently operating as SDRs.[1393] One commenter believed that an interpretation of Rule 13n-4(c)(1)(i) that prohibits the use of the "dealer pays" or "sell-side pays" model "would have the unintended consequence of significantly increasing the costs for buy-side participants . . . ."[1394] Because, as discussed above, Rule 13n-4(c)(1)(i) is not intended to prohibit an SDR from utilizing any one particular model, including a "dealer pays" or "sell-side pays" model, the Commission does not believe that the rule will necessarily increase costs for buy-side participants, as stated by the commenter.[1395] The Commission further believes that if there is significant demand by buy-side participants with reporting responsibility for a "dealer pays" model, then an SDR is likely to provide such a service.

A commenter to proposed Regulation SBSR suggested that SDRs should not be permitted to charge fees to third parties acting on behalf of counterparties for accepting SBS transaction information, as such fees would increase the cost of using an SB SEF or other third party.[1396] Although the Commission agrees that an SB SEF or other third party could pass along fees charged by SDRs, the Commission does not believe that it is appropriate to determine who an SDR can charge for its services. Rather, the Commission believes that SDRs should have flexibility in determining how and whom to charge for their services, and that any costs

1392 See Proposing Release 75 FR at 77364, supra note 2.

1393 See Proposing Release 75 FR at 77364, supra note 2.

1394 MarkitSERV, supra note 19.

1395 See Section VI.D.3.a.iii(1) of this release discussing Rule 13n-4(c)(1)(i).

1396 Tradeweb SBSR, supra note 27.

associated with such flexibility are justified by the benefits of allowing SDRs to develop sustainable business models in an open, competitive environment.

The Commission believes that existing SDRs may already have in place policies and procedures similar to the policies and procedures required by Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9. Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their policies and procedures to comply with Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9. Thus, such persons may experience costs in enhancing their policies and procedures to comply with Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9. Moreover, because the costs discussed above represent the costs of creating policies and procedures without any existing policies and procedures in place, existing SDRs that already have policies and procedures may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their policies and procedures into compliance with Rules 13n-4(c), 13n-5(b)(6), 13n-4(b)(8), and 13n-9, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.

c. Alternatives

As suggested by a commenter, the Commission considered (1) adding safeguards specifically related to confidentiality of trading positions and (2) requiring SDRs to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill their regulatory obligations.[1397] As discussed above, the Commission believes that Rules 13n-4(b)(8) and 13n-9, as adopted, are broad enough to cover information about trading positions, so

[1397] See MFA 1, supra note 19.

no specific requirement regarding confidentiality of trading positions is necessary.[1398] The Commission also believes that the rules are broad enough to allow SDRs, if they choose, to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill their regulatory obligations. The Commission believes that the adoption of the specific policies that were suggested by the commenter would prevent an SDR's management from finding the most cost effective method of meeting the privacy requirements in these rules.

The Commission considered, as an alternative to Rules 13n-4(c)(2) and (3), adopting, as suggested by two commenters, prescriptive rules relating to governance (e.g., ownership or voting limitations, independent directors, nominating committees composed of a majority of independent directors).[1399] As discussed above, the Commission believes that rules that are intended to minimize an SDR's potential and existing conflicts of interest and to help ensure that an SDR meets its core principles are sufficient and that prescriptive governance requirements are not warranted at this time.[1400] If the Commission were to impose additional governance requirements and limitations, SDRs would likely incur costs in addition to the costs already imposed by the SDR Rules, which do not seem to be warranted at this time. For these reasons, the Commission is not adopting the alternative to Rules 13n-4(c)(2) and (3) of more prescriptive governance arrangements.

The Commission considered whether the resolution of disputes should be left primarily to

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1398 See Sections VI.D.2.c and VI.I.1.c of this release discussing Rules 13n-4(b)(8) and 13n-9, respectively.

1399 See Barnard, supra note 19; Better Markets 1, supra note 19; see also Better Markets 2, supra note 19.

1400 See Sections VI.D.3.b.iii and VI.D.3.c.iii of this release discussing Rules 13n-4(c)(2) and 13n-4(c)(3), respectively.

the SBS counterparties and third party service providers, which one commenter suggested.[1401] The Commission believes that the benefits of a dispute resolution procedure in Rule 13n-5(b)(6) justify the possible issues cited by the commenter, such as duplication of services already provided by third party service providers. As discussed above, there may be instances where a third party service provider cannot resolve a dispute, and, in those situations, the cost of dispute resolution through the SDR will be necessary to maintain the accuracy and quality of the SBS data.[1402] The value of the SBS data depends on its accuracy and quality.

The Commission also considered prohibiting the commercial use of SBS data by SDRs unless the parties to the SBS provide written consent. Three commenters, including two commenters to proposed Regulation SBSR, also suggested that SDRs be prohibited from using SBS data for commercial purposes.[1403] As discussed above, the Commission believes that limiting the commercial use of SBS data would potentially limit the business models that SDRs may develop, thereby reducing competition.[1404] Decreased competition may result in higher costs for SDR services. Limiting the commercial use of SBS data would reduce SDRs' potential revenue streams, reducing the profitability and stability of SDRs. Further, as discussed above, such a limitation may decrease transparency by preventing an SDR from releasing to the public anonymized, aggregated reports of SBS data.[1405] Finally, the Commission believes that the SDR Rules, including Rules 13n-4(c)(3) and 13n-9, are sufficient to reduce conflicts of interest and

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1401 See DTCC 2, supra note 19.

1402 See Section VI.E.6.c of this release discussing Rule 13n-5(b)(6).

1403 See MFA 1, supra note 19; DTCC SBSR, supra note 27; WMBAA SBSR, supra note 27.

1404 See Section VI.D.3.c.iii of this release discussing Rule 13n-4(c)(3).

1405 See Section VI.D.3.c.iii of this release discussing Rule 13n-4(c)(3).

protect the privacy of SBS data. For these reasons, the Commission is not adopting the alternative of limiting the commercial use of SBS data.

8. Total Costs

Based on the analyses described above, the Commission estimates that Rules 13n-1 through 13n-11 and Form SDR will impose on registered SDRs an aggregate total initial one-time estimated dollar cost of $227,075,600.50.[1406] The Commission further estimates that Rules 13n-1 through 13n-11 and Form SDR will impose on registered SDRs a total ongoing annualized aggregate dollar cost of $145,630,646.10.[1407] Finally, the Commission estimates that certain non-U.S. persons may incur an aggregate total initial one-time estimated dollar cost of approximately $7,600[1408] in determining the availability of the SDR Exemption (i.e., Rule 13n-12).

1406 The Commission derived its estimate from the following: ($801,688 ($793,840 + $3,840 + $4,008) for Registration Requirements and Form SDR) + ($214,995,300 ($210,810,000 + $4,185,300) for SDR Duties, Data Collection and Maintenance, and Direct Electronic Access) + ($986,600 for Recordkeeping) + ($263,162.50 for Disclosure) + ($1,802,800 for Chief Compliance Officer and Compliance Functions) + ($8,226,050 ($1,465,550 + $901,400 + $1,802,800 + $1,352,100 + 2,704,200) for Other Policies and Procedures Relating to an SDR's Business) = $227,075,600.50.

1407 The Commission derived its estimate from the following: ($55,440 for Registration Requirements and Form SDR) + ($127,451,400 ($126,486,000 + $965,400) for SDR Duties, Data Collection and Maintenance, and Direct Electronic Access) + ($790,051.10 for Recordkeeping) + ($2,510 for Reports) + ($1,735 for Disclosure) + ($15,505,620 ($9,130,800 + $16,700 + $5,990,000 + $368,120) for Chief Compliance Officer and Compliance Functions) + ($1,823,890 ($320,890 + $200,400 + $400,800 + $300,600 + $601,200) for Other Policies and Procedures Relating to an SDR's Business) = $145,630,646.10.

1408 The Commission derived its estimate from the following: ($380 for one hour of an Attorney's time per person) x (20 non-U.S. persons that perform the functions of an SDR using in-house legal counsel to determine whether an applicable MOU or arrangement is in place).

Existing SDRs may experience costs lower than these estimates. Such persons may have in place existing technology systems, policies and procedures, personnel, and compliance regimes that they can use to comply with the SDR Rules. Because the estimates discussed above represent the costs of compliance starting from scratch, an existing SDR will most likely experience costs lower than these estimates.

Similarly, if such a person is registered with the CFTC as a swap data repository, the person's costs of complying with the SDR Rules will most likely be lower than the estimates provided above because the person may be able to use its existing policies, procedures, and operations to comply with the SDR Rules. As stated above, the Commission believes that on the whole, the SDR Rules are largely consistent with the rules adopted by the CFTC for swap data repositories.[1409] Consequently, a person registered with the CFTC as a swap data repository may be able to use its existing policies, procedures, and operations to comply with the SDR Rules and may not need to create policies, procedures, and operations from scratch.

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[1410] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[1411] of the Administrative Procedure Act,[1412] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to

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1409 See Section I.D of this release.

1410 5 U.S.C. 601 et seq.

1411 5 U.S.C. 603(a).

1412 5 U.S.C. 551 et seq.

determine the impact of such rulemaking on "small entities."[1413] Section 605(b) of the RFA states that this requirement does not apply to any final rule that an agency certifies will not "have a significant economic impact on a substantial number of small entities."[1414]

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) an issuer or a person, other than an investment company, that, on the last day of its most recent fiscal year, had total assets of $5 million or less and (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Exchange Act Rule 17a-5(d), or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small entity.[1415]

In the Proposing Release, the Commission stated that it did not believe that any persons that would register as SDRs would be considered small entities.[1416] The Commission stated that it believed that most, if not all, SDRs would be part of large business entities with assets in excess of $5 million and total capital in excess of $500,000. As a result, the Commission

1413 Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10. See Final Definitions of "Small Business" and "Small Organization" for Purposes of the Regulatory Flexibility Act, Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

1414 See 5 U.S.C. 605(b).

1415 17 CFR 240.0-10.

1416 Proposing Release, 75 FR at 77365, supra note 2.

certified that the proposed rules would not have a significant impact on a substantial number of small entities and requested comments on this certification.

The Commission did not receive any comments that specifically addressed whether Rules 13n-1 through 13n-12 and Form SDR would have a significant economic impact on small entities. Therefore, the Commission continues to believe that Rules 13n-1 through 13n-12 and Form SDR will not have a significant economic impact on a substantial number of small entities.[1417] Accordingly, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rules 13n-1 through 13n-12, Form SDR will not have a significant economic impact on a substantial number of small entities.

X. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 13(n) and 23(a) thereof, 15 U.S.C. 78m(n) and 78w(a), the Commission is adopting new Rules 13n-1 to 13n-12, which govern SDRs and a new form for registration as an SDR. Additionally, the Commission is adopting new Rule 407 and amendments to Regulation S-T under authority set forth in Exchange Act Section 23(a).[1418] The Commission is also adopting amendments to Exchange Act Rule 24b-2 under authority set forth in Exchange Act Section 23(a).[1419] All the new rules and amendments are adopted under Chapter II of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Part 232

Reporting and recordkeeping requirements.

1417 See Proposing Release, 75 FR at 77365, supra note 2.

1418 15 U.S.C. 78w(a).

1419 15 U.S.C. 78w(a).

List of Subjects in 17 CFR Parts 240 and 249

Confidential business information, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

3. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

4. Section 232.11 is amended by adding the definitions of "Interactive Data Financial Report" and "Related Official Financial Report Filing" in alphabetical order.

The amendment reads as follows:

§ 232.11 Definition of terms used in part 232.

* * * * *

Interactive Data Financial Report. The term Interactive Data Financial Report means the machine-readable computer code that presents information in eXtensible Business Reporting Language (XBRL) electronic format pursuant to § 232.407.

* * * * *

Related Official Financial Report Filing. The term Related Official Financial Report Filing means the ASCII or HTML format part of the official filing with which an Interactive Data Financial Report appears as an exhibit.

* * * * *

5. Section 232.101 is amended by:

a. Removing, in paragraph (a)(1)(xv), the word "and" after the semicolon;

b. In paragraph (a)(1)(xvi), replacing the period with a semicolon and adding the word "and" after the semicolon;

c. Adding paragraph (a)(1)(xvii); and

d. Revising paragraph (c) and adding paragraph (d).

The amendment reads as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xvii) Documents filed with the Commission pursuant to Section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, including Form SDR (17 CFR 249.1500) and reports filed pursuant to Rules 13n-11(d) and (f) under the Exchange Act.

* * * * *

(c) <u>Documents to be submitted in paper only</u>. Except as otherwise specified in paragraph (d) of this section, the following shall not be submitted in electronic format:

(1)(i) Confidential treatment requests and the information with respect to which confidential treatment is requested;

* * * * *

(d) All documents, including any information with respect to which confidential treatment is requested, filed pursuant to Section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder shall be filed in electronic format.

6. Section 232.305 is amended by revising paragraph (b).

The amendment reads as follows:

§ 232.305 Number of characters per line; tabular and columnar information.

* * * * *

(b) Paragraph (a) of this section does not apply to HTML documents, Interactive Data Files (§ 232.11), Interactive Data Financial Reports (§ 232.11) or XBRL-Related Documents (§ 232.11).

7. Section 232.407 is added to read as follows:

§ 232.407 Interactive data financial report filings.

Section 407 of Regulation S-T (§ 232.407) applies to electronic filers that file Interactive Data Financial Reports (§ 232.11) as required by Rule 13n-11(f)(5) (§ 240.13n-11(f)(5) of this chapter). Section 407 imposes content, format, and filing requirements for Interactive Data Financial Reports, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Financial Report Filing (§ 232.11). Rule 13n-11(f)(5) specifies the circumstances under which an Interactive Data Financial Report must be filed as an exhibit.

(a) Content, format, and filing requirements – General. Interactive Data Financial Reports must:

(1) Comply with the content, format, and filing requirements of this section;

(2) Be filed only by an electronic filer that is required to file an Interactive Data Financial Report pursuant to Rule 13n-11(f)(5) as an exhibit to a filing; and

(3) Be filed in accordance with the EDGAR Filer Manual and Rules 13n-11(f)(5) and (g) (§§ 240.13n-11(f)(5) and (g)).

(b) Content – categories of information presented. An Interactive Data Financial Report must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Financial Report Filing, no more and no less, for the following categories, as applicable:

(1) The complete set of the electronic filer's financial statements (which includes the face of the financial statements and all footnotes); and

(2) All schedules set forth in Article 12 of Regulation S-X (§§ 210.12-01 - 210.12-29 of this chapter) related to the electronic filer's financial statements.

Note to paragraph (b): It is not permissible for the Interactive Data Financial Report to present only partial face financial statements, such as by excluding comparative financial information for prior periods.

(c) Format – Generally. An Interactive Data Financial Report must comply with the following requirements, except as modified by paragraph (d) or (e) of this section, as applicable, with respect to the corresponding data in the Related Official Financial Report Filing consisting of footnotes to financial statements or financial statement schedules as set forth in Article 12 of Regulation S-X:

(1) Data elements and labels.

(i) Element accuracy. Each data element (i.e., all text, line item names, monetary values, percentages, numbers, dates and other labels) contained in the Interactive Data Financial Report reflects the same information in the corresponding data in the Related Official Financial Report Filing;

(ii) Element specificity. No data element contained in the corresponding data in the Related Official Financial Report Filing is changed, deleted or summarized in the Interactive Data Financial Report;

(iii) Standard and special labels and elements. Each data element contained in the Interactive Data Financial Report is matched with an appropriate tag from the most recent version of the standard list of tags specified by the EDGAR Filer Manual. A tag is appropriate only when its standard definition, standard label, and other attributes as and to the extent identified in the list of tags match the information to be tagged, except that:

(A) Labels. An electronic filer must create and use a new special label to modify a tag's existing standard label when that tag is an appropriate tag in all other respects (i.e., in order to use a tag from the standard list of tags only its label needs to be changed); and

(B) Elements. An electronic filer must create and use a new special element if and only if an appropriate tag does not exist in the standard list of tags for reasons other than or in addition to an inappropriate standard label; and

(2) Additional mark-up related content. The Interactive Data Financial Report contains any additional mark-up related content (e.g., the eXtensible Business Reporting Language tags themselves, identification of the core XML documents used and other technology-related content) not found in the corresponding data in the Related Official Financial Report Filing that is necessary to comply with the EDGAR Filer Manual requirements.

(d) Format – Footnotes - Generally. The part of the Interactive Data Financial Report for which the corresponding data in the Related Official Financial Report Filing consists of footnotes to financial statements must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (d). Each complete footnote must be block-text tagged.

(e) Format – Schedules - Generally. The part of the Interactive Data Financial Report for which the corresponding data in the Related Official Financial Report Filing consists of financial statement schedules as set forth in Article 12 of Regulation S-X must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (e). Each complete schedule must be block-text tagged.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

8. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

9. Sections 240.13n-1 through 240-13n-12 are added to read as follows:

Sec.

240.13n-1 Registration of security-based swap data repository.

240.13n-2 Withdrawal from registration; revocation and cancellation.

240.13n-3 Registration of successor to registered security-based swap data repository.

240.13n-4 Duties and core principles of security-based swap data repository.

240.13n-5 Data collection and maintenance.

240.13n-6 Automated systems.

240.13n-7 Recordkeeping of security-based swap data repository.

240.13n-8 Reports to be provided to the Commission.

240.13n-9 Privacy requirements of security-based swap data repository.

240.13n-10 Disclosure requirements of security-based swap data repository.

240.13n-11 Chief compliance officer of security-based swap data repository; compliance reports and financial reports.

240.13n-12 Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

§ 240.13n-1 Registration of security-based swap data repository.

(a) Definitions. For purposes of this section –

(1) Non-resident security-based swap data repository means:

(i) In the case of an individual, one who resides in or has his principal place of business in any place not in the United States;

(ii) In the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or

(iii) In the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(2) Tag (including the term tagged) has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(b) An application for the registration of a security-based swap data repository and all amendments thereto shall be filed electronically in a tagged data format on Form SDR (17 CFR 249.1500) with the Commission in accordance with the instructions contained therein. As part of the application process, each security-based swap data repository shall provide additional information to any representative of the Commission upon request.

(c) Within 90 days of the date of the publication of notice of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall –

(1) By order grant registration; or

(2) Institute proceedings to determine whether registration should be granted or denied.

Such proceedings shall include notice of the issues under consideration and opportunity for hearing on the record and shall be concluded within 180 days of the date of the publication of notice of the filing of the application for registration under paragraph (b) of this section. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

(3) The Commission shall grant the registration of a security-based swap data repository if the Commission finds that such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. The Commission shall deny the registration of a security-based swap data repository if it does not make any such finding.

(d) If any information reported in items 1 through 17, 26, and 48 of Form SDR (17 CFR 249.1500) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the security-based swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the security-based swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository.

(e) Each security-based swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the security-based swap data repository to enforce the federal securities laws and the rules and regulations thereunder.

(f) Any non-resident security-based swap data repository applying for registration pursuant to this section shall:

(i) Certify on Form SDR that the security-based swap data repository can, as a matter of law, and will provide the Commission with prompt access to the books and records of such security-based swap data repository and can, as a matter of law, and will submit to onsite inspection and examination by the Commission, and

(ii) Provide an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and can, as a matter of law, submit to onsite inspection and examination by the Commission.

(g) An application for registration or any amendment thereto that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

§ 240.13n-2 Withdrawal from registration; revocation and cancellation.

(a) Definitions. For purposes of this section –

(1) Tag (including the term tagged) has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(b) A registered security-based swap data repository may withdraw from registration by filing a withdrawal from registration on Form SDR (17 CFR 249.1500) electronically in a tagged data format. The security-based swap data repository shall designate on Form SDR a person to serve as the custodian of the security-based swap data repository's books and records. When filing a withdrawal from registration on Form SDR, a security-based swap data repository shall update any inaccurate information.

(c) A withdrawal from registration filed by a security-based swap data repository shall become effective for all matters (except as provided in this paragraph (c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such security-based swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine.

(d) A withdrawal from registration that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

(e) If the Commission finds, on the record after notice and opportunity for hearing, that any registered security-based swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.

(f) If the Commission finds that a registered security-based swap data repository is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

§ 240.13n-3 Registration of successor to registered security-based swap data repository.

(a) In the event that a security-based swap data repository succeeds to and continues the business of a security-based swap data repository registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR (17 CFR 249.1500), and the predecessor files a withdrawal from registration on Form SDR; provided, however, that the registration of the predecessor security-based swap data repository shall cease to be effective 90 days after the publication of notice of the filing of the application for registration on Form SDR filed by the successor security-based swap data repository.

(b) Notwithstanding paragraph (a) of this section, if a security-based swap data repository succeeds to and continues the business of a registered predecessor security-based swap data repository, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor security-based swap data repository on Form SDR to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

§ 240.13n-4 Duties and core principles of security-based swap data repository.

(a) Definitions. For purposes of this section –

(1) Affiliate of a security-based swap data repository means a person that, directly or

indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) Board means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) Control (including the terms controlled by and under common control with) means 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:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) 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

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

(4) Director means any member of the board.

(5) Direct electronic access means access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data.

(6) Market participant means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(7) Nonaffiliated third party of a security-based swap data repository means any person except:

(i) The security-based swap data repository;

(ii) Any affiliate of the security-based swap data repository; or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person).

(8) Person associated with a security-based swap data repository means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) Duties. To be registered, and maintain registration, as a security-based swap data repository, a security-based swap data repository shall:

(1) Subject itself to inspection and examination by any representative of the Commission;

(2) Accept data as prescribed in Regulation SBSR for each security-based swap;

(3) Confirm, as prescribed in Rule 13n-5, with both counterparties to the security-based swap the accuracy of the data that was submitted;

(4) Maintain, as prescribed in Rule 13n-5, the data described in Regulation SBSR in such

form, in such manner, and for such period as provided therein and in the Act and the rules and regulations thereunder;

(5) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

(6) Provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with the public reporting requirements set forth in Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder;

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(8) Maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity as prescribed in Rule 13n-9; and

(9) [Reserved]

(10) [Reserved]

(11) Designate an individual to serve as a chief compliance officer.

(c) Compliance with core principles. A security-based swap data repository shall comply with the core principles as described in this paragraph.

(1) Market Access to Services and Data. Unless necessary or appropriate to achieve the purposes of the Act and the rules and regulations thereunder, the security-based swap data repository shall not adopt any policies or procedures or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions. To comply with this core principle, each security-based

swap data repository shall:

(i) Ensure that any dues, fees, or other charges imposed by, and any discounts or rebates offered by, a security-based swap data repository are fair and reasonable and not unreasonably discriminatory. Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly-situated users of such security-based swap data repository's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the security-based swap data repository (including exchanges, security-based swap execution facilities, electronic trading venues, and matching and confirmation platforms), and third party service providers;

(ii) Permit market participants to access specific services offered by the security-based swap data repository separately;

(iii) Establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the security-based swap data repository as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the security-based swap data repository, and third party service providers that seek to connect to or link with the security-based swap data repository; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the security-based swap data repository and to grant such person access to such services or data if such person has been discriminated against unfairly.

(2) Governance arrangements. Each security-based swap data repository shall establish

governance arrangements that are transparent to fulfill public interest requirements under the Act and the rules and regulations thereunder; to carry out functions consistent with the Act, the rules and regulations thereunder, and the purposes of the Act; and to support the objectives of the Federal Government, owners, and participants. To comply with this core principle, each security-based swap data repository shall:

(i) Establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls;

(ii) Establish governance arrangements that provide for fair representation of market participants;

(iii) Provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the security-based swap data repository's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the security-based swap data repository, have a clear understanding of their responsibilities, and exercise sound judgment about the security-based swap data repository's affairs.

(3) Conflicts of interest. Each security-based swap data repository shall establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the security-based swap data repository and establish a process for resolving any such conflicts of interest. Such conflicts of interest include, but are not limited to: conflicts between the commercial interests of a security-based swap data repository and its

statutory and regulatory responsibilities; conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others; conflicts between, among, or with persons associated with the security-based swap data repository, market participants, affiliates of the security-based swap data repository, and nonaffiliated third parties; and misuse of confidential information, material, nonpublic information, and/or intellectual property. To comply with this core principle, each security-based swap data repository shall:

(i) Establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the security-based swap data repository's decision-making process on an ongoing basis;

(ii) With respect to the decision-making process for resolving any conflicts of interest, require the recusal of any person involved in such conflict from such decision-making; and

(iii) Establish, maintain, and enforce reasonable written policies and procedures regarding the security-based swap data repository's non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person.

Note to § 240.13n-4: This rule is not intended to limit, or restrict, the applicability of other provisions of the federal securities laws, including, but not limited to, Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder.

§ 240.13n-5 Data collection and maintenance.

(a) Definitions. For purposes of this section –

(1) Asset class means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives.

(2) Position means the gross and net notional amounts of open security-based swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument, index, or reference entity;

(ii) Counterparty;

(iii) Asset class;

(iv) Long risk of the underlying instrument, index, or reference entity; and

(v) Short risk of the underlying instrument, index, or reference entity.

(3) Transaction data means all information reported to a security-based swap data repository pursuant to the Act and the rules and regulations thereunder, except for information provided pursuant to Rule 906(b) of Regulation SBSR.

(b) Requirements. Every security-based swap data repository registered with the Commission shall comply with the following data collection and data maintenance standards:

(1) Transaction data.

(i) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the security-based swap data repository and shall accept all transaction data that is reported in accordance with such policies and procedures.

(ii) If a security-based swap data repository accepts any security-based swap in a particular asset class, the security-based swap data repository shall accept all security-based swaps in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1)(i) of this section.

(iii) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate, and clearly identifies the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data.

(iv) Every security-based swap data repository shall promptly record the transaction data it receives.

(2) Positions. Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the security-based swap data repository maintains records.

(3) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate.

(4) Every security-based swap data repository shall maintain transaction data and related identifying information for not less than five years after the applicable security-based swap expires and historical positions for not less than five years:

(i) In a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information; and

(ii) In an electronic format that is non-rewriteable and non-erasable.

(5) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the security-based swap data repository.

(6) Every security-based swap data repository shall establish procedures and provide

facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

(7) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by this section in the manner required by the Act and the rules and regulations thereunder and for the remainder of the period required by this section.

(8) Every security-based swap data repository shall make and keep current a plan to ensure that the transaction data and positions that are recorded in the security-based swap data repository continue to be maintained in accordance with Rule 13n-5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered security-based swap data repository).

§ 240.13n-6 Automated systems.

Every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

§ 240.13n-7 Recordkeeping of security-based swap data repository.

(a) Every security-based swap data repository shall make and keep current the following books and records relating to its business:

(1) A record for each office listing, by name or title, each person at that office who,

without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records; and

(2) A record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Act and the rules and regulations thereunder.

(b) Recordkeeping rule for security-based swap data repositories.

(1) Every security-based swap data repository shall keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such.

(2) Every security-based swap data repository shall keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.

(3) Every security-based swap data repository shall, upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of this section.

(c) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the records and data required to be collected, maintained and preserved by this section in the manner required by this section and for the remainder of the period required by this section.

(d) This section does not apply to transaction data and positions collected and maintained pursuant to Rule 13n-5.

§ 240.13n-8 Reports to be provided to the Commission.

Every security-based swap data repository shall promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act and the rules and regulations thereunder.

§ 240.13n-9 Privacy requirements of security-based swap data repository.

(a) Definitions. For purposes of this section –

(1) Affiliate of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) Control (including the terms controlled by and under common control with) means 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:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) 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

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

(3) Market participant means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(4) Nonaffiliated third party of a security-based swap data repository means any person except:

(i) The security-based swap data repository;

(ii) The security-based swap data repository's affiliate; or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and nonaffiliated third party includes such entity that jointly employs the person).

(5) Nonpublic personal information means:

(i) Personally identifiable information that is not publicly available information; and

(ii) Any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information.

(6) Personally identifiable information means any information:

(i) A market participant provides to a security-based swap data repository to obtain service from the security-based swap data repository;

(ii) About a market participant resulting from any transaction involving a service between the security-based swap data repository and the market participant; or

(iii) The security-based swap data repository obtains about a market participant in connection with providing a service to that market participant.

(7) Person associated with a security-based swap data repository means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) Each security-based swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository shares with affiliates and nonaffiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Any confidential information received by the security-based swap data repository, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;

(ii) Material, nonpublic information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions,

by the security-based swap data repository or any person associated with the security-based swap data repository for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation:

(A) Limiting access to such confidential information, material, nonpublic information, and intellectual property;

(B) Standards pertaining to the trading by persons associated with the security-based swap data repository for their personal benefit or the benefit of others; and

(C) Adequate oversight to ensure compliance with this subparagraph.

§ 240.13n-10 Disclosure requirements of security-based swap data repository.

(a) Definition. For purposes of this section –

(1) Market participant means any person participating in the over-the-counter derivatives market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(b) Before accepting any security-based swap data from a market participant or upon a market participant's request, a security-based swap data repository shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the services of the security-based swap data repository:

(1) The security-based swap data repository's criteria for providing others with access to services offered and data maintained by the security-based swap data repository;

(2) The security-based swap data repository's criteria for those seeking to connect to or link with the security-based swap data repository;

(3) A description of the security-based swap data repository's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n-6;

(4) A description of the security-based swap data repository's policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction

information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity, as described in Rule 13n-9(b)(1);

(5) A description of the security-based swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person;

(6) A description of the security-based swap data repository's dispute resolution procedures involving market participants, as described in Rule 13n-5(b)(6);

(7) A description of all the security-based swap data repository's services, including any ancillary services;

(8) The security-based swap data repository's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(9) A description of the security-based swap data repository's governance arrangements.

§ 240.13n-11 Chief compliance officer of security-based swap data repository; compliance reports and financial reports.

(a) In general. Each security-based swap data repository shall identify on Form SDR (17 CFR 249.1500) a person who has been designated by the board to serve as a chief compliance officer of the security-based swap data repository. The compensation, appointment, and removal of the chief compliance officer shall require the approval of a majority of the security-based swap data repository's board.

(b) Definitions. For purposes of this section –

(1) Board means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data

repository.

(2) Director means any member of the board.

(3) EDGAR Filer Manual has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(4) Interactive Data Financial Report has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(5) Material change means a change that a chief compliance officer would reasonably need to know in order to oversee compliance of the security-based swap data repository.

(6) Material compliance matter means any compliance matter that the board would reasonably need to know to oversee the compliance of the security-based swap data repository and that involves, without limitation:

(i) A violation of the federal securities laws by the security-based swap data repository, its officers, directors, employees, or agents;

(ii) A violation of the policies and procedures of the security-based swap data repository by the security-based swap data repository, its officers, directors, employees, or agents; or

(iii) A weakness in the design or implementation of the policies and procedures of the security-based swap data repository.

(7) Official filing has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(8) Senior officer means the chief executive officer or other equivalent officer.

(9) Tag (including the term tagged) has the same meaning as set forth in Rule 11 of Regulation S-T (17 CFR 232.11).

(c) Duties. Each chief compliance officer of a security-based swap data repository shall:

(1) Report directly to the board or to the senior officer of the security-based swap data repository;

(2) Review the compliance of the security-based swap data repository with respect to the requirements and core principles described in Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder;

(3) In consultation with the board or the senior officer of the security-based swap data repository, take reasonable steps to resolve any material conflicts of interest that may arise;

(4) Be responsible for administering each policy and procedure that is required to be established pursuant to Section 13 of the Act (15 U.S.C. 78m) and the rules and regulations thereunder;

(5) Take reasonable steps to ensure compliance with the Act and the rules and regulations thereunder relating to security-based swaps, including each rule prescribed by the Commission under Section 13 of the Act (15 U.S.C. 78m);

(6) Establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any --

(i) Compliance office review;

(ii) Look-back;

(iii) Internal or external audit finding;

(iv) Self-reported error; or

(v) Validated complaint; and

(7) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) <u>Compliance reports</u>.

(1) In general. The chief compliance officer shall annually prepare and sign a report that contains a description of the compliance of the security-based swap data repository with respect to the Act and the rules and regulations thereunder and each policy and procedure of the security-based swap data repository (including the code of ethics and conflicts of interest policies of the security-based swap data repository). Each compliance report shall also contain, at a minimum, a description of:

(i) The security-based swap data repository's enforcement of its policies and procedures;

(ii) Any material changes to the policies and procedures since the date of the preceding compliance report;

(iii) Any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the security-based swap data repository to incorporate such recommendation; and

(iv) Any material compliance matters identified since the date of the preceding compliance report.

(2) Requirements. A financial report of the security-based swap data repository shall be filed with the Commission as described in paragraph (g) of this section and shall accompany a compliance report as described in paragraph (d)(1) of this section. The compliance report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the compliance report is accurate and complete. The compliance report shall also be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S-T (17 CFR 232.301).

(e) The chief compliance officer shall submit the annual compliance report to the board for its review prior to the filing of the report with the Commission.

(f) Financial reports. Each financial report filed with a compliance report shall:

(1) Be a complete set of financial statements of the security-based swap data repository that are prepared in accordance with U.S. generally accepted accounting principles for the most recent two fiscal years of the security-based swap data repository;

(2) Be audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2-01 of Regulation S-X (17 CFR 210.2-01);

(3) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2-02 of Regulation S-X (17 CFR 210.2-02);

(4) If the security-based swap data repository's financial statements contain consolidated information of a subsidiary of the security-based swap data repository, provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the security-based swap data repository, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10-01(a)(2), (3), and (4) of Regulation S-X (17 CFR 210.10-01). Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees. Descriptions of significant provisions of the security-based swap data repository's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the security-based swap data repository shall be provided

along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the security-based swap data repository have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule; and

(5) Be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S-T (17 CFR 232.407).

(g) Reports filed pursuant to paragraphs (d) and (f) of this section shall be filed within 60 days after the end of the fiscal year covered by such reports.

(h) No officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under this section.

§ 240.13n-12—Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

(a) Definitions. For purposes of this section—

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

(2) U.S. person shall have the same meaning as set forth in Rule 3a71-3(a)(4)(i) of the Act (17 CFR 240.3a71-3(a)(4)(i)).

(b) A non-U.S. person that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the Act (15 U.S.C. 78m(n)), and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

10. Section 240.24b-2 is amended by:

a. In the first sentence of paragraph (b), revising "paragraph (g)" to read "paragraphs (g) and (h)"; and

b. Adding paragraph (h).

The amendment reads as follows:

§ 240.24b-2 Nondisclosure of information filed with the Commission and with any exchange.

* * * * *

(h) A security-based swap data repository shall not omit the confidential portion from the material filed in electronic format pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. In lieu of the procedures described in paragraph (b) of this section, a security-based swap data repository shall request confidential treatment electronically for any material filed in electronic format pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. Subpart P consisting of § 249.1500 is added to read as follows:

Subpart P – FORMS FOR REGISTRATION OF SECURITY-BASED SWAP DATA REPOSITORIES

§ 249.1500 Form SDR, for application for registration as a security-based swap data repository, amendments thereto, or withdrawal from registration.

[Note: The text of Form SDR does not, and the amendments will not, appear in the Code of Federal Regulations.]

The form shall be used for registration as a security-based swap data repository, and for the amendments to and withdrawal from such registration pursuant to Section 13(n) of the Exchange Act (15 U.S.C. 78m(n)).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION OR WITHDRAWAL FROM REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM SDR

1. Form SDR and exhibits thereto are to be filed electronically in a tagged data format through EDGAR with the Securities and Exchange Commission by an applicant for registration as a security-based swap data repository, by a registered security-based swap data repository amending its application for registration, or by a registered security-based swap data repository withdrawing its registration, pursuant to Section 13(n) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 13n-1 and 13n-2 thereunder. The electronic filing requirements of Regulation S-T will apply to all such filings.

2. With respect to an applicant for registration as a security-based swap data repository, Form SDR also constitutes an application for registration as a securities information processor. An amendment or withdrawal on Form SDR also constitutes an amendment or withdrawal of securities information processor registration pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. Applicants for registration as a securities information processor not seeking to become dually-registered as a security-based swap data repository and a securities information processor, or registered securities information processors that are not dually-registered as a security-based swap data repository and a securities information processor, should continue to file on Form SIP.

3. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments. No application for registration shall be effective unless the Commission, by order, grants such registration.

4. Individuals' names shall be given in full (last name, first name, middle name).

5. Form SDR shall be signed by a person who is duly authorized to act on behalf of the security-based swap data repository.

6. If Form SDR is being filed as an application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by "none" or "N/A" as appropriate.

7. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a security-based swap data repository and a securities information processor. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form may be made available on the Commission's website, will be included routinely in the public files of the Commission, and will be available for inspection by any interested person. A form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing. Acceptance of this form, however, shall not constitute any finding that it has been filed as required or that the information submitted is true, current, or complete. Intentional misstatements or omissions of fact constitute federal criminal violations (see 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)).

8. Rule 13n-1(d) under the Exchange Act requires a security-based swap data repository to amend promptly Form SDR if any information contained in items 1 through 17, 26, and 48 of this application, or any amendment thereto, is or becomes inaccurate for any reason. Rule 13n-1(d) under the Exchange Act also requires a security-based swap data repository to file annually an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository. Rule 13n-2 under the Exchange Act requires a security-based swap data repository that seeks to withdraw from registration to file such withdrawal on Form SDR.

9. For the purposes of this form, the term "applicant" includes any applicant for registration as a security-based swap data repository or any registered security-based swap data repository that is amending Form SDR or withdrawing its registration as a security-based swap data repository. In addition, the term "applicant" includes any applicant for registration as a securities information processor.

10. Applicants filing Form SDR as an amendment (other than an annual amendment) need to update any information contained in items 1 through 17, 26, and 48 that has become inaccurate since the security-based swap data repository's last filing of Form SDR. An applicant submitting an amendment (other than an annual amendment) represents that all unamended information contained in items 1 through 17, 26, and 48 remains true, current, and complete as filed.

11. Applicants filing a withdrawal need to update any items or exhibits that are being amended since the security-based swap data repository's last filing of Form SDR. An applicant submitting a withdrawal represents that all unamended items and exhibits remain true, current, and complete as filed.

12. Applicants filing an annual amendment must file a complete form, including all pages, answers to all items, together with all exhibits. Applicants filing an annual amendment must indicate which items have been amended since the last annual amendment, or, if the security-based swap data repository has not yet filed an annual amendment, since the security-based swap data repository's application for registration.

DEFINITIONS: Unless the context requires otherwise, all terms used in this form have the same meaning as in the Exchange Act, as amended, and in the rules and regulations of the Commission thereunder.

This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission estimates that the average burden to respond to Form SDR will be between 12 and 482 hours depending upon the purpose for which the form is being filed. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. It is mandatory that a security-based swap data repository file all notifications, updates, and reports required by Rules 13n-1 and 13n-2 using Form SDR.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION OR WITHDRAWAL FROM REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

____
(Exact Name of Applicant as Specified in Charter)

____
(Address of Principal Executive Offices)

If this is an APPLICATION for registration, complete this form in full and check here . . . .

If this is an AMENDMENT to an application, or to an effective registration (other than an annual amendment), list all items that are amended and check here . . . .

____

____

____

If this is an ANNUAL AMENDMENT to an application, or to an effective registration, complete this form in full, list all items that are amended since the last annual amendment, and check here . . . .

____

____

____

If this is a WITHDRAWAL from registration, list all items that are amended and check here . . . .

____

____

____

Or check here to confirm that there is no inaccurate information to update . . . .

GENERAL INFORMATION

1. Name under which business is conducted, if different than name specified herein: ____________________

____

2. If name of business is amended, state previous business name: ____________________

3. Mailing address:

(Number and Street)

(City) (State/Country) (Mailing Zip/Postal Code)

4. List of principal office(s) and address(es) where security-based swap data repository and securities information processor activities are conducted:

Office	Address

5. If the applicant is a successor (within the definition of Rule 12b-2 under the Exchange Act) to a previously registered security-based swap data repository, please complete the following:

   a. Date of succession: ______________________

   b. Full name and address of predecessor security-based swap data repository:

   (Name)

   (Number and Street)

   (City) (State/Country) (Mailing Zip/Postal Code)

   c. Predecessor's CIK ____________

6. List all asset classes of security-based swaps for which the applicant is collecting and maintaining data or for which it proposes to collect and maintain data.

7. Furnish a description of the function(s) that the applicant performs or proposes to perform. ____________

8. Applicant is a: Corporation

Partnership

Other Form of Organization (Specify) ______________________

9. If the applicant is a corporation or other form of organization (besides a partnership):

a. Date of incorporation or organization

____

b. Place of incorporation or state/country of organization

____

10. If the applicant is a partnership:

a. Date of filing of partnership agreement ______________________

b. Place where partnership agreement was filed ______________________

11. Applicant understands and consents that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to the officer specified or person named below at the U.S. address given. Such officer or person cannot be a Commission member, official, or employee.

____

(Name of Person or, if Applicant is a Corporation, Title of Officer)

____

(Name of Applicant or Applicable Entity)

____

(Number and Street)

____

(City) (State) (Zip Code)

____

(Area Code) (Telephone Number)

12. If this is a withdrawal from registration, furnish:

a. Name(s) and address(es) of the person(s) who has or will have custody or possession of the books and records that the applicant maintained in connection with its performance of security-based swap data repository and securities information processor functions.

____

(Name of Person)

____

(Number and Street)

____

(City) (State/Country) (Mailing Zip/Postal Code)

(Area Code) (Telephone Number)

b. If different from above, provide address(es) where such books and records will be located.

(Number and Street)

(City) (State/Country) (Mailing Zip/Postal Code)

13. SIGNATURE: Applicant has duly caused this application, amendment, or withdrawal to be signed on its behalf by the undersigned, hereunto duly authorized, on this date: ________________.
Applicant and the undersigned hereby represent that all information contained herein is true, current, and complete. Intentional misstatements or omissions of fact constitute federal criminal violations (see 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)). It is understood that all required items and exhibits are considered integral parts of this form and that the submission of any amendment or withdrawal represents that all unamended items and exhibits remain true, current, and complete as previously filed and that the submission of any amendment (other than an annual amendment) represents that all unamended information contained in items 1 through 17, 26, and 48 remains true, current, and complete as filed. If the applicant is a non-resident security-based swap data repository, the applicant and the undersigned further represent that the applicant can, as a matter of law, and will provide the Commission with prompt access to the applicant's books and records and that the applicant can, as a matter of law, and will submit to an onsite inspection and examination by the Commission. For purposes of this certification, "non-resident security-based swap data repository" means (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(Name of Applicant)

(Signature of General Partner, Managing Agent, or Principal Officer)

(Title)

EXHIBITS — BUSINESS ORGANIZATION

14. List as Exhibit A any person as defined in Section 3(a)(9) of the Exchange Act that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the applicant. State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

15. Attach as Exhibit B the following information about the chief compliance officer who has been appointed by the board of directors of the applicant or a person or group performing a function similar to such board of directors:

   a. Name
   b. Title

c. Date of commencement and, if appropriate, termination of present term of position
d. Length of time the chief compliance officer has held the same position
e. Brief account of the business experience of the chief compliance officer over the last five years
f. Any other business affiliations in the securities industry or derivatives industry
g. Details of:

  (1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
  (2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;
  (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
  (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof; and
  (5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:
    i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
    ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
    iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
    iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
    v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

16. Attach as Exhibit C a list of the officers, directors, governors, and persons performing similar functions, and the members of all standing committees grouped by committee of the applicant or of the entity identified in item 19 that performs the security-based swap data repository and securities information processor activities of the applicant, indicating for each:

  a. Name
  b. Title
  c. Dates of commencement and, if appropriate, termination of present term of office or position
  d. Length of time each present officer, director, governor, persons performing similar functions, or member of a standing committee has held the same office or position
  e. Brief account of the business experience of each officer, director, governor, persons performing similar functions, or member of a standing committee over the last five years
  f. Any other business affiliations in the securities industry or derivatives industry
  g. Details of:

    (1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
    (2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;
    (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
    (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof; and
    (5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:

i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

17. Attach as Exhibit D a copy of documents relating to the governance arrangements of the applicant, including, but not limited to, the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board; the responsibilities of the board and each such committee; the composition of the board and each such committee; and the applicant's policies and procedures reasonably designed to ensure that the applicant's senior management and each member of the board or such committee possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the applicant, to have a clear understanding of their responsibilities, and to exercise sound judgment about the applicant's affairs.

18. Attach as Exhibit E a copy of the constitution, articles of incorporation or association with all amendments thereto, existing by-laws, rules, procedures, and instruments corresponding thereto, of the applicant.

19. Attach as Exhibit F a narrative and/or graphic description of the organizational structure of the applicant. Note: If the security-based swap data repository or securities information processor activities of the applicant are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit F the description that applies to the segregable entity.

20. Attach as Exhibit G a list of all affiliates of the applicant and indicate the general nature of the affiliation. For purposes of this application, an "affiliate" of an applicant means a person that, directly or indirectly, controls, is controlled by, or is under common control with the applicant.

21. Attach as Exhibit H a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, the principal parties to the proceeding, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by any governmental agencies.

22. Attach as Exhibit I copies of all material contracts with any security-based swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of security-based swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts.

23. Attach as Exhibit J procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the applicant and to resolve any such conflicts of interest.

EXHIBITS — FINANCIAL INFORMATION

24. Attach as Exhibit K a statement of financial position, results of operations, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If statements

certified by an independent public accountant are available, such statements shall be submitted as Exhibit K. Alternatively, a financial report, as described in Rule 13n-11(f) under the Exchange Act, may be filed as Exhibit K.

25. Attach as Exhibit L a statement of financial position and results of operations for each affiliate of the applicant as of the end of the most recent fiscal year of each such affiliate. Alternatively, identify, if available, the most recently filed annual report on Form 10-K under the Exchange Act for any such affiliate as Exhibit L.

26. Attach as Exhibit M the following:

    a. A complete list of all dues, fees, and other charges imposed, or to be imposed, as well as all discounts or rebates offered, or to be offered, by or on behalf of the applicant for its services, including the security-based swap data repository's services, securities information processor's services, and any ancillary services, and identify the service(s) provided for each such due, fee, other charge, discount, or rebate;

    b. A description of the basis and methods used in determining at least annually the level and structure of the services as well as the dues, fees, other charges, discounts, or rebates listed in paragraph a of this item; and

    c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed or any discount or rebate offered for the same or similar services, then state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differences.

EXHIBITS — OPERATIONAL CAPABILITY

27. Attach as Exhibit N a narrative description, or the functional specifications, of each service or function listed in item 7 and performed as a security-based swap data repository or securities information processor. Include a description of all procedures utilized for the collection and maintenance of information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by market participants.

28. Attach as Exhibit O a list of all computer hardware utilized by the applicant to perform the security-based swap data repository or securities information processor functions listed in item 7, indicating:

    a. Name of manufacturer and manufacturer's equipment identification number;

    b. Whether such hardware is purchased or leased (If leased, state from whom leased, duration of lease, and any provisions for purchase or renewal); and

    c. Where such equipment (exclusive of terminals and other access devices) is physically located.

29. Attach as Exhibit P a description of the personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the applicant or the division, subdivision, or other segregable entity within the applicant as described in item 19.

30. Attach as Exhibit Q a description of the measures or procedures implemented by the applicant to provide for the security of any system employed to perform the functions of the security-based swap data repository or securities information processor. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used by the applicant to satisfy itself that the information received or disseminated by the system is accurate.

31. Where security-based swap data repository or securities information processor functions are performed by automated facilities or systems, attach as Exhibit R a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any such function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system connection, or as a result of any independent source.

32. Attach as Exhibit S the following:

   a. For each of the security-based swap data repository or securities information processor functions described in item 7:

      (1) quantify in appropriate units of measure the limits on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) the data elements included within each function (e.g., number of inquiries from remote terminals); and

      (2) identify the factors (mechanical, electronic, or other) that account for the current limitations reported in answer to (1) on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) the data elements included within each function.

   b. If the applicant is able to employ, or presently employs, its system(s) for any use other than for performing the functions of a security-based swap data repository or securities information processor, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and other uses.

EXHIBITS — ACCESS TO SERVICES AND DATA

33. Attach as Exhibit T the following:

   a. State the number of persons who subscribe, or who have notified the applicant of their intention to subscribe, to the applicant's services.

   b. For each instance during the past year in which any person has been prohibited or limited with respect to access to services offered or data maintained by the applicant, indicate the name of each such person and the reason for the prohibition or limitation.

   c. For each of such services that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, state the total number of devices to which information is, or will be supplied ("serviced") and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant. In addition, define the data elements for each service.

   d. For each service that is furnished in machine-readable form, state the storage media of any service furnished and define the data elements of such service.

34. Attach as Exhibit U copies of all contracts governing the terms by which persons may subscribe to the security-based swap data repository services, securities information processor services, and any ancillary services provided by the applicant. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.

35. Attach as Exhibit V a description of any specifications, qualifications, or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any security-based swap data repository or securities information processor services offered or data maintained by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria.

36. Attach as Exhibit W any specifications, qualifications, or other criteria required of persons who supply security-

based swap information to the applicant for collection, maintenance, processing, preparing for distribution, and publication by the applicant or of persons who seek to connect to or link with the applicant.

37. Attach as Exhibit X any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers, who requests access to data maintained by the applicant.

38. Attach as Exhibit Y policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS — OTHER POLICIES AND PROCEDURES

39. Attach as Exhibit Z policies and procedures implemented by the applicant to protect the privacy of any and all security-based swap transaction information that the applicant receives from a market participant or any registered entity.

40. Attach as Exhibit AA a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.

41. Attach as Exhibit BB policies and procedures implemented by the applicant regarding its use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

42. Attach as Exhibit CC procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

43. Attach as Exhibit DD policies and procedures relating to the applicant's calculation of positions.

44. Attach as Exhibit EE policies and procedures implemented by the applicant to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the applicant.

45. Attach as Exhibit FF a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a security-based swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered security-based swap data repository).

46. Attach as Exhibit GG all of the policies and procedures required under Regulation SBSR.

47. If the applicant has a rulebook, then the applicant may attach the rulebook as Exhibit HH.

EXHIBIT — LEGAL OPINION

48. If the applicant is a non-resident security-based swap data repository, then attach as Exhibit II an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

By the Commission.

Brent J. Fields
Secretary

Date: February 11, 2015

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74249 / February 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of **CHARLES L. HILL, JR.,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Charles L. Hill, Jr. ("Hill" or the "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. <u>SUMMARY</u>

1. Hill engaged in insider trading, in violation of Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, in connection with securities of Radiant Systems, Inc. ("Radiant").

2. In May 2011, NCR Corporation ("NCR"), a point-of-sale technology company based in Duluth, Georgia, began discussions with Radiant, another point-of-sale technology company based in Alpharetta, Georgia, about NCR's potential acquisition of Radiant. Radiant's Chief Operating Officer ("COO"), who first learned details about the acquisition in May 2011, discussed material, nonpublic information about the acquisition, ultimately structured to include a tender offer, in confidence with his close personal friend of approximately 40 years ("Radiant's COO's friend," or the "COO's friend"). Radiant's COO's friend, in turn, relayed the material, non-public information he learned from Radiant's COO to Hill. Radiant's COO's friend had also been a close friend of Hill's for approximately 20 years.

3. At the time Hill received material, non-public information concerning NCR's acquisition of Radiant from the COO's friend, Hill was aware of the friendship between Radiant's COO's friend and Radiant's COO, and of Radiant's COO's position at Radiant.

4. Between June 1, 2011, and July 8, 2011, before news of the potential acquisition became public, Hill purchased 101,600 shares of Radiant stock for approximately $2.1 million.

5. On July 11, 2011, after the close of the markets, NCR and Radiant announced that NCR would acquire Radiant in a tender offer. On July 12, 2011, Radiant's stock price increased by more than 30 percent on the news. That same day, Hill sold all of his Radiant stock, realizing gains of approximately $744,000.

B. RESPONDENT

6. **Hill**, age 54, is a resident of Atlanta, Georgia. Hill is a self-employed real estate developer. Hill has never been registered with the Commission.

C. OTHER RELEVANT INDIVIDUALS AND ENTITIES

7. **Radiant**, a Georgia corporation, was headquartered in Alpharetta, Georgia. Its common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on NASDAQ. On August 24, 2011, Radiant was acquired by NCR. In connection with the acquisition, Radiant's stock was delisted from NASDAQ and deregistered with the Commission.

8. **NCR**, a Maryland corporation, is headquartered in Duluth, Georgia. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange.

9. **Radiant's COO's friend**, age 52, is a resident of Brooklyn, New York. Between May 2011 and August 2011, Radiant's COO's friend resided in Atlanta, Georgia. Radiant's COO's friend is a self-employed artist. Radiant's COO's friend has never been registered with the Commission.

10. **Radiant's COO**, age 50, is a resident of Atlanta, Georgia. Radiant's COO is currently a Senior Vice President at NCR. Radiant's COO has never been registered with the Commission.

D. RADIANT'S COO LEARNS DETAILS ABOUT THE CONTEMPLATED ACQUISITION OF RADIANT BY NCR

11. In early May 2011, NCR's Chief Executive Officer, ("NCR's CEO") called Radiant's Chief Executive Officer ("Radiant's CEO") to express an interest in a potential business combination.

12. On May 12, 2011, NCR sent a letter to Radiant expressing a non-binding indication of interest concerning the acquisition of Radiant at a price of $24 to $26 per share, and requesting a period of exclusive negotiation rights. At that time, Radiant was trading at approximately $20 per share.

13. On May 24, 2011, Radiant's board of directors convened for a special meeting to discuss a potential transaction with NCR, and authorized continued negotiations with NCR, including allowing NCR to conduct due diligence, and the engagement of an investment bank to ascertain whether there were other parties interested in acquiring Radiant.

14. On June 2, 2011, NCR began conducting due diligence in connection with the potential acquisition of Radiant.

15. On June 13, 2011, NCR made a written offer to Radiant to acquire Radiant stock at $26 per share.

16. On June 30, 2011, Radiant's board of directors approved a related exclusivity agreement with NCR.

17. On July 11, 2011, Radiant and NCR executed a related merger agreement, which was structured to include a tender offer from NCR for Radiant stock.

18. Radiant's COO first learned material, nonpublic information concerning NCR's contemplated acquisition of Radiant in early May 2011 after his brother, who then served as Radiant's CEO and as a member of Radiant's board of directors, told him about NCR's CEO's expression of interest in a potential business combination.

19. Beginning in May 2011, Radiant's CEO continued to discuss details concerning the evolving transaction with Radiant's COO. Radiant's COO was also directly involved in the related due diligence process during the negotiations between NCR and Radiant.

20. In connection with the potential acquisition, Radiant's COO also negotiated his employment terms with NCR in the event the merger was consummated.

E. RADIANT'S COO SHARED MATERIAL, NON-PUBLIC INFORMATION WITH THE COO'S FRIEND

21. Radiant's COO and the COO's friend have maintained a close personal friendship since childhood. They both attended the University of Georgia, where they were members of the same fraternity. After college, they remained close personal friends, both residing in Atlanta, Georgia. Given this close relationship, Radiant's COO considered the COO's friend to be like a close family member. Radiant's COO and the COO's friend routinely shared confidential, personal information with each other.

22. In 2011, Radiant's COO's friend was aware of Radiant COO's position at Radiant.

23. During the period from early May to July 11, 2011 (the "relevant period"), Radiant's COO and the COO's friend frequently communicated via telephone or text message, and on some days exchanged multiple telephone calls and text messages. Also during the relevant period, Radiant's COO and the COO's friend, who both resided in the Atlanta metropolitan area, met in person.

24. During the relevant period, Radiant's COO shared material, nonpublic information with the COO's friend concerning NCR's potential acquisition of Radiant.

F. RADIANT'S COO'S FRIEND SHARED MATERIAL, NON-PUBLIC INFORMATION LEARNED FROM RADIANT'S COO WITH HILL

25. Radiant's COO's friend and Hill have been close friends for more than 20 years. During the relevant period, Radiant's COO's friend and Hill frequently communicated via telephone or text message, and on some days exchanged multiple telephone calls and texts. During the relevant period, Radiant's COO's friend and Hill also periodically met in person as they both resided in the Atlanta metropolitan area.

26. During the relevant period, Hill was aware of the relationship between the COO's friend and Radiant's COO, as well as Radiant's COO's position at Radiant. The COO's friend also knew that Hill was an acquaintance of the Radiant COO.

27. During the relevant period, Radiant's COO's friend shared material, non-public information that he had learned from Radiant's COO with Hill concerning the potential acquisition of Radiant by NCR.

28. Hill knew or had reason to know that the information acquired from Radiant's COO's friend concerning NCR's potential acquisition of Radiant was nonpublic, and had been acquired directly or indirectly from Radiant, or an officer or employee thereof.

G. HILL TRADED RADIANT STOCK

29. Prior to May 2011, Hill previously had never traded Radiant securities, and had not purchased a security for at least four years prior to purchasing Radiant stock.

30. In late May 2011, Hill opened two new brokerage accounts, intending to purchase Radiant stock in those accounts.

31. From June 1, 2011 through July 8, 2011, Hill purchased shares of Radiant stock in his two newly opened brokerage accounts, and in each of his three daughters' custodial brokerage accounts, for which Hill was authorized to make trading decisions.

32. On June 1, 2011, Hill purchased 4,500 shares of Radiant stock.

33. On June 3, 2011, Hill purchased 50,000 shares of Radiant stock. These purchases represented over 10% of the total Radiant trading volume that day (467.4 thousand shares)

34. On June 24, 2011, Hill purchased 13,000 shares of Radiant stock.

35. On July 1, 2011, Hill purchased 20,000 shares of Radiant stock.

36. On July 5, 2011, Hill purchased 4,100 shares of Radiant stock.

37. On July 8, 2011, Hill purchased 10,000 shares of Radiant stock.

38. Hill purchased all Radiant stock at prices ranging between approximately $19.97 per share and $21.95 per share.

39. As of July 8, 2011, the last trading day before the acquisition announcement, Hill's Radiant shares, including those shares in his daughters' accounts, were valued at approximately $2.2 million dollars. This represented a significant portion of both his liquid and his overall net worth, and was substantially more than his annual income.

40. Hill purchased all Radiant stock while in possession of material information related to NCR's tender offer for Radiant stock.

41. Hill purchased all Radiant stock knowing, or with reason to know, that the information concerning the tender offer was nonpublic.

42. Hill purchased all Radiant stock knowing, or with reason to know, that the information had been acquired directly or indirectly from Radiant, or an officer, director or employee thereof.

43. Hill purchased all Radiant stock after NCR had taken substantial steps to commence a tender offer for Radiant stock.

44. On July 11, 2011, Radiant stock closed at $21.45 per share. After market close, the merger agreement between Radiant and NCR was publicly announced via press releases.

45. On July 12, 2011, Radiant stock price increased by more than 30 percent. That day, Hill sold the entirety of his 101,600 Radiant shares at prices ranging from $27.98 to $28.03, realizing illicit gains of approximately $744,000.

H. VIOLATIONS

46. As a result of the conduct described above, Hill violated Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, which prohibit any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement, including prejudgment interest, pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74261 / February 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16384 / February 11, 2015

In the Matter of **NICHOLAS TOMS,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Nicholas Toms ("Respondent" or "Toms").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Toms, while the chairman, chief executive officer ("CEO"), and president of a public company, owned and sold millions of shares of his employer's stock through a nominee and concealed it from investors. He received proceeds of over $897,000 from his secret sales.

2. From November 2009 through at least mid-2014, Toms beneficially owned and sold more than 2.3 million shares of his employer's stock. To do so, he used his long-time secretary as a nominee on an account held by an entity he controlled. He concealed his true stock ownership and sales from his employer, who consequently made materially false filings with the Commission. Toms falsely certified the accuracy of these filings.

3. Toms defrauded investors through these false filings. The filings materially understated Toms' ownership of his employer's stock and led investors to believe that he was increasing his stock position when in fact he, the company's top officer, was selling substantial amounts of the company's stock.

B. RESPONDENT

4. **Toms**, 66, is a resident of Boca Raton, Florida. From 2003 through mid-2014, Toms was chairman, CEO, and president of DecisionPoint Systems, Inc. ("DecisionPoint"). From 1981 through 1989, Toms was an associate at a prominent New York law firm, where he was then a self-described expert on the federal securities laws. He still remains licensed to practice law in New York. At all times, Toms owned at least 10% of Edwardstone & Co., Inc. ("Edwardstone"), and, until at least June 2009, he was Edwardstone's CEO. In June 2014, Toms resigned as the chairman of DecisionPoint. On August 15, 2014, he resigned as its CEO and president and as a member of its Board of Directors.

C. OTHER RELEVANT ENTITIES AND INDIVIDUALS

5. **Edwardstone** is a Delaware corporation. Since 2009, it has been located at Toms' former Manhattan residence. Toms controls Edwardstone and at all times has owned at least 10% of it. From at least 2009 through the present, Edwardstone has had no operations.

6. **DecisionPoint** is a Delaware corporation with its headquarters in Foothill Ranch, California. DecisionPoint's common stock is currently traded under the symbol DPSI on the OTC market.

7. **Barbara Martorano ("Martorano")**, age 57, is a resident of Polk City, Florida. From at least 1999 through 2014, she was Toms' secretary at several different employers.

D. BACKGROUND

8. Since 1989, Toms has been associated with Edwardstone. At all relevant times, Toms has controlled Edwardstone and used it as a vehicle for his personal finances.

9. In 1999, Martorano began working for Toms as his secretary. Toms then worked at Cape Systems, Inc.

10. In April 2009, Toms purchased a majority of the stock of Canusa Systems, Inc. ("Canusa"), a shell company not registered under Section 12.

11. In June 2009, DecisionPoint merged into Canusa. The resulting entity changed its name to DecisionPoint. DecisionPoint voluntarily filed annual reports with the Commission on Form 10-K.

12. In June 2009, Toms became DecisionPoint's chairman, CEO, and president. Martorano continued to work as Toms' secretary.

13. In approximately 2009, Toms changed Edwardstone's address to his townhouse in Manhattan.

E. TOMS USED MARTORANO AS A NOMINEE

14. In October 2009, Toms directed Martorano to open an account in Edwardstone's name at Broker A, then a registered broker-dealer firm.

15. Toms directed Martorano to identify herself to Broker A as Edwardstone's vice president.

16. Martorano faxed account opening documents to Broker A that identified her as Edwardstone's vice president and the "primary account holder." Her fax contained instructions for wiring the proceeds of stock sales out of the account. The instructions identified a single recipient of such proceeds: a bank account in Edwardstone's name (the "Edwardstone Bank Account"). Toms and his wife were the only signatories for that account.

17. Martorano in fact had no decision-making authority for Edwardstone. At all times, Martorano merely followed Toms' trading instructions in the Edwardstone account and communicated with Broker A on Toms' behalf. Martorano never took direction from anyone other than Toms as to Edwardstone's Broker A account.

18. Toms used Edwardstone's Broker A account only to sell DecisionPoint stock. Broker A sent all proceeds from these sales to the Edwardstone Bank Account.

F. EDWARDSTONE OBTAINED AND SOLD DECISIONPOINT STOCK AT TOMS' DIRECTION AND FOR HIS BENEFIT

19. On June 30, 2009, in connection with DecisionPoint's merger with Canusa, Red Lodge Ltd., a privately-held company Toms controlled, received 1,386,000 shares of DecisionPoint stock from Canusa's minority shareholders. At Toms' direction, Martorano identified herself as Red Lodge's corporate secretary and directed DecisionPoint's transfer agent to transfer 786,000 shares from Red Lodge to Edwardstone. Again at Toms' direction, Martorano subsequently deposited these shares into Edwardstone's Broker A account.

20. On September 29, 2009, Toms sent DecisionPoint's transfer agent a letter requesting that an additional 760,000 DecisionPoint shares then held by Canusa minority

shareholders be transferred to Edwardstone and sent to Martorano. On October 7, 2009, at Toms' direction, Martorano sent a letter to DecisionPoint's transfer agent identifying herself as Edwardstone's corporate secretary. Her letter directed the transfer agent to transfer 660,000 of these shares to Edwardstone's Broker A account. The shares were later deposited into the account.

21. In January and April 2010, approximately 554,500 additional DecisionPoint shares were deposited into Edwardstone's Broker A account.

22. On September 17, 2010, DecisionPoint issued 881,512 shares to Toms when he exercised certain DecisionPoint stock options. On September 28, 2010, Toms directed DecisionPoint's transfer agent to transfer these shares to an individual lender as collateral for a $70,000 loan to Toms. Toms later defaulted on the loan but nevertheless received some DecisionPoint shares back from the lender. On March 11, 2011, Toms had 365,000 of these returned shares deposited into Edwardstone's Broker A account.

23. In total, from June 2009 through March 2011, 2,365,500 shares of DecisionPoint stock passed through Edwardstone's Broker A account.

24. Between November 2009 and March 2011, Toms directed Martorano to sell all of the shares in thirty-four separate transactions. Edwardstone's proceeds from those sales totaled $898,705.74.

25. After each sale, Toms instructed Martorano to have Broker A wire the proceeds to the Edwardstone Bank Account. In total, Broker A wired virtually all of the proceeds, $897,593.76, to the Edwardstone Bank Account.

26. Toms controlled the Edwardstone Bank Account and treated it as his personal account.

27. Toms commingled the DecisionPoint stock sale proceeds with other deposits in the Edwardstone Bank Account.

28. Toms spent a substantial portion of the DecisionPoint stock sale proceeds on his own personal expenses. These expenses included transfers to Toms' personal checking account, home utility bills, home repair expenses, medical expenses, pet supplies, contributions for his daughter's trip to Italy, association fees for a club in the Bahamas, designer clothing, shoes, and health club dues.

G. DECISIONPOINT FILED MATERIALLY FALSE ANNUAL REPORTS AND TOMS FALSELY CERTIFIED THEIR ACCURACY

29. On March 31, 2010, DecisionPoint voluntarily filed an annual report on Form 10-K with the Commission for the year that had ended on December 31, 2009 (the "2009 10-K"). The 2009 10-K reported that Toms owned 3,521,170 DecisionPoint shares. It failed to report the additional 1,296,000 DecisionPoint shares Toms beneficially owned

through Edwardstone's Broker A account on December 31, 2009. The 2009 10-K therefore underreported Toms' ownership of DecisionPoint shares by over 36%.

30. Toms certified the accuracy of the 2009 10-K, while knowing it falsely underreported his beneficial ownership of DecisionPoint shares.

31. On March 16, 2011, DecisionPoint voluntarily filed a Form 10-K with the Commission for the year that ended on March 15, 2011 (the "2010 10-K"). The 2010 10-K reported that Toms owned 3,684,899 DecisionPoint shares. It failed to report the additional 524,512 shares that Toms beneficially owned through Edwardstone's Broker A account on March 15, 2011. The 2010 10-K therefore underreported Toms' ownership of DecisionPoint shares by over 14%.

32. Toms certified the accuracy of the 2010 10-K, while knowing it falsely underreported his beneficial ownership of DecisionPoint shares.

33. On December 22, 2011, DecisionPoint filed a Form 10-K-A amendment with the Commission for the year that ended on March 15, 2011 (the "2010 10-K-A"). Like the 2010 10-K, the 2010 10-K-A reported that Toms owned 3,684,899 DecisionPoint shares, when in fact he beneficially owned an additional 524,512 shares through Edwardstone's Broker A account on March 15, 2011. The 2010 10-K-A therefore underreported Toms' ownership of DecisionPoint shares by over 14%.

34. Toms certified the accuracy of the 2010 10-K-A, while knowing it falsely underreported his beneficial ownership of DecisionPoint shares.

35. The disclosures in the 2009 and 2010 10-Ks and the 2010 10-K-A not only materially understated Toms' beneficial ownership of DecisionPoint shares but also materially misrepresented that Toms had increased his holdings of DecisionPoint shares. In fact, he had significantly reduced them.

H. TOMS CONTINUED TO TRADE THROUGH A NOMINEE IN A SECOND EDWARDSTONE BROKERAGE ACCOUNT

36. In June 2011, Broker A sold its brokerage business to Broker B, another registered broker-dealer firm. Broker A transferred the Edwardstone brokerage account to Broker B. At the time, the account held 17,400 shares of DecisionPoint stock.

37. On June 16, 2011, the DecisionPoint shares in the new Broker B account were canceled pursuant to a reverse stock split and replaced with 2,175 new DecisionPoint shares.

38. Martorano continued serving as Edwardstone's nominal officer and taking direction from Toms on the Broker B account. At Toms' direction, Martorano placed Edwardstone's orders and directed Broker B to wire Edwardstone's DecisionPoint stock sale proceeds to the Edwardstone Bank Account.

39. On August 18 and October 21, 2011, Edwardstone sold 2000 and 160 shares, respectively, of DecisionPoint stock at Toms' direction.

40. On May 10, 2013, Edwardstone sold 10,000 shares of DecisionPoint stock, again at Toms' direction.

41. As of June 30, 2014, Edwardstone's Broker B account held 7,745 shares of DecisionPoint stock, worth approximately $3,500.

I. VIOLATIONS

42. As a result of the conduct described above, Toms violated, and Toms caused DecisionPoint's violation of, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which make it unlawful for any person, directly or indirectly, to employ any device, scheme, or artifice to defraud, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it appropriate that cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. Whether, pursuant to Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74262 / February 11, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3637 / February 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15965

In the Matter of **CHILD, VAN WAGONER & BRADSHAW, PLLC, RUSSELL E. ANDERSON, CPA, and MARTY VAN WAGONER, CPA,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE**

I.

On July 8, 2014, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings against Child, Van Wagoner & Bradshaw, PLLC ("CVB"), Russell E. Anderson, CPA ("Anderson"), and Marty Van Wagoner, CPA ("Van Wagoner") (collectively "Respondents"), pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice and also against CVB and Anderson pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice. Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept.

II.

Solely for the purpose of settling these proceedings, and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds[1] that:

SUMMARY

1. Between March 2010 and June 2011, CVB, an accounting firm based in Salt Lake City, Utah, and Anderson and Van Wagoner, two of its partners, served as the independent auditors of Yuhe International, Inc. ("Yuhe"), a China-based company whose stock was previously registered with the Commission and traded on Nasdaq. These proceedings arise from Respondents' failures to comply with Public Company Accounting Oversight Board ("PCAOB") Auditing Standards ("PCAOB Standards") in their 2009 and 2010 audits of Yuhe. Among other failures, CVB and Anderson failed to: (a) properly plan the audits and supervise assistants; (b) properly assess audit risk and materiality; (c) properly consider fraud and illegal acts; and (d) act with due professional care. In his role as engagement quality review partner, Van Wagoner failed to act with due professional care because he was aware, or should have been aware, of audit deficiencies but did not address them. Additionally, by virtue of his failure to comply with professional standards during Yuhe's 2010 audit, Van Wagoner also violated the engagement quality review standard set forth in AS 7.

2. The Respondents' failures in the 2009 audit arose principally because CVB and Anderson effectively performed no audit work of their own and instead relied on the audit work papers of Yuhe's prior auditor which had begun the 2009 audit, but then abruptly resigned without completing it. Even though neither CVB nor Anderson planned, performed, or supervised the prior firm's audit work, they took that firm's work papers, performed at best a cursory review of them, and then issued an audit report containing an unqualified opinion on Yuhe's financial statements—all within only approximately three weeks of accepting the Yuhe engagement.

3. CVB and Anderson also performed a deficient audit of Yuhe's 2010 financial statements. During planning for the 2010 audit, CVB and Anderson assessed Yuhe as lacking effective internal controls such that no controls reliance could be utilized in performing the audit. Specifically, they documented within CVB's planning work papers that "the auditor is concerned about the risk of material misstatement" due to Yuhe's "inability to perform proper procedures necessary to produce a reliable financial statement." They also noted that Yuhe personnel appeared to lack the experience and ability to create financial statements using accounting principles generally accepted in the United States ("US GAAP"). Yet, despite this assessment, CVB and Anderson failed to implement auditing procedures that addressed the risks identified. They performed an audit based upon the basic audit procedures within their prescribed checklists without modification, failed to extend procedures to address the known risk of material misstatement, and relied heavily on management representations. They also failed to provide meaningful direction and supervision to the foreign audit staff CVB hired to perform fieldwork in China (hereafter, "Foreign Audit Staff"). Despite these deficiencies, and without the application of

[1] The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

due professional care in his role as engagement quality reviewer, Van Wagoner provided his concurrence on the issuance of the audit report.

RESPONDENTS

4. Child, Van Wagoner & Bradshaw, PLLC, located during the pertinent period in Salt Lake City, Utah, is a Utah professional limited liability company and public accounting firm formerly registered with the PCAOB. CVB acted as Yuhe's independent auditor initially from March 12, 2008 to December 7, 2009, and then again from March 9, 2010 to June 17, 2011. CVB performed public company audits[2] of, and issued audit reports containing unqualified opinions on, the financial statements of Yuhe for Yuhe's fiscal years ending December 31, 2008, December 31, 2009, and December 31, 2010. CVB resigned as Yuhe's independent auditor on June 17, 2011, following public disclosure by Yuhe that a purported business acquisition by Yuhe had, in fact, never occurred. During the time of its Yuhe audits, CVB had four audit partners and two non-audit partners. CVB ceased to do public company audits as of August 1, 2012. CVB is no longer registered with the PCAOB, but remains "active" and in "good standing" in the records of the State of Utah Division of Corporations and Commercial Code.

5. Russell E. Anderson, age 53, is a Certified Public Accountant ("CPA") licensed to practice in Utah. Anderson served as CVB's engagement partner for the 2008, 2009, and 2010 Yuhe audits and was responsible for making all significant decisions regarding the engagements. During 2009 and 2010, Anderson was also CVB's "quality control partner." He is a resident of West Valley City, Utah.

6. Marty Van Wagoner, age 52, is a CPA licensed to practice in Utah. Van Wagoner served as CVB's engagement quality review partner for the 2008, 2009 and 2010 audits of Yuhe. He is a resident of Eagle Mountain, Utah.

RELEVANT ENTITY

7. Yuhe International, Inc. is a Nevada corporation whose principal offices are located in Weifang, Shandong Province, People's Republic of China.[3] Yuhe sells day-old chicken broilers, *i.e.*, chickens that are bred and raised for meat production, and claims to be the largest supplier of day-old broilers in China. All of Yuhe's operations are carried out in China. Its common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and was traded on the Nasdaq Capital Market. On October 20, 2010, Yuhe completed a registered public offering in the United States of more than four million shares of its common stock at a price of $7 per share, raising approximately $27 million. On July 21, 2011, Nasdaq suspended trading of Yuhe's common stock, and, on December 16, 2011, Nasdaq filed a Form 25 with the

[2] A public company audit is defined as an engagement to audit the financial statements of an "issuer" as that term is defined in Section 3(a)(8) of the Exchange Act.

[3] On October 18, 2013, the Commission filed a civil injunctive action against Yuhe and its Chief Executive Officer ("CEO"), alleging violations of the antifraud provisions of the Securities Act of 1933 and the Exchange Act, as well as the books and records, internal controls, and reporting provisions of the Exchange Act. *SEC v. Yuhe Int'l, Inc. and Gao Zhentao*, Civil Action No. 1:13-CV-01598-RCL (D.D.C., filed Oct. 18, 2013).

Commission to delist the common stock, which is now quoted on OTC Link. Yuhe's fiscal year ends on December 31.

FACTS

Background

8. CVB audited Yuhe's financial statements for its fiscal year ending December 31, 2008, and issued an audit report containing an unqualified opinion. In order to perform field work in China for this audit, CVB contracted with accounting personnel in a Shanghai, China independently owned member firm of an international public accounting network firm (hereafter, "Shanghai Office"). In conducting Yuhe's 2008 audit, CVB did not place any reliance on Yuhe's internal controls due to CVB's assessment that Yuhe's internal controls were ineffective. As a result, CVB conducted a fully substantive audit and did not reduce any substantive testing in its audit procedures based upon assessment or testing of internal controls.

9. CVB continued its engagement as Yuhe's auditor for Yuhe's 2009 fiscal year, and conducted interim reviews of Yuhe's financial statements for that fiscal year's first, second, and third quarters. However, in late 2009 during Yuhe's fourth fiscal quarter, the Shanghai Office was acquired by another international public accounting firm (hereafter, the "Acquiring Firm").

10. Following this acquisition, on December 7, 2009, the Audit Committee of Yuhe's Board of Directors appointed the Acquiring Firm as Yuhe's independent auditor. Under the engagement agreement, the Acquiring Firm was to perform the 2009 year-end audit and opine on the 2009 financial statements. Thereafter, from December 2009 through February 2010, the individuals who were formerly the Shanghai Office personnel working on Yuhe's audits, but now employees of the Acquiring Firm, planned and executed the Yuhe audit under the Acquiring Firm's supervision and in accordance with the Acquiring Firm's audit approach.

11. During its audit procedures and fieldwork, the Acquiring Firm identified in Yuhe's books and records, as of February 2010, ongoing related party transactions which Yuhe had earlier asserted in a public filing would be discontinued by December 31, 2009. In the prior year, Yuhe's management had concluded that the related party transactions constituted violations of Section 402 of the Sarbanes-Oxley Act of 2002 and that a material weakness existed over the lack of review and approval of related party loans, due to Yuhe's management permitting these transactions without Board of Director approval. On March 5, 2010, the Acquiring Firm resigned from the engagement, and Yuhe's Form 8-K filing cited the prohibited related party loan, the material weakness over the review and approval of such loans, and a material weakness related to Yuhe's inability to properly close its books as the reasons for the Acquiring Firm's resignation. At the time of its resignation, the Acquiring Firm's audit field work for the 2009 audit of Yuhe was incomplete.

12. Yuhe's due date for filing its 2009 Form 10-K with the Commission was March 31, 2010, less than a month after the Acquiring Firm's resignation. With such a short time period before its filing deadline, Yuhe approached CVB to return as its independent auditor and complete the 2009 audit. Respondents accepted Yuhe's request and, on March 9, 2010, CVB re-engaged as

Yuhe's independent auditor. Only twenty-one days later, on March 30, 2010, Anderson, with Van Wagoner's concurrence, issued CVB's audit report containing an unqualified opinion on Yuhe's financial statements for the 2009 fiscal year.

CVB and Anderson's 2009 Audit of Yuhe

13. Auditing standards require an auditor to adequately plan and perform an audit and properly supervise assistants. AU § 311.01.[4] Audit planning involves developing an overall strategy for the expected conduct and scope of the audit. The nature, extent, and timing of planning vary with the size and complexity of the entity, experience with the entity, and knowledge of the entity's business. In planning the audit, the auditor should consider, among other matters, the entity's business, accounting policies and procedures, and planned assessed level of control risk. AU § 311.03. Supervision involves directing the efforts of assistants who are involved in accomplishing the objectives of the audit and determining whether those objectives are accomplished. AU § 311.01, .11-.13. Elements of supervision include, among others, instructing assistants, keeping informed of significant problems encountered, and reviewing the work performed. AU § 311.11-.13.

14. After reengaging as Yuhe's auditor for the 2009 audit, CVB and Anderson did not perform their own audit of Yuhe. Instead, CVB and Anderson sought and obtained the audit work papers of the Acquiring Firm from its incomplete fieldwork for the short period it was Yuhe's auditor. Between approximately March 9 and March 30, 2010, CVB's acting audit manager for the 2009 Yuhe audit, a senior associate at CVB who was not a CPA, collected and reviewed the incomplete audit work papers of the Acquiring Firm. The acting audit manager did not request that any additional audit procedures be performed, and did not provide review notes for additional clarification or documentation to be added to the substantive audit procedures. In fact, no additional meaningful substantive audit procedures were performed for the Yuhe audit by CVB or Anderson or anyone acting at their direction.

15. As a result of not performing their own audit of Yuhe, neither CVB nor Anderson participated in the planning, execution, or supervision of any audit procedures performed for Yuhe's 2009 audit. Neither CVB nor Anderson formulated a specific audit plan for Yuhe's 2009 audit, or conducted formal audit planning meetings. Moreover, neither CVB nor Anderson made sufficient inquiry into Yuhe's business, recent developments, accounting policies and procedures, or control risk. Additionally, CVB and Anderson did not provide direction or guidance to the accounting staff in China who performed the audit field work.

16. The auditor should consider audit risk and materiality both in (a) planning the audit and designing auditing procedures and (b) evaluating whether the financial statements taken as a whole are presented fairly, in all material respects, in conformity with generally accepted accounting principles. The auditor should consider audit risk and materiality in the first circumstance to obtain sufficient competent evidential matter on which to properly evaluate the financial statements in the second circumstance. AU § 312.12.

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[4] References to auditing standards in this Order are to PCAOB Standards in effect at the time the audit work was performed.

17. As a result of not performing their own audit of Yuhe, neither CVB nor Anderson participated in assessing audit risk or materiality for Yuhe's 2009 audit. CVB and Anderson simply accepted the assessment of materiality that the Acquiring Firm had documented without any consideration of how the amounts were established or if those amounts were appropriate. As part of the work that CVB and Anderson had done for the quarterly reviews, there was no planning or assessments documented that correspond to the procedures that were ultimately performed.

18. The audit approach used by the Acquiring Firm for Yuhe's 2009 audit differed significantly from that of CVB and Anderson's audit approach in the 2008 audit of Yuhe. For the 2009 audit, the Acquiring Firm's audit approach contemplated an intended reliance on Yuhe's internal controls which, if effective, would have allowed the Acquiring Firm to reduce its substantive testing. However, for the 2008 audit, CVB and Anderson had assessed Yuhe's internal control over financial reporting as weak to the point of planning to obtain no audit comfort from testing them. Further, the testimony of Anderson shows that he and CVB continued to place no reliance on controls for the 2009 audit. When CVB re-engaged as Yuhe's auditor, CVB and Anderson failed to adjust the audit approach used by the Acquiring Firm, or explain in their work papers why reliance on Yuhe's internal controls was appropriate.

19. Auditing standards require an auditor to plan and perform an audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. AU § 316.01. Among other things, members of the audit team should discuss the potential for material misstatement due to fraud. Discussions should include an exchange of ideas or "brainstorming" among the audit team members, including the auditor with final responsibility for the audit, about how and where they believe the entity's financial statements might be susceptible to material misstatement due to fraud, how management could perpetrate and conceal fraudulent financial reporting, and how assets of the entity could be misappropriated. AU § 316.14. Auditing standards require an auditor to make inquiries of management and others within the entity to obtain their views about the risks of fraud and how they are addressed. AU §316.14-.27.

20. By not planning or performing the 2009 audit of Yuhe, CVB and Anderson did not seek to obtain reasonable assurance that Yuhe's financial statements were free of material misstatement, whether by error or fraud. CVB and Anderson did not consider the risks of material misstatement due to fraud at Yuhe, did not meet to discuss the susceptibility of Yuhe's financial statements to material misstatement due to fraud, and did not inquire of Yuhe management or its employees about fraud in connection with CVB and Anderson's issuance of its 2009 audit report.

21. AU § 317 notes that audit procedures applied for the purpose of forming an opinion on the financial statements may bring possible illegal acts to the auditor's attention. Examples of these procedures include reading minutes; inquiring of the client's management and legal counsel concerning litigation, claims, and assessments; and performing substantive tests of details of transactions or balances. Auditing standards require an auditor to make inquiries of management concerning the client's compliance with laws and regulations, including, where applicable, the client's policies relative to the prevention of illegal acts. AU § 317.08.

22. There is no documentary evidence suggesting any inquiries by CVB or Anderson of Yuhe's management concerning Yuhe's policies related to the prevention of illegal acts and compliance with laws and regulations. Here, such inquiries would have been appropriate, given (i) the resignation of the prior auditor; (ii) the continued existence of prohibited loans; (iii) the number and type of audit adjustments included in the Acquiring Firm's incomplete audit work papers that CVB obtained, which indicated a lack of knowledge within Yuhe of financial reporting practices common to the United States; (iv) the weak or non-existent control environment; and (v) the use of personal bank accounts for Yuhe payments, which would have indicated higher risk and potentially triggered additional procedures and inquiries.

23. Auditing standards also require an auditor to consider the risks surrounding related party transactions. AU § 334. An auditor should obtain an understanding of management responsibilities, the relationship of each component to the total entity, the business purpose served by the various components of the entity, and the controls over management activities. AU § 334.05. After identifying related party transactions, the auditor should apply the procedures he considers necessary to obtain satisfaction concerning the purpose, nature, and extent of these transactions and their effect on the financial statements. The procedures should be directed toward obtaining and evaluating sufficient competent evidential matter and should extend beyond inquiry of management. AU § 334.09.

24. CVB and Anderson did not consider the risks surrounding related party transactions during the 2009 Yuhe audit. Instead, CVB and Anderson relied upon work performed and assessments made by the Acquiring Firm whose work papers were incomplete. CVB and Anderson did not inquire of management independently as part of their audit, nor did they hold any discussions with the Audit Committee concerning related party transactions.

25. Under auditing standards, the observation of inventories is mandated as a generally accepted auditing procedure. AU § 331.01. CVB and Anderson did not perform an inventory observation during the 2009 audit of Yuhe. An inventory observation was done by the Acquiring Firm. Moreover, when the Acquiring Firm performed the observation, it only performed limited counts because it placed some reliance on Yuhe's internal controls relating to inventory.

26. Auditing standards require auditors to exercise due professional care throughout the audit. AU § 230. Due professional care requires that the auditor exercise professional skepticism, which means a questioning mind and a critical assessment of audit evidence. Moreover, gathering and objectively evaluating audit evidence requires the auditor to consider the competency and sufficiency of the evidence. Since evidence is gathered and evaluated throughout the audit, professional skepticism should be exercised throughout the audit process. By failing to adhere to the auditing standards set forth above, CVB and Anderson failed to exercise due professional care during the 2009 Yuhe audit.

27. Van Wagoner, as engagement quality review partner, also failed to exercise due professional care in Yuhe's 2009 audit. Van Wagoner had responsibility for reviewing the audit work for the 2009 audit. He was aware that CVB and Anderson had not planned, conducted, or supervised an audit of Yuhe and had instead taken, and were relying upon, the work papers of a different audit firm. Despite having this knowledge, Van Wagoner concurred in CVB's issuance

of an audit report containing an unqualified opinion on Yuhe's financial statements for fiscal year 2009.

28. Under the third standard of field work, sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit. AU § 326.01. CVB and Anderson did not contribute or provide supervision in the inspection, observation, inquiry, or confirmation processes of the 2009 audit of Yuhe—all of which were done by the Acquiring Firm.

29. Audit documentation is the written record of the basis for the auditor's conclusions that provides the support for the auditor's representations in the auditor's report. Audit documentation also is the basis for the review of the quality of the work because it provides the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Among other things, audit documentation includes records of the planning and performance of the work, the procedures performed, evidence obtained, and conclusions reached by the auditor. AS 3, ¶ 2.

30. CVB and Anderson failed to properly document the 2009 audit. They failed to document how they accepted and utilized the work of another firm, how they were able to supervise assistants performing audit procedures before CVB was engaged on the audit, how they obtained evidence, and how they reached conclusions.

31. Obtaining representations from management is required for audits performed in accordance with PCAOB Standards, as outlined in AU § 333. While such representations are part of the evidence obtained by an independent auditor, they cannot substitute for the application of the auditing procedures needed to afford a reasonable basis for an opinion regarding the financial statements under audit. AU § 333.02. In the 2009 audit of Yuhe, CVB and Anderson obtained written representations without applying auditing procedures which would have been necessary to form a basis for their opinion.

CVB and Anderson's 2010 Audit of Yuhe

32. Yuhe engaged CVB to conduct an audit of its 2010 financial statements. CVB and Anderson documented that Yuhe presented a significant risk of material misstatement because Yuhe lacked the ability to perform the proper procedures necessary to produce reliable financial statements, and Yuhe personnel lacked the experience and ability to create financial statements in accordance with US GAAP, understand Yuhe's transactions, and account for them properly. Accordingly, citing a weak controls environment, CVB and Anderson planned their audit assuming no controls reliance.

33. For the 2010 audit, CVB *increased* the planning materiality threshold to over 230% of the prior year's number, even though CVB and Anderson continued to believe that they could not rely on Yuhe's internal controls and there was not a proportionate increase in net income. Additionally, CVB and Anderson did not document their rationale for increasing materiality in 2010.

34. Despite assessing a weak controls environment, CVB and Anderson's approach to the audit consisted mostly of a perfunctory completion of checklists and certain substantive testing procedures, along with a review of those checklists by CVB and Anderson and did not include a proper consideration of risk and materiality.

35. For the 2010 Yuhe audit, CVB and Anderson contracted with personnel in China to perform fieldwork on CVB's behalf. However, CVB and Anderson did not play a substantive role in audit supervision and, instead, sent checklists to the Foreign Audit Staff to use without specific instructions, detailed work plans, or appropriate modifications based on identified risks. CVB and Anderson failed to provide the Foreign Audit Staff specific guidance on the procedures to be performed, the audit objectives to be accomplished, or the need to maintain proper audit documentation in accordance with AU § 311 and AS 3.

36. CVB's audit manager gave the work papers created by the Foreign Audit Staff only a cursory review with no follow up or substantive dialogue as to their content or findings. Neither CVB nor Anderson questioned the substantive work performed by the Foreign Audit Staff or provided any review comments or requests for additional procedures. CVB and Anderson failed to comply with the provisions of AU § 311 as outlined in paragraph 13.

37. Whenever the auditor has concluded that there is significant risk of material misstatement of the financial statements, the auditor should consider this conclusion in determining the nature, timing, or extent of procedures; assigning staff; or requiring appropriate levels of supervision. The knowledge, skill, and ability of personnel assigned significant engagement responsibilities should be commensurate with the auditor's assessment of the level of risk for the engagement. Ordinarily, higher risk requires more experienced personnel or more extensive supervision by the auditor with final responsibility for the engagement during both the planning and the conduct of the engagement. Higher risk may cause the auditor to expand the extent of procedures applied, apply procedures closer to or as of year end, particularly in critical audit areas, or modify the nature of procedures to obtain more persuasive evidence. AU § 312.17.

38. CVB and Anderson documented during the fraud risk discussion concerns about the risk of material misstatement due to Yuhe's inability to perform proper procedures necessary to produce reliable financial statements. Despite CVB and Anderson having assessed Yuhe's internal controls as ineffective and its personnel as lacking in experience to produce US GAAP financial statements, CVB and Anderson failed to properly consider the risk of material misstatement and design appropriate audit procedures to address the identified risks.

39. CVB and Anderson failed to properly consider the possibility of fraud or modify and extend the audit procedures based on such considerations in 2010. CVB and Anderson also identified as a risk the use of personal bank accounts to transact company business and the risk of personal funds being intermingled with business funds. To address the risk identified, CVB and Anderson assigned two Hong Kong based individuals on the Foreign Audit Staff to perform procedures to address these risks. However, neither CVB nor Anderson supervised or reviewed the procedures carried out by these two individuals. AU § 312.17 states that higher risk requires more experienced personnel or more extensive supervision by the auditor with final

responsibility for the engagement during both the planning and the conduct of the engagement. AU § 316.01 requires an auditor to plan and perform an audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. By not properly addressing the risks that were identified, or supervising the staff assigned to the task, CVB and Anderson failed to properly consider and address the risk associated with fraud on the financial statements.

40. Even though CVB and Anderson assessed Yuhe's internal controls as ineffective and its personnel as lacking in experience to produce US GAAP financial statements, CVB and Anderson relied on discussions with management by the Foreign Audit Staff and on evidence supplied by management throughout their audit as their sole basis for audit evidence in certain areas. CVB and Anderson's overreliance on management's representations, especially in light of their assessment of management's abilities, was inappropriate. While such representations from management are part of the evidential matter the independent auditor obtains, they are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit. AU § 333.02.

41. In late March 2011, CVB and Anderson completed Yuhe's 2010 audit and issued an audit report containing an unqualified opinion on Yuhe's financial statements for fiscal year 2010.

42. Under the auditing standard governing engagement quality review which was effective for Yuhe's 2010 audit, the engagement quality reviewer should evaluate the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report. AS 7, ¶ 9. The engagement quality reviewer should evaluate the significant judgments that relate to engagement planning, including the consideration of the auditing firm's recent engagement experience with the company and risks identified in connection with the firm's client acceptance and retention process, the consideration of the company's business, recent significant activities, and related financial reporting issues and risks, and the judgments made about materiality and the effect of those judgments on the engagement strategy. AS 7, ¶ 10. To evaluate such judgments and conclusions, the engagement quality reviewer should, to the extent necessary to satisfy the requirements, hold discussions with the engagement partner and other members of the engagement team and review documentation. AS 7, ¶ 9. In an audit, the firm may grant permission to the client to use the engagement report only after the engagement quality reviewer provides concurring approval of issuance. AS 7, ¶ 13.

43. Van Wagoner failed to fulfill the requirements of AS 7 for Yuhe's 2010 audit. Specifically, the work papers do not evidence any communications between the audit team and Van Wagoner throughout the year or during the audit process. The emails among team members show that the vast majority of Van Wagoner's communications appear perfunctory and lacking in substantive information or commentary. There is no evidence that he reviewed or evaluated the audit planning process, the assessment of materiality, or the consideration and assessment of fraud risks in a manner that would fulfill professional responsibilities.

Yuhe's Public Offering and Fraud

44. On June 2, 2010, Yuhe filed its Form S-3 Registration Statement and Prospectus with the Commission, which became effective on June 23, 2010. On October 19, 2010, Yuhe filed its Preliminary Prospectus Supplement, and, on October 20, 2010, it filed its Final Prospectus Supplement. CVB's audit report containing an unqualified opinion for 2009 was included in those filings, as each incorporated Yuhe's 2009 Form 10-K. From October 20, 2010 to November 2, 2010, Yuhe conducted a public offering, selling 4.14 million newly issued shares of common stock at a price of $7.00 per share, and receiving net proceeds in excess of $27 million.

45. On December 31, 2009, and January 4, 2010, Yuhe filed Forms 8-K announcing that on December 24, 2009, it had entered into an agreement with Waifang Dajiang Corporation to purchase thirteen breeder farms for an aggregate price of approximately $15.2 million. Prior to the acquisition, Yuhe owned only fourteen breeder farms, which meant the acquisition would increase Yuhe's capacity by 60%. From January 2010 through June 2011, in press releases and filings with the Commission, Yuhe provided numerous updates concerning the status of the acquired farms. However, on June 17, 2011, Yuhe hosted a conference call during which Yuhe disclosed for the first time that the acquisition had never been completed and that the funds had, instead, been placed in a private account controlled by the CEO. On the same day shortly after the conference call, CVB resigned as Yuhe's independent auditor, stating that reliance should no longer be placed on its previously issued audit report for 2010.

VIOLATIONS

Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice

46. As a result of the conduct described above, Respondents engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) provide, in pertinent part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. Section 4C(b) and Rule 102(e)(1)(iv) define improper professional conduct with respect to persons licensed to practice as accountants.

47. Under Section 4C(b) and Rule 102(e)(1)(iv)(B), the term "improper professional conduct" means one of two types of negligent conduct: (1) a single instance of highly unreasonable conduct in circumstances for which heightened scrutiny is warranted; or (2) repeated instances of unreasonable conduct that indicate a lack of competence.

48. Respondents' failures to abide by PCAOB Standards during the 2009 and 2010 Yuhe audits constitute repeated instances of unreasonable conduct. Additionally, the actions of CVB and Anderson during the 2009 Yuhe audit constitute a single instance of highly unreasonable conduct in circumstances in which heightened scrutiny was warranted. As a result, the Respondents have demonstrated a lack of competence to practice before the Commission.

49. As a result of the conduct described above, CVB willfully violated and Anderson willfully aided and abetted CVB's violations of Section 10A(a)(1) and (2) of the Exchange Act and Rule 2-02(b)(1) of Regulation S-X within the meaning of Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice. Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice provide, in pertinent part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

CVB Violated and Anderson Caused CVB's Violations of Section 10A(a)(1) and (2) of the Exchange Act and Rule 2-02(b)(1) of Regulation S-X

50. Under Section 21C of the Exchange Act, the Commission may enter a cease and desist order against any person who commits a violation or is or was a "cause" of another's primary violation if the person knew or should have known that his act or omission would contribute to the primary violation. Negligence is sufficient to establish "causing" liability under Section 21C of the Exchange Act when a person is alleged to have caused a primary violation that does not require scienter. *See KPMG LLP v. SEC*, 289 F.3d 109, 112 (D.C. Cir. 2002).

51. Sections 10A(a)(1) and (2) of the Exchange Act require that each audit of the financial statements of an issuer by a registered public accounting firm must include, in accordance with generally accepted auditing standards ("GAAS"), procedures designed to detect illegal acts and identify related party transactions that are material to the financial statements. "[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission." *See* SEC Release No. 34-49708 (May 14, 2004).

52. As a result of the conduct described above, CVB violated Sections 10A(a)(1) and (2) of the Exchange Act by not designing procedures to detect illegal acts and identify related party transactions that were material to the financial statements, and Anderson caused CVB's violations of Sections 10A(a)(1) and (2) of the Exchange Act.

53. Rule 2-02(b)(1) of Regulation S-X requires an accountant's report to state whether the audit was made in accordance with generally accepted auditing standards. "Thus, an auditor violates Regulation S-X Rule 2-02(b)(1) if it issues a report stating that it had conducted its audit in accordance with PCAOB Standards when it had not." *See In re Andrew Sims*, CPA, Rel. No.34-59584, AAER No. 2950 (Mar. 17, 2009).

54. As a result of the conduct described above, CVB violated Rule 2-02(b)(1) of Regulation S-X by issuing an audit report stating that it had conducted its audit in accordance with PCAOB Standards when it had not, and Anderson caused CVB's violation of, Rule 2-02(b)(1) of Regulation S-X.

FINDINGS

55. Based on the foregoing, the Commission finds that Respondents engaged in improper professional conduct within the meaning of Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

56. Based on the foregoing, the Commission finds that CVB willfully violated and Anderson willfully aided and abetted CVB's violations of Sections 10A(a)(1) and (2) of the Exchange Act and Rule 2-02(b)(1) of Regulation S-X within the meaning of Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

57. Based on the foregoing, the Commission finds that CVB violated Sections 10A(a)(1) and (2) of the Exchange Act, and Anderson caused CVB's violations of Sections 10A(a)(1) and (2) of the Exchange Act.

58. Based on the foregoing, the Commission finds that CVB violated Rule 2-02(b)(1) of Regulation S-X, and Anderson caused CVB's violation of Rule 2-02(b)(1) of Regulation S-X.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondents' Offer.

Accordingly, it is hereby ORDERED that:

A. CVB shall cease and desist from committing or causing any violations and any future violations of Sections 10A(a)(1) and (2) of the Exchange Act.

B. CVB shall cease and desist from committing or causing any violations and any future violations of Rule 2-02(b)(1) of Regulation S-X.

C. CVB is denied the privilege of appearing or practicing before the Commission as an accountant.

D. Anderson shall cease and desist from committing or causing any violations and any future violations of Sections 10A(a)(1) and (2) of the Exchange Act.

E. Anderson shall cease and desist from committing or causing any violations and any future violations of Rule 2-02(b)(1) of Regulation S-X.

F. Anderson is denied the privilege of appearing or practicing before the Commission as an accountant. After three years from the date of this Order, Anderson may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Anderson's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Anderson, or the public accounting firm with which he is associated, is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Anderson, or the registered public accounting firm with which he is associated, has been inspected by the PCAOB and that inspection did not identify any criticisms of or potential defects in Anderson's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Anderson has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and

(d) Anderson acknowledges his responsibility, as long as Anderson appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

G. The Commission will consider an application by Anderson to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Anderson's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

H. CVB and Anderson shall pay, jointly and severally, disgorgement of $78,000 and prejudgment interest of $12,506.81, and Anderson shall pay a civil money penalty in the amount of $40,000, within 60 days of the entry of this Order, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(2) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-deliver or mail to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying CVB and/or Anderson as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Edward G. Sullivan, Senior Trial Counsel, Division of Enforcement, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia 30326.

I. Van Wagoner is denied the privilege of appearing or practicing before the Commission as an accountant. After three years from the date of this Order, Van Wagoner may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Van Wagoner's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Van Wagoner, or the public accounting firm with which he is associated, is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Van Wagoner, or the registered public accounting firm with which he is associated, has been inspected by the PCAOB and that inspection did not identify any criticisms of or potential defects in Van Wagoner's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Van Wagoner has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and

(d) Van Wagoner acknowledges his responsibility, as long as Van Wagoner appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

J. The Commission will consider an application by Van Wagoner to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Van Wagoner's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 31455 / February 12, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16385

In the Matter of **Water Island Capital LLC,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 9(f) of the Investment Company Act of 1940 against Water Island Capital LLC ("Water Island" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that

1. Water Island, founded in 2000 and based in New York, New York, is, and at all times relevant herein has been, a registered investment adviser with the Securities and Exchange Commission. Water Island currently serves as the investment adviser to several registered open-

end management investment companies, commonly known as mutual funds. Water Island, which currently manages approximately $3.5 billion in assets, engages in specialized trading strategies including, among others, merger arbitrage.[1] To carry out its strategies, Water Island trades equities and derivatives including swaps. Because of the trading strategies employed by Water Island, the investment companies managed by it (the "Funds") are commonly referred to as alternative mutual funds.

2. All registered investment companies are subject to the Investment Company Act of 1940 ("Investment Company Act") and the rules and regulations thereunder [15 U.S.C. § 80a-1 *et seq*.]. Investment companies, as defined by statute, are "affected with a national public interest."

3. A focus of the Investment Company Act is to protect investment company assets.

4. The Investment Company Act requires all registered management investment companies to comply with strict rules governing custody of fund assets. The Funds maintained custody with a qualified bank. Section 17(f)(5) of the Investment Company Act generally provides that if an investment company maintains its securities and similar investments in the custody of a qualified bank, the cash proceeds from the sale of such securities and similar investments and other cash assets of the investment company shall likewise be kept in the custody of such a bank. In accordance with this section, the Funds' compliance procedures during at least 2012 – which designated Water Island with the responsibility for overseeing compliance with the Funds' custody requirements – provided that each Fund "shall maintain its securities and similar investments, the cash proceeds from the sale of such securities and similar investments and other cash assets … in the custody of a qualified bank."

5. From at least January to September 2012, however, Water Island did not ensure that certain assets of the Funds were maintained in the custody of the Funds' qualified bank. The Funds' broker-dealer counterparties instead held assets consisting of roughly $247 million in cash collateral. Water Island caused the Funds to post the contractually required cash collateral relating to certain total return and portfolio return swaps. Water Island did not ensure the transfer of these assets to the Funds' qualified bank as required by Section 17(f)(5) of the Investment Company Act and the Funds' policies and procedures.[2]

6. The Investment Company Act and its rules provide further protections for fund assets, including provisions governing the use of fund assets to pay broker-dealers and others for the sale or distribution of fund shares.

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1 Merger arbitrage frequently involves purchasing shares of an announced acquisition target company at a discount to their expected value upon completion of the merger.

2 The cash collateral could have, for example, been maintained with the Funds' custodian bank subject to a tripartite agreement, that is, a three-way agreement between the custodial bank, the counterparty, and the Fund. These agreements are standard industry practice.

7. Use of fund brokerage, or amounts used to effect portfolio securities transactions, to pay for expenses related to the distribution of fund shares implicates Rule 12b-1 under the Investment Company Act. While fund advisers choose which broker or dealer will effect securities transactions on behalf of a fund, fund brokerage is an asset of the fund. Rule 12b-1 under the Investment Company Act regulates the use of fund assets to pay for distribution expenses, and Section 12(b) of the Investment Company Act prohibits funds from distributing their own shares (except through a principal underwriter) in contravention of Commission rules. Under Rule 12b-1(h), funds are prohibited from compensating a broker-dealer for promoting or selling fund shares by directing brokerage transactions to that broker. Rule 12b-1(h) recognizes, however, that for some portfolio transactions, the broker-dealer that can provide best execution may also sell the fund's shares.[3] Therefore, a fund is permitted to direct fund portfolio transactions to brokers that sell fund shares only if the fund or its adviser has implemented policies and procedures reasonably designed to, among other things, ensure that the selection of brokers for portfolio securities transactions is not influenced by considerations about the sale of shares of that or any other fund.

8. The Funds' policies and procedures concerning Rule 12b-1(h) were not implemented following their adoption. As required by the relevant policies and procedures concerning Rule 12b-1(h), Water Island had the responsibility for implementing the policies and procedures designed to ensure that any broker selected to execute securities transactions was chosen in accordance with the Rule. Water Island failed to create and maintain an approved list of executing brokers for the Funds pursuant to the Rule 12b-1(h) policies and procedures, and also failed to maintain documentation reflecting monitoring of the Funds' compliance with the Rule 12b-1(h) policies and procedures, as required by the policies and procedures themselves.

9. As a result of the conduct described above, Water Island caused the Funds to violate Sections 12(b) and 17(f) of, and Rule 12b-1(h) under, the Investment Company Act.

10. Rule 38a-1 under the Investment Company Act requires registered investment companies to adopt and implement written policies and procedures reasonably designed to prevent violations of the federal securities laws, and to review those policies and procedures at least annually for their adequacy and the effectiveness of their implementation. As described above, the Funds violated Section 17(f) of the Investment Company Act and did not implement their policies and procedures concerning Section 17(f) of, as well as Rule 12b-1(h) under, the Investment Company Act. As a result, the Funds violated Rule 38a-1 under the Investment Company Act, and Water Island caused the Funds' violations of Rule 38a-1 under the Investment Company Act.

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3 Prohibition on the Use of Brokerage Commissions to Finance Distribution, Investment Company Act Rel. No. 26591 (Sept. 2, 2004) at Section II.B.

Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 12(b) and 17(f) of the Investment Company Act, and Rules 12b-1 and 38a-1 promulgated under the Investment Company Act.

B. Respondent shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Water Island Capital LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Amelia A. Cottrell, Associate Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, New York 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74269 / February 13, 2015

Admin. Proc. File No. 3-15701

In the Matter of the Application of ROBERT MARCUS LANE and JEFFREY GRIFFIN LANE For Review of Disciplinary Action Taken by FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Securities Laws and Conduct Rules

Unfair and Fraudulent Markups

Interpositioning

Failure to Supervise and Deficient Supervisory Procedures

Failure to Provide Requested Information

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of former member firm of registered securities association interpositioned controlled accounts between member firm and its customers, resulting in excessive and, in some instances, fraudulent markups to the customers. Registered representative's supervisor failed reasonably to supervise representative and prepared deficient written supervisory procedures. Both registered representative and his supervisor failed to provide information requested by registered securities association. *Held*, registered securities association's findings of violations and sanctions are *sustained*.

APPEARANCES:

Robert Marcus Lane and *Jeffrey Griffin Lane*, *pro se*.

Alan Lawhead and *Michael Garawski*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: January 28, 2014
Last brief received: May 12, 2014

Robert Marcus Lane and Jeffrey Griffin Lane (together, "Applicants") appeal from FINRA disciplinary action.[1] FINRA found that Marcus Lane, on eleven occasions over a six-month period, interpositioned two accounts he owned and controlled between the Firm and two of its retail customers, charging the customers excessive and, in some cases, fraudulent markups, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder,[2] and NASD Conduct Rules 2110, 2120, 2320(b), 2440, and IM-2440.[3] For these violations,

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[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member-regulation, enforcement, and arbitration functions of the New York Stock Exchange. *See* Securities Exchange Act Release No. 56146, 2007 WL 5185331 (July 26, 2007). Because much of the conduct at issue here occurred before this date, NASD Conduct Rules that were in effect at the time apply, except as noted herein.

[2] 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. FINRA also found that Marcus Lane's "willful violation of Exchange Act Section 10(b) gives rise to a statutory disqualification." The Securities Acts Amendments of 1975 introduced the concept of a "statutory disqualification." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *10 & n.49 (Nov. 9, 2012) (citation omitted). Under Article III, § 3 of FINRA's By-Laws, a person subject to a statutory disqualification cannot become or remain associated with a FINRA member unless the disqualified person's member firm applies for and is granted, in FINRA's discretion, relief from the statutory disqualification. *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.4 (Apr. 18, 2013). A person is subject to a statutory disqualification under Exchange Act Section 3(a)(39)(F) if, among other things, he "has willfully violated any provision of the Exchange Act." 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D), which refers, among other things, to willful violations of the Exchange Act).

[3] NASD Conduct Rule 2110 required members to observe "high standards of commercial honor and just and equitable principles of trade," and we have repeatedly held that a violation of the Exchange Act and any FINRA rule constitutes a violation of Rule 2110. *E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 2005 WL 770880, at *2 (Apr. 6, 2005). NASD Conduct Rule 2120 prohibited members from effecting transactions, or inducing the

(continued...)

FINRA barred Marcus Lane from associating with any FINRA member firm in all capacities and directed him to pay disgorgement of $218,582, plus prejudgment interest, to the affected customers.

FINRA also found that Jeffrey Lane violated NASD Conduct Rule 3010 by failing to establish and maintain reasonable written supervisory procedures and failing reasonably to supervise Marcus Lane.[4] For these violations, FINRA barred Jeffrey Lane from associating with any member firm in a principal capacity.[5]

FINRA further found that Applicants failed to respond in a timely manner to FINRA's requests for information under Rule 8210.[6] FINRA did not impose a sanction on Marcus Lane for this violation in light of the bar it imposed for his other violations, but it imposed on Jeffrey Lane a two-year suspension in all capacities and a $25,000 fine.

On appeal, Applicants contend that the markups Marcus Lane charged were fair and reasonable in light of the type of securities involved, that Jeffrey Lane prepared adequate supervisory procedures and that his supervision of Marcus Lane was reasonable, and that Applicants provided the information that FINRA requested in connection with its investigation.

(...continued)
purchase or sale of a security, by means of any manipulative, deceptive, or fraudulent device. Conduct Rule 2320 generally prohibited members from interpositioning a third party between the member and the best available market. Conduct Rule 2440 required members to buy securities from and sell securities to customers at prices that are fair, taking into consideration all relevant circumstances. IM-2440 deemed it a violation of NASD Conduct Rules 2110 and 2440 "for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security."

4 NASD Conduct Rule 3010(b) required, among other things, member firms' written supervisory procedures to "set forth the supervisory system," including "the responsibilities of each supervisory person" and to maintain records relating to these procedures. Conduct Rule 3010(d) required member firms to establish written procedures designed reasonably to supervise each registered representative by reviewing all transactions and to maintain evidence that such review has occurred.

5 FINRA found that Jeffrey Lane "failed reasonably to supervise [Marcus Lane], with a view to preventing violations of Section 10(b) of the Exchange Act and the rules thereunder" and, as a result, that he, too, was subject to a statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(E), 15 U.S.C. § 78o(b)(4)(E), which refers, among other things, to the failure "reasonably to supervise, with a view to preventing violations . . . ").

6 NASD Conduct Rule 8210 required associated persons to provide information or documents in an investigation.

For the reasons set forth below, we sustain FINRA's findings of violations and imposition of sanctions.

I. Background

A. Applicants

During the relevant period, brothers Marcus Lane and Jeffrey Lane were general securities representatives associated with Greenwich High Yield, LLC ("Greenwich" or the "Firm").[7] Marcus Lane owned eighty percent of the Firm and Jeffrey Lane owned twenty percent. Marcus Lane was the Firm's chief executive officer and sole trader, and he was the sole owner of High Yield Partners, LLC and High Yield Partners Income, LLC, which Marcus Lane described as "separate trading account[s]" or "inventory account[s]" for the Firm (together, the "Controlled Accounts"). Jeffrey Lane was the principal responsible for supervision, the Firm's Chief Compliance Officer, and the Firm's registered Financial and Operations Principal ("FINOP"). He also was responsible for drafting all aspects of the Firm's Written Supervisory Procedures ("WSPs").

B. Marcus Lane charged two customers undisclosed markups ranging from 6.45 percent to 40.93 percent on eleven trade sets.

Between October 20, 2006, and May 2, 2007, Marcus Lane, trading for the Firm, executed eleven separate sets of transactions in corporate bonds issued by three companies in the automotive supply industry, as set forth in the attached Appendix (the "Trade Sets").[8] The Trade Sets followed a similar, multi-step pattern, which occurred over a short period of time: (1) the Firm purchased the bonds from a broker-dealer; (2) the Firm immediately sold the bonds with a markup to one of the Controlled Accounts owned by Marcus Lane and used by the Firm for inventory; (3) the Firm purchased the bonds back from the Controlled Account with a second markup; and (4) the Firm sold the bonds to one of its retail customers with a third markup. Ten out of the eleven Trade Sets were completed in their entirety within one hour, and the other was

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7 Greenwich became a FINRA member on November 23, 1994 and terminated its FINRA membership on June 23, 2009. Both Marcus Lane and Jeffrey Lane became registered with FINRA in 1995 and terminated their registrations in April 2009.

8 The bonds were issued by Collins & Aikman Corporation, Werner Enterprises, Inc., and RJ Tower Corporation. FINRA's opinion states that the record does not include the full corporate names of the issuers of the bonds at issue, but the parties do not dispute the identity of the issuers. The clearing firm's trade confirmations included in the record support the Lanes' characterization of the bonds as "distressed securities." According to those trade confirmations, both the Werner and Collins & Aikman bonds were rated "D" by Standard & Poor's, which indicates "payments default on financial commitments." The Tower bonds, which were denominated in Euros, were not rated by Standard & Poor's, but the trade confirmations state that the bonds were "in default."

completed in 138 minutes; all were completed on the same trading day.[9] The aggregate markup (*i.e.*, the percentage difference between the Firm's initial purchase price for the bonds from a broker-dealer and the final sale price to the customer) ranged from a low of 6.45 percent to a high of 40.93 percent , and the total profits for all eleven Trade Sets (for the Firm and the Controlled Accounts) amounted to $317,030.70.[10] All but three of the markups exceeded 10 percent. The Firm's profits in the Trade Sets represented a significant percentage of its total revenues during the applicable period.[11]

Trade Set 8 illustrates the pattern that ran through all eleven Trade Sets. The Firm initially purchased 2,000,000 Tower bonds from a broker-dealer at 11:35 a.m. on March 29, 2007, at a price of 7.33.[12] Within one minute, the Firm sold the bonds to a Controlled Account at

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9 Trade Set 3, on October 31, 2006, was divided into two separate sales to the same retail customer, which occurred simultaneously, but at different prices. This resulted in two separate markups. The record does not indicate why this Trade Set was divided in this way; all the other Trade Sets involved a single sale to the applicable retail customer. A markup was charged at every leg of each of the Trade Sets, except for two of the Trade Sets, in which one of the four legs was executed at a price equal to the previous leg. None of the Trade Sets included any markdowns in price.

10 Trade Set 1 occurred at a 15.11 percent markup for an aggregate profit (for the Firm and Controlled Accounts) of $13,387.50. Trade Set 2 occurred at an 11.76 percent markup for an aggregate profit of $15,000.00. Trade Set 3 involved two separate multi-step transactions, the first of which occurred at a 7.46 percent markup for an aggregate profit of $12,500.00 and the second of which occurred at a 13.43 percent markup for an aggregate profit of $11,250.00. Trade Set 4 occurred at a 7.41 percent markup for an aggregate profit of $2,825.00. Trade Set 5 occurred at a 6.45 percent markup for an aggregate profit of $5,000.00. Trade Set 6 occurred at a 10.34 percent markup for an aggregate profit of $14,250.00. Trade Set 7 occurred at a 20.02 percent markup for an aggregate profit of $42,600.00. Trade Set 8 occurred at a 40.93 percent markup for an aggregate profit of $60,000.00. Trade Set 9 occurred at a 39.92 percent markup for an aggregate profit of $76,950.00. Trade Set 10 occurred at a 20 percent markup for an aggregate profit of $52,068.20. Trade Set 11 occurred at a 14.53 percent markup for an aggregate profit of $11,200.00.

11 During the first quarter of 2007, Trade Sets 5 through 10 (the only Trade Sets that occurred during that quarter) generated aggregate profits (for the Firm and Controlled Accounts) totaling $250,868.20, of which the Firm itself (as opposed to the Controlled Accounts) retained approximately $92,000. This amount represented over 20 percent of the Firm's total revenues during that quarter.

We further note, because it relates to contentions discussed below, that, although the Firm was subject to a net capital requirement of $100,000, it maintained excess net capital of over $2,000,000 during the first two quarters of 2007.

12 Bond prices are stated in "points," with each point representing ten percent ($10) of the bond's par value. Thus, a stated price of 7.33 for a $1,000 par value bond is $73.33.

a price of 7.65. Less than thirty minutes later, at 12:01 p.m., the Firm bought the bonds back from the Controlled Account at a price of 9.91. The Firm then immediately re-sold the bonds to a retail customer at a price of 10.33. The aggregate markup for this twenty-six-minute Trade Set was 40.93 percent for a total markup amount of $60,000.

The markups were not disclosed to customers. Order tickets did not reflect the markups, nor did any other communication to customers, such as account statements.[13] Further, customers could not have discovered or determined the markups. Although FINRA was able to generate "audit trails" for the periods immediately before and after certain Trade Sets,[14] these audit trails were based on information provided by broker-dealers to FINRA's Trade Reporting and Compliance Engine ("TRACE").[15] There is no evidence that this information or similar audit trails are available to the public.

Even if a retail customer could have accessed TRACE audit trails, those audit trails lacked important information about the nature of the transactions at issue. For example, although the four legs of the transactions appeared on the audit trail with price information from which markup percentages could be calculated, the two legs involving the Controlled Accounts were identified by Applicants with a "C" for customer. Therefore, the transactions with the Controlled Accounts were represented on the audit trail as customer transactions, as opposed to transactions

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13 FINRA senior regulatory analyst Derrick Leak reviewed a number of the Trade Sets, describing the timing and pricing of the component transactions. Among other things, Leak noted in his testimony during the hearing that the order tickets the customers received included no disclosure of the markups, and he pointed out that, for several of the Trade Sets, there were no intervening transactions in the market for those securities between the time of the Firm's initial purchase and the time of the final sale to retail customers, which meant that "other broker-dealers were not participating in the [applicable] market, thus the price was not affected."

14 Leak testified that an audit trail "shows all the activity in a certain [bond] and a certain designated time frame" and that FINRA staff selected the time frame "so we could get an accurate picture of what was happening in the market over an extended time frame." In addition to the audit trails, FINRA's Department of Market Regulation introduced the order tickets and confirmations for all of the Firm's transactions at issue.

15 FINRA "introduced TRACE in July 2002 in an effort to increase price transparency in the U.S. corporate debt market. The system captures and disseminates consolidated information on secondary market transactions in publicly traded TRACE-eligible securities (investment grade, high yield and convertible corporate debt)—representing all over-the-counter market activity in these bonds."
http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/CorporateBondData/.
The Tower bonds, which were denominated in Euros, were not entered into the TRACE system.

with inventory accounts wholly owned by Marcus Lane. There was no other information that disclosed their identity.[16]

C. The Firm's Written Supervisory Procedures, drafted by Jeffrey Lane, did not address interpositioning and indicated that NASD's 5% Policy did not apply to transactions involving distressed bonds.

The Firm's Written Supervisory Procedures ("WSPs"), for which Jeffrey Lane was responsible, did not address interpositioning—the channeling of a customer's transaction through another broker-dealer or person in a similar position—which is a violation of NASD Rule 2320(b), "unless [a FINRA member or registered representative] can show that by so doing he reduced the costs of the transactions to the customer." Further, the WSPs and the Firm's Markup Policy did not specify who was responsible for reviewing the Firm's markups to ensure compliance with FINRA Rules, how such a review would be conducted (although the WSPs included a list of six factors to be considered), how often they would occur, and how the reviews

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16 The audit trails show that market activity in the bonds at issue varied considerably during the relevant period; at times, several days passed without any trades in the bonds. Even during periods when there was trading activity on a daily basis, fewer than ten trades typically occurred on any given day. The audit trails for the dates surrounding the Trade Sets show that there was some price volatility in the bonds at issue, but much of this price volatility correlates closely with the volume of the transactions at issue: transactions involving a smaller quantity of bonds tended to occur at higher prices, whereas larger-quantity, so-called "Round Lot" transactions (such as all of the transactions in the Trade Sets), tended to occur at lower prices.

The audit trails for Trade Sets 3, 4, and 5 included no other same-day transactions at prices higher than the Firm's initial purchase price. Trade Sets 1, 2, and 6 had same-day transactions at a higher price than the Firm's initial purchase price. But in Trade Set 1, the only other same-day transaction occurred over four hours *after* the Firm's initial purchase, in a much lower volume transaction than the Firm's purchase. In Trade Set 2, although the higher-priced transactions occurred before the Firm's initial purchase of the bonds, the higher-priced transactions involved much lower volumes than the Firm's transactions, and other large-volume transactions closer to the time of the Firm's transactions occurred at lower prices than the Firm's transactions. In Trade Set 6, which took place on a day in which there was more trading activity than usual in the Werner bonds, there was only one transaction at a higher price than the Firm's initial purchase price, and that transaction involved a much smaller volume than the Firm's initial purchase; further, the trades closest in time to the Firm's purchase all occurred at lower prices than the Firm's purchase price. In addition, there is no evidence in the record to indicate whether these transactions were inter-dealer or involved retail customers of the firms involved. Some of the Trade Sets had no intervening inter-dealer trades between the time of the Firm's initial purchase of the bonds and the eventual sale to a Firm retail customer (giving the Firm no outside basis for its pricing determinations), and those that did have such intervening transactions all occurred at lower prices than the Firm's purchase price.

would be documented. Jeffrey Lane testified that he "didn't feel that [supervisory] steps actually had to be written out."

Despite the lack of procedures or guidance regarding how the Firm would review markups, the WSPs incorporated some of the general considerations included in FINRA's Markup Policy in effect at the time, IM-2440-1. But the WSPs omitted two key considerations under IM-2440-1(a): (1) "In the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security"; and (2) "a mark-up pattern of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'" Further, the WSPs included the assertions, without supporting authority, that "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% Policy'" and "a higher percentage of mark-up customarily applies to a distressed bond transaction than for an investment grade bond transaction" because "[t]he high yield marketplace is known for illiquid markets in low priced securities for which customers are inclined to trade by appointment with member firms that provide useful research advice." The 2006-07 version of the WSPs stated that the Firm had "addressed to NASD in prior exit interviews" its belief that the 5% Policy did not apply to trades of distressed bonds. That version further stated that "NASD has consistently neglected to render any additional opinion or adopt any stricter standard that could be reasonably applied across the board as a rule (example: no mark-up may exceed four points)."[17]

D. Jeffrey Lane processed all of the transactions at issue without modification.

Jeffrey Lane prepared the order tickets for all of the transactions at issue without modification and reported the transactions to TRACE. He was aware that Marcus Lane owned the Controlled Accounts and set the markup prices for all legs of the Trade Sets, and he knew the timing of the various legs of each Trade Set. Jeffrey Lane discussed the markup amounts with Marcus Lane, and he acknowledged in his hearing testimony that he had encouraged Marcus Lane to charge a markup on the second leg of the Trade Set because "[i]t would not be fair to [the Firm] not to make a profit on those trades." But Jeffrey Lane never questioned Marcus Lane's use of the Controlled Accounts in the Trade Sets, stating, "When [Marcus Lane] bought bonds he said, now I own them, I have to go sell them, and no, I did not question." In addition, Jeffrey Lane acknowledged that none of the Firm's other customer accounts (*i.e.*, those owned by customers other than Marcus Lane) received the benefit of a markup when they sold securities to the Firm.

In reviewing the markup amounts, Jeffrey Lane looked only to the markup charged at each leg of the Trade Sets, and not to the amount of the aggregate markup over the initial purchase price the Firm paid when it first bought the bond from a broker-dealer. Although he claimed not to know what interpositioning was, he acknowledged that Marcus Lane regularly

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[17] As discussed above, bond prices are listed in "points," rather than dollar amounts, with one point equal to $10 of the bond's par value. *See supra* note 12.

had been conducting transactions for years in which the Controlled Accounts purchased bonds from the Firm and then sold them back before the Firm re-sold them to a retail customer. Jeffrey Lane testified that he was aware that his obligation in reviewing transactions for markup violations was to ensure that customers received fair prices, not that the Firm could make a profit on transactions.

E. FINRA investigated the Firm's markups and requested information pursuant to Rule 8210.

FINRA initiated an investigation in 2007 after detecting, through its electronic surveillance system, that certain of the Firm's trades made during the fourth quarter of 2006 appeared to include excessive markups. In 2007 and 2008, FINRA requested information from the Firm pursuant to Rule 8210, and Applicants responded fully to those requests. Based on that information, FINRA narrowed its focus to the Trade Sets because it appeared that, with respect to those transactions, the Firm had interpositioned the Controlled Accounts between the market and the Firm's customers, resulting in excessive markups. At that time, FINRA knew that one of the Controlled Accounts shared the same address as the Firm. But FINRA believed that the Controlled Accounts were customer accounts and did not know who owned or had investment authority over them.

From March 6, 2009, to July 6, 2009, FINRA made a series of Rule 8210 requests asking for information about the ownership of those accounts, their account opening documents, Firm communications regarding the transactions at issue, and electronic communications sent and received by Marcus Lane. As described in more detail below, Applicants failed to respond in a timely manner and did not provide certain information until October 2009, after FINRA had issued a Notice of Suspension and assigned a Hearing Officer.

F. FINRA charged Marcus Lane and Jeffrey Lane, alleging markup, supervisory, and failure-to-respond violations.

On April 6, 2011, FINRA filed a complaint alleging markup, supervisory, and failure-to-respond violations. FINRA held a hearing on February 28 and 29, 2012, before a three-person Hearing Panel. On July 12, 2012, the Hearing Panel found that Applicants committed the violations alleged and imposed sanctions. On July 25, 2012, Applicants timely appealed the Hearing Panel decision to the National Adjudicatory Council ("NAC"). On December 26, 2013, the NAC issued a decision affirming the findings of violations and imposing the sanctions listed above. This appeal followed.

II. Analysis

A. Standard of Review

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization disciplinary actions.[18] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[19]

B. Marcus Lane's Violations

1. Marcus Lane's execution of the Trade Sets violated NASD Rule 2320(b)'s prohibition on interpositioning.

We sustain FINRA's findings that Marcus Lane violated NASD Rule 2320(b), which was in effect at the time of the transactions at issue.[20] Under NASD Rule 2320(b), "[a] member's obligations to his customer are generally not fulfilled when he channels transactions through another broker/dealer or some person in a similar position, unless he can show that by doing so he reduced the costs of the transactions to the customer."[21] We find that Marcus Lane engaged

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18 *See David M. Levine*, Exchange Act Release No. 48760, 2003 WL 22570694, at *9 n.42 (Nov. 7, 2003).

19 15 U.S.C. § 78s(e)(1).

20 These violations also constitute violations of Rule 2110, which required members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 3. Rule 2110 reflects the mandate of Exchange Act Section 15A(b)(6), which requires, among other things, that FINRA design its rules to "promote just and equitable principles of trade." 15 U.S.C. § 78o-3(b)(6). As we have stated, "[t]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. NASD Rule 2110 protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. NASD Rule 2110 has proven effective through nearly 70 years of regulatory experience." *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *2 (July 3, 2008), *Rule Change Approved Without Modification*, 2008 WL 4468749 (Sept. 25, 2008). We therefore find that Rule 2110 is, and that FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.

21 In 2009, after the dates of the Trade Sets, NASD Rule 2320(b) was amended and incorporated into NASD Rule 2320(a). *See FINRA Regulatory Notice 09-58*, 2009 FINRA LEXIS 161 (Oct. 2009).

in this practice of interpositioning in each of the eleven Trade Sets when he channeled transactions through the Controlled Accounts.

An applicant who channels transactions through another broker-dealer or person in a similar position has prima facie failed to meet his obligation to obtain the most favorable price for his customers.[22] An applicant may rebut this presumption by "showing that the customer's total cost or proceeds of the transaction is the most favorable obtainable under the circumstances."[23] As we have observed, "[p]ersons engaged in the securities business cannot be unaware of their obligation to serve the best interests of their customers, and that interpositioning is bound to result in increased prices or costs."[24] Marcus Lane failed to show that the Firm's customers received the most favorable prices obtainable under the circumstances. Instead, as discussed below, Marcus Lane charged customers excessive markups in each of the eleven Trade Sets.

2. Marcus Lane's markups on the Trade Sets were excessive and violated NASD Rule 2440.

We sustain FINRA's findings that Marcus Lane charged the retail customers excessive markups, in violation of its rules.[25] NASD Conduct Rule 2440 stated, "if a member . . . sells for his own account to his customer, he shall . . . sell at a price which is fair, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved, and the fact that he is entitled to a profit."

To clarify what constitutes an excessive markup, FINRA published IM-2440, its Markup Policy, in which it adopted what is commonly referred to as the "5% Policy." Among other things, the 5% Policy stated that a markup is excessive and violates Rules 2110 and 2440 if the price of a security is not reasonably related to its current market price and that "a mark-up pattern

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22 *Thomson & McKinnon*, Exchange Act Release No. 8310, 43 SEC 785, 1968 WL 87637, at *3 (May 8, 1968).

23 *Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 WL 2488067, at *7 n.23 (Aug. 14, 2009) (citing *Thomson & McKinnon*, 1968 WL 87637, at *3 (concluding broker-dealers' interpositioning "constituted a fraud upon their customers" in violation of the antifraud provisions of the Exchange Act); *Milton M. Star*, Exchange Act Release No. 15577, 47 SEC 58, 1979 WL 173680, at *2 (Feb. 22, 1979) ("[W]here interpositioning has occurred, the burden is on the member to demonstrate that his action resulted in the customer being charged a lower price than that prevailing in the inter-dealer market.")).

24 *Gonchar*, 2009 WL 2488067, at *9.

25 These violations also constitute violations of Rule 2110. *See supra* notes 3 and 20.

of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'"[26] Absent countervailing evidence, the best indicator of the current market price is a member firm's contemporaneous cost of acquiring the security, and a firm's contemporaneous cost is the price upon which member firms should calculate their markup amounts.[27] Wholesale trades between dealers are a better indicator of prevailing market price than retail transactions between firms and their customers.[28] We have held consistently that markups greater than five percent (as every markup here was) are "acceptable in only the most exceptional cases."[29] Once evidence has been presented that markups are five percent or more above a firm's contemporaneous cost, the burden shifts to the firm, or its associated persons, to explain why contemporaneous cost is not an

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26 *See also A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 44328, 55 SEC 147, 2001 WL 588039, at *3 (May 21, 2001) ("The prices that a broker dealer charges retail customers for securities must be reasonably related to the prevailing market price of the security.").

27 *See Gonchar*, 2009 WL 2488067, at *7 n.22 (citing *Daniel R. Lehl*, Exchange Act Release No. 34196, 1994 WL 268782, at *2 (June 10, 1994) (holding that a firm that is not a market maker must base its prices on its own contemporaneous cost), *aff'd*, 90 F.3d 1483 (10th Cir. 1996); *F.B. Horner & Assocs., Inc. v. SEC*, 994 F.2d 61, 63 (2d Cir. 1993) (affirming contemporaneous cost of acquiring bonds as an appropriate gauge of the market price for purposes of determining markups); *David Disner*, Exchange Act Release No. 38234, 52 SEC 1217, 1997 WL 47268, at *2 n.8 (Feb. 4, 1997) (citing *Alstead, Dempsey & Co.*, Exchange Act Release No. 20825, 47 SEC 1034, 1984 WL 50800, at *1 (Apr. 5, 1984)); *George Salloum*, Exchange Act Release No. 35563, 52 SEC 208, 1995 WL 215268, at *3 (Apr. 5, 1995) (using contemporaneous cost to conclude that applicant had charged customers fraudulently excessive markups)).

It is undisputed that the Firm was not a market maker in any of the bonds at issue. Section 3(a)(38) of the Exchange Act, 15 U.S.C. § 78c(a)(38), in relevant part, defines "market maker" as "any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy or sell such security for his own account on a regular or continuous basis."

28 *See, e.g.*, *Michael H. Novick*, Exchange Act Release No. 34640, 51 SEC 1258, 1994 WL 499291, at *3 (Sept. 2, 1994) (stating that "the prevailing market price (on the basis of which retail markups are computed) means the contemporaneous price at which dealers are trading with one another (*i.e.*, the current inter-dealer market)"); *First Honolulu Secs., Inc.*, Exchange Act Release No. 32933, 51 SEC 695, 1993 WL 380039, at *2 (Sept. 21, 1993) ("[t]he prices paid for a security by a dealer in actual transactions closely related in time to its sales are normally a highly reliable indication of the prevailing market").

29 *Inv. Planning, Inc.*, Exchange Act Release No. 32687, 51 SEC 592, 1993 WL 289728, at *2 (July 28, 1993).

appropriate measure of the prevailing market price or to present facts otherwise justifying higher markups.[30]

In this matter, Marcus Lane does not dispute the markup percentages in the attached Appendix and concedes that he calculated those markups. Since all of the markups exceeded five percent, the burden shifts to Marcus Lane to justify the markups.

Marcus Lane has not satisfied this burden, despite his contentions that the markups were justified based on his allegations that: (1) the Firm was at risk while it held the bonds; (2) the Firm had conducted significant research identifying these specific securities for its customers; (3) the Firm had significant general research expenses and needed to be profitable; (4) the customers were sophisticated investors and would not have accepted the markup prices if they were not fair and that the pricing information "was on TRACE so they could figure it out"; (5) FINRA examiners were aware of the Controlled Accounts; and (6) the prices the Firm charged its customers were "within the constraints of the market."

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30 *Gonchar*, 2009 WL 2488067, at *7 n.25 (citing *Mark David Anderson*, Exchange Act Release No. 48352, 56 SEC 840, 2003 WL 21953883, at 87 n.41 (Aug. 15, 2003) (noting that the applicant "had the burden of producing evidence to support his claim that his pricing was not excessive"); *First Honolulu*, 1993 WL 380039, at *4 n.23 ("Once the NASD presented evidence of the markups, the burden shifted to applicants to refute this evidence.")); *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 WL 1697151, at *11 n.62 (Apr. 11, 2008) (citing *Steven P. Sanders*, Exchange Act Release No. 40600, 53 SEC 889, 1998 WL 741105, at *4 (Oct. 26, 1998)).

For example, in sustaining FINRA findings of excessive markups, we have held that applicants may provide "countervailing evidence that showed a change in the market between when Applicants acquired the bonds and when they later sold the bonds to their customers" to overcome the long-recognized presumption in favor of contemporaneous cost as the proper basis for calculating markup amounts. *Gonchar*, 2009 WL 2488067, at *8. And although we have recognized that other factors, such as extra efforts or expenses, may be considered in evaluating whether a markup is excessive, we have faulted applicants who failed to document extra efforts or expenses associated with trades. *Gordon*, 2008 WL 1697151, at *12. This follows from NASD's instruction to members that they must provide "adequate documentation" to justify markups greater than five percent. *Notice to Members 92-16*, 1992 WL 1319225, at *3 (Apr. 1992).

Among the factors to be considered in determining whether a markup is excessive are: "the expense associated with effectuating the transaction; the reasonable profit fairly earned by the broker or dealer; the expertise provided by the broker or dealer; the total dollar amount of the transaction; the availability of the financial product in the market; the price or yield of the instrument; the resulting yield after the subtraction of the markup compared to the yield on other securities of comparable quality, maturity, availability, and risk; and the role played by the broker or dealer." *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 535 (2d Cir. 1999).

Marcus Lane claims that the markups were justified because the Controlled Accounts took risks by purchasing the bonds from the Firm and that, as a result, the Controlled Accounts were entitled to "compensation" for "committing risk capital." According to this argument, one purpose of the transactions was to create "inventory" for the Firm's retail customers, which put the Firm (and, presumably, the Controlled Accounts) at risk while they held the bonds. Marcus Lane further argues that, because of the risk levels involved, it would not be profitable for any broker to sell low-priced securities unless the broker could charge markups exceeding five percent.

But the existence of general market risk in the distressed bond market does not permit the Firm to charge its customers a price that is not in accordance with the prevailing market.[31] We have consistently found that "markups above 5% generally are not justified even in the sale of lower-priced securities."[32] Further, as set forth in the Appendix, the Firm did not struggle to make money on these transactions; in one instance it made over $75,000 on a Trade Set. We have acknowledged that a markup greater than five percent conceivably may be appropriate in transactions involving low-priced securities, but "only if the size of the total transaction is small and the total compensation charged is equal to or less than a reasonable minimum ticket charge."[33] Here, the dollar amounts of the transactions were large, and the compensation the Firm received was far greater than a reasonable minimum ticket charge.[34]

In any event, the evidence contradicts Marcus Lane's claims that the Firm was at risk in these transactions. Although Marcus Lane asserted in his hearing testimony that he and the Firm were "at risk" on these trades—which, in his view, helped to justify the markups—Marcus Lane acknowledged that he "assume[d] he probably did" receive indications that the customers at issue "would be interested in these bonds" and knew that the customers were knowledgeable about the

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[31] *See, e.g.*, *Frank L. Palumbo*, Exchange Act Release No. 36427, 1995 WL 630926, at *6 & n.44 (Oct. 26, 1995) ("We have repeatedly stated that market risk does not justify excessive markups.") (citing *G.K. Scott*, Exchange Act Release No. 33485, 1994 WL 17114, at *4 n.25 (Jan. 14, 1994)).

[32] *Sanders*, 1998 WL 741105, at *5.

[33] *Century Capital Corp. of South Carolina*, Exchange Act Release No. 31206, 50 SEC 1208, 1992 WL 252170, at *3 & n.10 (Sept. 21, 1992). This precedent is consistent with the testimony of Patrick S. Geraghty, discussed *infra* in note 47.

[34] Marcus Lane also argues that the "point" amounts of the markups were small, repeatedly stating that the range of markups ranged from "0.25 to 1.375 points," which he claims indicated that the markups were "fair and reasonable." But even if the "point" amount of the markup might appear to be small, the percentages of the markups ranged from 6.45 percent to 40.93 percent. Marcus Lane cites no authority to support using "points," rather than percentages, to evaluate markup amounts. As discussed, the 5% Policy and numerous courts and the Commission have analyzed markups on a percentage basis. We are aware of no authority that would suggest that markups should be evaluated based on the "point" value of the markup.

bonds at issue.[35] And the very short time periods between the Firm's initial purchase and the eventual sale to the customers support FINRA's position that the risk, if any, was minimal.[36] Further, Marcus Lane was the sole owner of the Controlled Accounts; thus, Marcus Lane did not truly shift any of the economic risk of the transactions when he sold the bonds back and forth between entities he owned.[37]

Marcus Lane's claim that risk justified the markups also does not explain why he charged "layered" markups in a multi-step Trade Set—even if the initial markup compensated the Firm for purchasing the securities from a broker-dealer, this would not explain why the Firm charged the customers markups for the third and fourth legs of the Trade Sets. As discussed above, markups were added to the price of the bonds at issue at nearly every leg of each Trade Set, and no markdowns were charged. As FINRA argued in its pre-hearing brief below, "At most, the customers should have paid the price [the Controlled Accounts] paid to [the Firm]. . . . Instead, the customers incurred one or two additional markups above the initial markup charged."[38] Marcus Lane provides no explanation why, once the Controlled Accounts (which Applicants commonly refer to as Firm "trading accounts") charged a markup to the Firm, it was necessary to assess two additional markups before the sale of the bonds to the retail customer.[39]

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35 Applicants conceded that these customers had purchased the bonds at issue from the Firm previously and that "there was a readily identifiable competitive market for [the bonds]."

36 *See Lake Sec., Inc.*, Exchange Act Release No. 31823, 51 SEC 19, 1992 WL 296794, at *3 (describing any risk that member firm endured as "minimal" where markup transaction occurred within two hours of firm's initial purchase).

37 Marcus Lane contends that it was important to "position" the Controlled Accounts because of unspecified "broker dealers that have . . . been liquidated because of trades blowing up." But he does not explain why the impact of a trade "blowing up" would be mitigated through his use of the Controlled Accounts, since he owned 100 percent of the Controlled Accounts and 80 percent of the Firm.

38 Such an alternative approach would have resulted in much smaller markups to the customers, which may have compensated the Firm fairly without violating FINRA's Rules. As FINRA notes, if Marcus Lane considered the risk of the transactions to be too great without charging excessive markups, "he could have effected riskless principal trades, or declined to execute the trades altogether." In riskless principal transactions, the firm "buys only to fill orders already in hand, and immediately 'books' the shares it buys to its customers." In such a transaction, "the firm serves as an intermediary for others who have assumed the market risk." *Gonchar*, 2009 WL 2488067, at *2 & n.11 (citing *Kevin B. Waide*, Exchange Act Release No. 30561, 50 SEC 932, 1992 WL 90342, at *3 (Apr. 7, 1992)).

39 As discussed above, on appeal, FINRA correctly notes that Jeffrey Lane "argues that [the Firm] properly charged [the Controlled Accounts] a mark-up 'as it would . . . another customer,' but he does not address why the firm did not also charge a mark-down when purchasing the bonds back." A markup at this stage, where a customer is selling rather than buying a security, is not typical. Instead, a firm ordinarily would mark down the security—that is, reduce the price it

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In addition, Applicants claim that it was necessary to interposition the Controlled Accounts in order to protect the Firm's net capital position, but the Firm maintained a net capital position of over twenty times its required net capital during the period at issue (*i.e.*, although the Firm was subject to a net capital requirement of $100,000, it maintained excess net capital of over $2,000,000 during the first two quarters of 2007), and none of these transactions would have put the Firm at risk of failing to maintain the required levels of net capital if the Firm itself had sold the bonds to the customers without interpositioning the Controlled Accounts.[40]

The purported costs incurred by the Firm also do not justify the markups here. Marcus Lane testified at the hearing that the Firm had conducted significant "analysis of the auto supply [distressed bond market] prior to [the dates of the Trade Sets]," which it provided to the retail customers at issue, enabling the customers to identify opportunities for advantageous purchases of the bonds. Marcus Lane further testified that distressed debt broker-dealers, like the Firm, "have a lot of analytical expenses" and needed to make a profit. Marcus Lane also claims that he "provided extensive credit analysis and valuable services that were indirectly paid for only through bond transactions . . . especially given the capital risk." Marcus Lane provides no support for this claim. But even if he had established that he provided such services, there is nothing in FINRA's Markup Policy that would allow a member firm to charge excessive markups on a specific bond transaction to compensate the member for expenses associated with general customer services it provided. Likewise, Applicants claim, without supporting evidence, that the Firm lost money on other distressed bond transactions during this time period, but a firm may not charge excessive markups to compensate for losses in other transactions.[41]

(...continued)
pays to a selling customer for the security to cover the cost of the transaction and make a profit on it. *See generally*, *Gonchar*, 2009 WL 2488067, at *5; *Mark David Anderson*, Exchange Act Release No. 48352, 2003 WL 21953883, at *1-2 (Aug. 15, 2003); *The Law and Finance of Broker-Dealer Mark-ups*, Allen Ferrell (Apr. 6, 2011) (Discussion paper), available at: http://ssrn.com/abstract=1805131. By charging a markup instead of a markdown on the third leg of each Trade Set, Marcus Lane suffered no lost profit because that profit remained in the Controlled Account (*i.e.*, with him). Then, in the fourth leg, he achieved an even greater profit by charging the true customer a markup based on the third leg's marked up price, rather than what should have been a marked down price (*i.e.*, a lower price at the third leg).

40 *See supra* note 11.

41 *Horner*, 994 F.2d at 63 ("The facts that [the respondent firm] sometimes lost money on other transactions for the same clients or that some of its markups paid the firm's costs in other transactions does not justify an excessive markup in any one transaction."); *Inv. Planning*, 1993 WL 289728, at *4 ("A lack of profit on some transactions for a customer cannot justify excessive markups on others.").

In his opening statement at the FINRA hearing, Marcus Lane expressed his belief that it could be fair to charge an excessive markup, stating: "Now, occasionally, let's say when a bond falls from 10 – 20 to 15 to 10 to 5 and you buy them at 6 and you can sell them at 9 or something

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Marcus Lane claims that the retail customers at issue were highly sophisticated and knowledgeable about market prices and that the customers would not have accepted the prices he charged unless those prices matched the customers' own analysis of the bonds at issue, but this does not justify charging excessive markups. He noted that the customers had made a great deal of money on the transactions at issue, in one instance describing a customer's returns as "excessive." Marcus Lane's claim that the customers made a large amount of money on these and other transactions using the Firm as a broker also does not justify the markups he charged. We have held that each individual transaction with a customer must be at a fair price under Rule 2440; fairness is not assessed based on the average markup charged per customer in all transactions over time.[42]

We reject Marcus Lane's further argument that there was no violation because the Firm's retail customers had "full transparency" with respect to five of the eleven Trade Sets via TRACE, but nevertheless did not complain about the markups because they "achieved extraordinary returns."[43] First, customers did not have access to the TRACE reports, and even if they did have

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like that and get, you know, more than you – you know, once every couple of years you can do that, once every year, you know, once a year maybe, and that's only facilitated by your risking capital. This is necessary to offset your losses from situations you buy which don't work out." Apparently based on this belief, Applicants argue that they should have been permitted to introduce evidence to show that the Controlled Accounts lost money on transactions involving other bonds (not those involved in the Trade Sets) during the relevant period. The Hearing Panel did not admit such evidence, but the NAC found that such evidence "may have shed additional light on whether any market risk was assumed." Ultimately, however, the NAC found that the error was "harmless" because "the presence of some market volatility is not a ground for charging excessive markups." Based on the authority discussed above, we agree with the NAC's finding. As discussed, in order to justify these markups, Marcus Lane could not simply point to losses on other transactions; he had to present adequate documentation explaining why it was necessary for the Firm to charge prices that deviated significantly from the prevailing market price at the time of these specific transactions.

42 *Thomas F. White & Co., Inc.*, Exchange Act Release No. 33477, 51 SEC 932, 1994 WL 17044, at *2 & n.21 (Jan. 14, 1994) (citing *Inv. Planning*, 1993 WL 289728, at *4); *Horner*, 994 F.2d at 63 (stating that using the average markup per customer to evaluate fairness of pricing "is not consistent with well-established law").

43 Marcus Lane claims that the six Trade Sets involving Tower bonds were "outside FINRA regulatory authority" because they were "foreign bonds." The record contains limited information about the Tower bonds, but the parties do not dispute that they were purchased and sold in the United States. Accordingly, FINRA has jurisdiction. *See Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2884 (2010) (finding that the focus of the Exchange Act is "upon purchases and sales of securities in the United States" and holding that Exchange Act Section 10(b) applies to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities"). To the extent that Applicants argue that *Morrison* does not

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access, those reports contained misleading information. Second, it is irrelevant that the affected customers did not complain to FINRA about the markups. Customers make decisions about whether to file formal complaints for numerous reasons, but it is well established that FINRA maintains the authority to enforce its Rules regardless of whether customers have complained.[44]

Marcus Lane also claims that the Firm had discussed the Controlled Accounts with FINRA examiners on multiple occasions, which led him to conclude that FINRA had "approved" the transactions at issue.[45] But he also acknowledges that he had no documentation to substantiate this claim. Further, any awareness FINRA had of the Controlled Accounts would not have relieved Marcus Lane of the burden of providing documentary evidence supporting the fairness of his pricing. As FINRA argues on appeal, "Marcus Lane does not claim that FINRA staff ever informed him that he would not have to demonstrate *why* a markup exceeding 5% was fair." Applicants also claim that the Trade Sets were reviewed by FINRA district examiners in

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apply because it was decided after the conduct at issue, they are incorrect. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years.") (Holmes, J., dissenting).

44 *See Maximo Justo Guevara*, Exchange Act Release No. 42793, 54 SEC 655, 2000 WL 679607, at *6 (May 18, 2000) (finding that "NASD's power to enforce its rules is independent of a customer's decision not to complain"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 WL 442063, at *2 n.5 (July 20, 1995) (same and noting that customer decisions about whether to complain "may be influenced by many factors"); *Raymond M. Ramos*, Exchange Act Release No. 26007, 49 SEC 868, 1988 WL 902244, at *4 (Aug. 18, 1988) (finding violations of NASD Rules against misappropriating customer funds despite the fact that affected customer had written to NASD requesting leniency for applicant).

45 In support of the claim that FINRA was aware of the Controlled Accounts, Applicants introduced a January 1997 letter from the Firm to NASD, which stated that the Firm planned to fund its "inventory account" because "in conjunction with its regular trading activities, [the Firm] does occasionally buy and sell positions in the companies we are following." The letter does not disclose the Firm's use of the Controlled Accounts to interposition and charge markups to retail customers. Notably, the account opening documents for the Controlled Accounts, which were dated August 2003, indicate that those accounts did not exist at the time of the 1997 letter. Further, the letter says nothing about the Firm's trading accounts or how its use of such accounts would affect the Firm's markups.

annual reviews, but the record indicates that FINRA staff looked at only one leg of one Trade Set. And as we have held, FINRA's failure to identify a deficiency during an examination does not excuse a violation.[46] The responsibility for complying with regulatory requirements cannot be shifted to regulatory authorities.

Finally, Marcus Lane claims that the prices he charged the customers were "within the constraints of the market," but these claims lack merit.[47] Marcus Lane testified that trades published on TRACE are a "good definer of the constraints of the marketplace," but he does not cite any transactions reported on TRACE that would indicate a different prevailing market price than the Firm's initial purchase price in each of the Trade Sets.[48] As discussed above, to the extent there were any same-day transactions at a higher price than the Firm's initial purchase price, those transactions either occurred hours after the completion of the relevant Trade Set or involved significantly smaller volumes than the Round Lot transactions of the Firm here.[49] Thus,

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46 *Sanders*, 1998 WL 741105, at *6.

47 On appeal, Marcus Lane references testimony of Patrick S. Geraghty, a FINRA staff member in charge of fixed income products. Marcus Lane correctly notes that Geraghty acknowledged that it was possible that markups on distressed securities, under certain limited circumstances, could exceed five percent without being excessive. But the circumstances that Geraghty cited were "if the overall dollar profit associated with the transaction is going to be relatively small otherwise" and would not "cover the costs of the transaction." As discussed above, the record does not support the conclusion the Applicants had a basis for similar concerns when they included the multi-layer markups in the Trade Sets.

48 Among other attempts to justify the markups the Firm charged, Jeffrey Lane claims that FINRA's expert witness, Charles Myers, testified that the prices in the Trade Sets were "in line with the market both before and after the cited trades." Jeffrey Lane mischaracterizes Myers's testimony. The only trades that Myers described in such a way were not part of the Trade Sets, but rather were cited by Myers in showing how he determined what the applicable contemporaneous market prices were on or around the relevant dates. It was in this portion of Myers's testimony, in fact, that he noted that prices in the surrounding days (such as the ones being discussed in the quoted passage referenced by Jeffrey Lane) were *not* an appropriate measure of the prevailing market price. In any event, the NAC did not rely upon his testimony, and neither do we.

Similarly, Jeffrey Lane claims on appeal that the prices the Firm charged to customers for the Euro-denominated Tower bonds were the "same or less" as the market price of unspecified "Tower corporate bonds." Jeffrey Lane, however, introduced no evidence to support this claim, nor did he cite any authority or evidence to support the theory that the contemporaneous market price of a security can be determined by looking to the prices of another security, even if issued by the same company. *Cf. Sanders*, 1998 WL 741105, at *5-6 (rejecting arguments that prices charged for warrants correlated with prices of common stock and units because evidence indicated that market for common stock and units was controlled by one firm).

49 *See supra* note 16.

those trades do not provide a useful indication of the prevailing market price. Absent evidence to the contrary, the Firm's contemporaneous cost of obtaining the bonds in the initial purchase from a broker-dealer is the best indicator of prevailing market prices because the initial purchase transaction occurred "between informed market professionals."[50] Further, Marcus Lane cannot cite transactions between the Firm and the Controlled Accounts (at prices he set) as indicators of the prevailing market price. Applicants also claim that these trading practices are widespread in the industry, but they cite no evidence to support this assertion; nor would such a claim excuse violative conduct.

3. Marcus Lane's excessive markups on nine of the Trade Sets were fraudulent and violated Exchange Act Section 10(b) and Rule 10b-5 thereunder and NASD Rule 2120.

In addition to violating Rules 2110 and 2440, undisclosed excessive markups are fraudulent when they are done with scienter.[51] We sustain FINRA's findings that, with respect to the nine Trade Sets with aggregate markups of ten percent or higher, Marcus Lane violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and NASD Rule 2120, which prohibit

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50 *Salloum*, 1995 WL 215268, at *3.

Jeffrey Lane defends the markups, claiming that Marcus Lane "went in to buy bonds with below the market bids and that in assuming the risk he is free to mark up the bonds and offer them to customers still within the confines of the current bids and offers." But we have held that "[q]uotations only propose a transaction and do not reflect the actual result of a completed arm's-length sale" and "may have little value as evidence of the current market." *Adams Sec., Inc.*, Exchange Act Release No. 34028, 51 SEC 1092, 1994 WL 186827, at *2 (May 9, 1994).

51 *See Gonchar*, 2009 WL 2488067, at *7 (finding that interpositioning resulted in fraud where it was done with scienter and resulted in the charging of excessive and undisclosed markups).

Based on the finding that Marcus Lane charged fraudulently excessive markups, FINRA also found that Marcus Lane is subject to a statutory disqualification. *See supra* note 2. We have sustained FINRA findings that an applicant is subject to statutory disqualification where, as here, the applicant acted willfully. *See, e.g.*, *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *7-10 (Oct. 20, 2011); *Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at *12 & n.40 (Dec. 7, 2009), *aff'd*, *Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012). It is well established that a willful violation of the securities laws means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal quotation marks and citation omitted). The record demonstrates that Marcus Lane intentionally applied the markups to the transactions at issue without disclosing the details of those markups. We therefore agree with FINRA that he acted willfully.

material misrepresentations or omissions or the use of any manipulative or fraudulent device in connection with the purchase or sale of a security.[52]

The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[53] Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care ... to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[54]

We have held that, "[w]here a dealer knows the circumstances indicating the prevailing inter-dealer market price for the securities, knows the retail price that it is charging . . . and knows or recklessly disregards the fact that its markup is excessive . . . the scienter requirement is satisfied."[55] In order to further clarify which markups provide the basis for a finding of fraud, we have held generally that undisclosed markups of more than ten percent over the prevailing market price are so egregiously excessive that the markups themselves are evidence of scienter.[56]

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[52] FINRA determined that the Firm's markups of less than ten percent were not fraudulent because it found that "the fact that these transactions involved distressed securities provided a thin basis on which [Marcus Lane] could believe—albeit unreasonably—that these three markups were fair." We will not disturb FINRA's findings on this point. *But see infra* note 56.

[53] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[54] *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977); *Hollinger v. Titan Corp.*, 914 F.2d 1564, 1569-70 (9th Cir. 1990).

[55] *Meyer Blinder*, Exchange Act Release No. 31095, 1992 WL 216702, at *9 (Aug. 26, 1992). If markups are excessive, then a broker-dealer has an implied duty to disclose them. *See Gonchar*, 2009 WL 2488067, at *7 & n.20 (citing *Starr ex rel. Estate of Sampson v. Georgeson S'holders, Inc.*, 412 F.3d 103, 111 (2d Cir. 2005) (quoting *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 192 (2d Cir. 1998)); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996) (holding that a failure to disclose excessive markups violated Rule 10b-5); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 835 F.2d 1031, 1033 (3d Cir. 1987) ("The SEC has established through its enforcement actions the principle that charging undisclosed excessive commissions constitutes fraud.").

[56] *A.S. Goldmen*, 2001 WL 588039, at *3 ("We further have held that markups of more than 10 percent over the prevailing market price are evidence of scienter and have held such markups to be fraudulent."); *D.W. Wine Invs., Inc.*, Exchange Act Release No. 43929, 2001 WL 98581, at *2 (Feb. 6, 2001) ("[M]arkups on equity securities of more than 10% generally are fraudulent.").

We note that we have found markups of less than ten percent to be fraudulent, under certain circumstances. *See, e.g.*, *Gonchar*, 2009 WL 2488067, at *9 (finding that undisclosed markups under ten percent on certain convertible bond transactions were fraudulent where applicants recklessly disregarded that the markups were not reasonably related to the prevailing market price); *David E. Lynch*, Exchange Act Release No. 46439, 2002 WL 1997953, at *2-3

(continued...)

In nine of the Trade Sets, Marcus Lane charged markups exceeding ten percent. Marcus Lane charged the markups without disclosing them to the customers. There is no dispute that the written confirmations received by the retail customers failed to disclose the markups and that Marcus Lane did not inform the customers himself. Contrary to Marcus Lane's argument that the TRACE audit trails provided the requisite disclosure, the record supports a finding that they did not: even if the retail customers had access to the audit trails, they would have been misled into believing that the Controlled Accounts were other customers rather than proprietary accounts; and the five Tower bond Trade Sets did not appear on TRACE at all. Marcus Lane knew that there were no intervening inter-dealer trades regarding the bonds reported to TRACE; and the record does not demonstrate that he made an effort to ascertain the prevailing market price at the time he purchased the Tower bonds. Although Marcus Lane directed the pricing structure of the Trade Sets, he betrayed the customers' trust by concealing the fact that he was charging excessive markups.[57] His conduct was at least reckless and strongly supports a finding that he violated the antifraud provisions.

4. NASD Rules 2320, 2440, and 2120 are, and were applied in a manner, consistent with the Exchange Act.

Each of the NASD Rules regarding the markups at issue in this matter were consistent with the Exchange Act because, as required under Section 15A(b)(6) of the Exchange Act, the rules at issue were "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . , and, in general, to protect investors and the public interest."

Rule 2320 was consistent with the purposes of the Exchange Act because it prohibited member firms and associated persons from engaging in a type of conduct that generally harms investors—interpositioning a third party between the member and the best available market. This conduct denies the investor the best available price for the securities at issue and, therefore, reduces the investor's profits. When we approved a change to Rule 2320 in 2009, we noted that the rule would continue to prohibit interpositioning "that is unnecessary or violates a member's general best execution obligations—either because of unnecessary costs to the customer or

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(Aug. 30, 2002) (finding that undisclosed markups under ten percent on certain collateralized mortgage obligation transactions were fraudulent where trader knew that the markups were not reasonably related to the prevailing market price). Indeed, undisclosed, excessive markups constituting any percentage may be fraudulent if done with scienter.

57 *See Gonchar*, 2009 WL 2488067, at *9 (finding that applicants acted with scienter where customers relied on applicants' pricing and applicants exacerbated the lack of transparency by not disclosing the interpositioning and markups).

improperly delayed executions."[58] Further, we find that FINRA applied Rule 2320 here in a manner consistent with the purposes of the Exchange Act. As described above, Marcus Lane's interpositioning harmed the Firm's customers and resulted in excessive prices.

Rule 2440 also was consistent with Section 15A(b)(6) of the Exchange Act. The rule protected investors by requiring member firms to charge customers a fair price, taking into account all relevant circumstances.[59] Charging a fair price promotes just and equitable principles of trade and is designed to prevent fraud or conduct that harms investors. Because we sustain FINRA's finding that Marcus Lane charged the Firm's customers unfair and excessive markups that were not correlated to the contemporaneous market price for the securities at issue, we find that FINRA applied Rule 2440 in a manner consistent with the purposes of the Exchange Act.

Finally, Rule 2120 was designed to prevent fraudulent and manipulative acts and practices because it prohibited members and their associated persons from effecting transactions in, or inducing the purchases or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance. Therefore, it was consistent with the purposes of the Exchange Act.[60] This rule, which has remained unchanged for approximately seventy years, enabled NASD (now FINRA) to "continue to enforce these overarching provisions that express FINRA's core regulatory objectives and allow FINRA to effectively protect investors and the public interest."[61] FINRA properly found that Marcus Lane fraudulently charged excessive markups. We therefore find that FINRA applied Rule 2120 in a manner consistent with the purposes of the Exchange Act.

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58 *Order Approving Proposed Rule Change as Modified by Amendment No. 1 Thereto Amending Rule 2320 Regarding Best Execution and Interpositioning*, Exchange Act Release No. 60635, 2009 WL 2900773, at *2 & nn.15-16 (Sept. 8, 2009).

59 *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change*, Exchange Act Release No. 72208, 2014 WL 2120449, at *4 (May 21, 2014); *Order Approving Proposed Rule Change and Amendment No. 1 Thereto to Expand the Scope of NASD Rule 2440 and Interpretive Material 2440-1 Relating to Fair Prices and Commissions to Apply to All Securities Transactions*, Exchange Act Release No. 57964, 2008 WL 2971906, at *2 (June 13, 2008) (stating that the excessive markup rule will "protect investors").

60 *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *4 (July 3, 2008) (observing FINRA's belief that transferring NASD Rule 2120 into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes was consistent with the provisions of Exchange Act Section 15A(b)(6), which requires that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest), *Rule Change Approved Without Modification*, 2008 WL 4468749 (Sept. 25, 2008).

61 *Id.*

C. Jeffrey Lane's Supervisory Violations

1. Jeffrey Lane violated NASD Conduct Rule 3010 when he prepared deficient WSPs.

We sustain FINRA's findings that Jeffrey Lane violated NASD Conduct Rule 3010 when he prepared deficient WSPs. Rule 3010 required member firms to "establish and maintain" a supervisory system "reasonably designed to achieve" regulatory compliance.

We have held that a member firm violated Rule 3010 where its supervisory procedures relating to the pricing of securities did not explain "the manner in which Firm personnel were to make" a determination about whether an independent market for the security existed and whether the price charged was consistent with the prevailing market price.[62] Likewise, we have emphasized the importance of members providing a "mechanism" to detect violations of the markup rules, as well as to detect interpositioning.[63] This is consistent with FINRA's articulation that WSPs "serve as a 'frontline' defense to protect investors from fraudulent trading practices and help to ensure that members are complying with rules designed to promote the transparency and integrity of the market."[64] The WSPs that Jeffrey Lane prepared did not identify the individual responsible for supervision at the Firm and also did not set forth how and when the designated supervisor should conduct supervisory reviews. As a result, as the NAC found, the WSPs did not help to protect investors.

As the NAC found, the WSPs were also deficient because they did not address interpositioning, even though the Firm regularly engaged in that practice. Such a failure is inconsistent with Rule 3010(b)(3)'s requirement that WSPs "shall include the . . . responsibilities of each supervisory person as these relate *to the types of business engaged in* . . . ." (Emphasis added). The failure of the WSPs to cover a topic that was regularly implicated by its trading practices contradicts Jeffrey Lane's argument on appeal that the supervisory system was appropriately tailored for a firm of its size and was "written to emphasize the nature of the firm's business."

Finally, as discussed above, the WSPs repeatedly characterized FINRA's 5% Policy as optional, but omitted crucial FINRA guidance on how to apply the 5% Policy, including FINRA statements that markup patterns of "5% or even less" could be considered unfair and that members needed to provide "bona fide evidence" to counter the presumption that its contemporaneous cost was the prevailing market price of a security.[65] As discussed, the Firm

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62 *Sanders*, 1998 WL 741105, at *7.

63 *Sheldon*, 1992 WL 353048, at *14.

64 *Notice to Members 98-96*, 1998 NASD LEXIS 121, at *2 (Dec. 1998).

65 Jeffrey Lane contends that his omission of these aspects of the 5% Policy was "meant to intend a heightened awareness of the 5% markup policy and in no way 'strongly suggest' that

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repeatedly charged markups exceeding five percent and failed to provide evidence justifying those markups. Given the inclusion in the WSPs of statements suggesting that the 5% Policy was unreasonable for distressed bonds (which the Firm routinely traded), these omissions increased the likelihood of violative markups and provide an additional basis for finding the WSPs deficient. Accordingly, we find that Jeffrey Lane violated Rule 3010 by preparing deficient WSPs.

Jeffrey Lane argues that the Firm's WSPs "had been tested and approved by the NASD District Office in its Annual Examinations" and claims that examiners had only identified one deficiency in the WSPs, which was not related to markups. But we have rejected similar arguments, noting that associated persons cannot shift their compliance burden to FINRA.[66]

Jeffrey Lane contends that FINRA *Notice to Members 98-96*, which was referenced in the NAC's decision, is "simply an advisory" and does not provide "authority for establishing violations" because it has not been "incorporated into the Rule regarding supervisory procedures [since the Notice was issued in 1998]."[67] The NAC considered the notice as a "source of guidance," which the NAC is entitled to do. Although the notice contains specific recommendations about the kinds of information that FINRA believes should be included in WSPs, it does not "mandate[e] any particular type or method of supervision."[68] For example, the notice suggests that WSPs (1) identify the individual responsible for supervision; (2) describe the supervisory steps and reviews to be undertaken by that individual; (3) describe the frequency of such reviews; and (4) describe the manner in which the reviews are to be documented.[69] The NAC considered these four factors, finding that the WSPs addressed none of them. But, as discussed above, the NAC also considered other factors and other authority in reaching its determination that Jeffrey Lane violated Rule 3010(a). Given the nature of the Firm's business,

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trades 'would often' exceed the 5% guideline." But we fail to see how omitting elements of the 5% Policy from the Firm's WSPs indicates increased concern about its adherence to the policy.

66 *Rita H. Malm*, Exchange Act Release No. 35000, 1994 WL 665963, at *8 n.40 (Nov. 23, 1994) (rejecting contention that "because the NASD noted no markup, pricing, or other 'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

67 Jeffrey Lane also contends that he complied with the requirements of the Notice to Members regarding the identification of supervisory personnel, in that he was designated as the Firm's principal in charge of supervision, but he conceded in his hearing testimony that the WSPs he drafted did not contain the other specifications set forth in *Notice to Members 98-96*.

68 *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *8.

69 *Id.*

we find no impropriety in the NAC's use of the notice in supporting its findings, coupled with its analysis of additional authority and record evidence.[70]

2. Jeffrey Lane failed reasonably to supervise Marcus Lane when he approved the transactions without reviewing the aggregate markup for each Trade Set.

In addition to requiring WSPs that are reasonably designed to achieve compliance, we have held that "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."[71] The duty to supervise requires "reasonable" supervision, which is "determined based on the particular circumstances of each case."[72] We have held that supervisors violate supervisory requirements if a firm violates FINRA's markup rules, even where the WSPs did not set forth specific requirements for the review of markups.[73] Based on the circumstances discussed above, Jeffrey Lane's supervision of Marcus Lane was not reasonable.

Jeffrey Lane was the principal responsible for supervision, and he does not dispute the relevant facts regarding his supervisory role. Instead, he attempts to justify the fairness of the markups, rather than specifically address the quality of his supervision of Marcus Lane. He states that he approved the Trade Sets for a number of reasons we have rejected above in the discussion of Marcus Lane's markup violations.[74] With respect to his supervisory role, he claims that he acted reasonably by reviewing each transaction within the Trade Sets individually, evaluating whether a given stage complied with the 5% Policy rather than looking at the aggregate markup for an entire Trade Set.[75]

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70 *See Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 WL 2508169, at *2-3 & n.10 (Oct. 11, 1985) (discussing the specifications in *Notice to Members 98-96*, along with other record evidence, in support of finding that a firm's supervisory procedures lacked necessary provisions).

71 *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 WL 5328765, at *10 n.22 (Dec. 19, 2008) (setting forth the supervisory responsibilities of NASD members under Rule 3010).

72 *Id.* at *10 n.26.

73 *See Palumbo*, 1995 WL 630926, at *6 n.54 (Oct. 26, 1995).

74 These reasons include the need to protect the Firm's net capital position and that the Firm's approach to pricing was consistent with industry practice.

75 In addition to his attempts to justify the markups themselves, Jeffrey Lane contends that he had conducted his supervisory duties properly in other respects (by, for example, preparing annual supervisory reports). But such a claim is irrelevant to our consideration of his failure to supervise with respect to the transactions at issue here. *See Albert Vincent O'Neal*, Exchange Act Release No. 34116, 1994 WL 234316, at *5 (May 26, 1994) (finding that "the test is whether

(continued...)

As discussed above, Jeffrey Lane conceded that he was aware of all elements of the Trade Sets, including the timing of each individual leg, the amounts of the markups at each step, and the fact that Marcus Lane set the prices for the relevant transactions by using the Controlled Accounts. Given this awareness, Jeffrey Lane was obligated to question the aggregate amounts of the markups from the point of the Firm's initial purchase price, not merely at each individual leg of the Trade Set. We find that Jeffrey Lane violated Rule 3010 by failing reasonably to supervise Marcus Lane after the Firm repeatedly charged its customers fraudulent and excessive markups.[76]

3. Rule 3010 is, and was applied in a manner, consistent with the Exchange Act.

Rule 3010 required that FINRA member firms implement and maintain supervisory systems designed to prevent violations of rules and statutory provisions such as the markup provisions at issue here. We have found that Rule 3010 was consistent with the purposes of the Exchange Act, under which the rules of a registered securities association must "prevent fraudulent and manipulative acts and practices, [and] promote just and equitable principles of trade," and reaffirm that finding here.[77] In finding Rule 3010 to be consistent with the purposes of the Exchange Act, we noted that the Commission "has long emphasized that the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme."[78] Based on our determination to sustain FINRA's finding that Jeffrey Lane's supervisory failures did not provide the Firm's customers protections against fraudulent or unfair trading practices, we find that FINRA applied Rule 3010 here in a manner consistent with the purposes of the Exchange Act.

(...continued)
[respondent's] supervision was reasonably designed to prevent the violations at issue, not . . . whether, if all the many other supervisory functions he performed were taken into account, his overall supervisory performance somehow earned him a hypothetical passing grade"). He further claims that the customers "have realized tremendous returns on the vast majority of the securities that [the Firm] sold to them," without explanation how such a claim relates to the quality of his supervision.

76 As discussed, Jeffrey Lane's violation of Rule 3010 also resulted in his violation of Rule 2110. *See supra* note 3. And, as FINRA found, because Jeffrey Lane failed reasonably to supervise Marcus Lane with a view to preventing his violations of the antifraud provisions of the federal securities laws, he is subject to a statutory disqualification. *See supra* note 5.

77 *See Order Granting Approval of a Proposed Rule Change to Adopt Rules Regarding Supervision in the Consolidated FINRA Rulebook, as Modified by Amendment No. 1*, Exchange Act Release No. 71179, 2013 WL 6794111, at *31-32 & n.230 (Dec. 23, 2013).

78 *Id.*

D. Applicants' Rule 8210 Violations

1. FINRA investigated the Firm's markups and requested information pursuant to Rule 8210.

On March 6, 2009, FINRA requested that the Firm provide, by March 27, 2009, nine categories of information regarding the trades at issue. On May 27, 2009, FINRA received responsive documents for only five of the nine categories. FINRA did not receive documents or information that responded to four categories: (1) "the ownership breakdown and the identity of the individuals with investment authority for" the Controlled Accounts; (2) a "list identifying any and all [Firm] accounts involved in each transaction, as well as copies of the respective New Account Form and subsequent updates, if any"; (3) copies of all communications regarding the trades at issue, including, among other things, Bloomberg messages; and (4) all electronic communications sent and received by Marcus Lane from January 1, 2006 through December 31, 2007.

Instead of providing information responsive to those four categories, Jeffrey Lane sent FINRA a letter on March 23, 2009, stating that he had "already provided significantly all the information that is currently being requested," that he "could send all of [the Firm's] boxes containing all of [the Firm's] historical records" because the Firm was out of business, and that he could "provide assent to Bloomberg for them to provide . . . the messages" because the Firm had terminated its Bloomberg services. According to an Assistant Director in FINRA Market Regulation's Fixed Income Group, who filed a declaration in the proceeding below, FINRA needed information about the outstanding four categories "to determine what information, if any, Marcus Lane relied on when he priced the [Trade Sets], whether he communicated with the customers or Jeffrey Lane about the transactions, and who the beneficial owners were of the [Controlled Accounts]."

In late June 2009, FINRA requested that Applicants provide information regarding the remaining four categories by July 3, 2009. The letter clarified that the only manner in which FINRA could obtain the Bloomberg messages was for one of the Applicants to sign and return an enclosed form. The letter advised Applicants that "Bloomberg has agreed to waive charges for processing the messages" and instructed them to "not make any changes to the form's standard language." Marcus Lane e-mailed FINRA on July 1, but did not provide the requested information. Instead, the e-mail stated that he had "provided all records requested," that "FINRA's Bloomberg representative" told him that FINRA should subpoena the Bloomberg messages, and that he already "offered to send all records for the 15 years [the Firm] acted as a broker dealer."

FINRA staff, in a July 6 e-mail to Marcus Lane, explained that it could not obtain the Bloomberg messages in the manner he suggested because it does not have subpoena power and reiterated the need for one of the Applicants to sign the authorization form previously provided. On that same date, FINRA again requested that Applicants provide information about the same four outstanding categories by July 17, 2009. FINRA's request reminded Applicants of the process for obtaining the Bloomberg messages and asked Applicants to submit the authorization form by July 13, 2009. The request also asked Applicants to contact FINRA by July 17, 2009, so that it could copy and return a hard drive containing Firm communications that FINRA understood to be in Marcus Lane's possession.

On July 15, 2009, Marcus Lane e-mailed FINRA but did not provide the requested information. Instead, he stated that FINRA already had access to all the requested information during fifteen previous annual audits, that he would not sign the Bloomberg authorization form because he would be obligated to pay $2,000 in fees, and that "the nature of [the Controlled Accounts] . . . has been provided on several occasions in the annual audit." In response, on July 16, 2009, FINRA explained that information obtained during previous audits did not excuse Applicants' obligation to provide information requested pursuant to Rule 8210, that FINRA still needed the outstanding information, that a signed Bloomberg authorization form was still required, and that Bloomberg would not charge fees for accessing the messages.

Applicants did not respond. Consequently, on July 31, 2009, FINRA issued a Notice of Suspension to each Applicant, to become effective on August 24, 2009, if they did not provide information about the remaining four categories. In August 2009, Applicants requested a hearing and insisted that they already had provided all requested information, except for the Bloomberg authorization form, which they continued to refuse to sign.

On September 26, 2009, Marcus Lane e-mailed FINRA, stating that he would sign the Bloomberg authorization form, provide FINRA with access to the Firm's hard drive, and ask Jeffrey Lane to "look for the new account forms."[79] Marcus Lane also disclosed the ownership details of the Controlled Accounts, stating: "During 2006 and 2007 I was responsible for risk management and investments in [the Firm and the Controlled Accounts] and ownership was 80% myself and 20% for Jeff."[80] In October 2009, after FINRA received the Firm's Bloomberg messages and copied the Firm's hard drives, a FINRA Hearing Officer granted FINRA's motion to dismiss the suspension proceeding without prejudice.

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79 The record contains a new account form for only one of the Controlled Accounts, although FINRA found that "the Lanes satisfied [the] request [for the other Controlled Account's new account form] in some other fashion."

80 Applicants, in delivering this information, did not explain the inconsistency with their earlier position that they already had provided all information.

2. Applicants violated FINRA Rules 8210 and 2010 by failing to respond to FINRA's requests in a timely manner.

Rule 8210(a)(1) requires a person subject to FINRA's jurisdiction to provide information upon FINRA's request.[81] From March to August 2009, FINRA sent multiple Rule 8210 requests to Applicants seeking information about the Trade Sets.[82] The record supports FINRA's findings that Applicants failed to provide the requested information by the various deadlines set in the successive Rule 8210 requests and failed to provide all information until almost seven months after the initial request. We therefore sustain FINRA's finding that Applicants failed to respond in a timely manner in violation of Rules 8210 and 2010.[83]

Applicants argue that they responded fully and timely. But the record contradicts their assertion, and they offer no evidence otherwise. Applicants state that they responded to all Rule 8210 requests made in 2007 and 2008. While that may be true, the conduct at issue in this proceeding relates to Applicants' failure to respond in a timely manner to Rule 8210 requests that were made in 2009.[84] Applicants argue that they had provided authorization to retrieve Bloomberg messages in connection with FINRA's Rule 8210 request made in 2007. But the 2007 authorization covered a shorter period of time (October 1, 2006 through December 31, 2006) than the authorization sought by FINRA in 2009, which covered January 1, 2006 through

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81 *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *4 (Nov. 8, 2007).

82 Applicants terminated their respective registrations on April 24, 2009 and therefore were under FINRA's jurisdiction when the requests were made, because FINRA's jurisdiction continues for two years after such termination. *See* NASD Bylaws, Article V, Section 4 (providing that, within two years after the effective date of termination of registration, a "person whose association with a member has been terminated . . . shall continue to be subject to the filing of a complaint . . . based upon conduct that commenced prior to the termination . . . or upon such person's failure . . . to provide information requested"); *Lee Gura*, Exchange Act Release No. 11414, 2004 WL 2363871, at *2 n.7 (Oct. 20, 2004) (finding that applicant was subject to NASD's jurisdiction where Rule 8210 request was made within two years after applicant terminated his registration).

83 *See Erenstein*, 2007 WL 3306103, at *6-7 (finding that applicant's production of tax returns after deadline set forth in Rule 8210 request was failure to provide timely response in violation of Rule 8210). Jeffrey Lane's Rule 8210 violation also constitutes conduct inconsistent with just and equitable principles of trade. *Supra* note 3.

84 Jeffrey Lane seeks to admit into the record FINRA's 2007 and 2008 Rule 8210 requests along with his responses to those requests. But as we have made clear, Applicants' compliance during 2007 and 2008 is not in dispute or the basis for the Rule 8210 violation. We therefore reject his request.

December 31, 2007 and specifically focused on the Trade Sets.[85] Likewise, Marcus Lane argues that FINRA already had ownership information about the Controlled Accounts after having conducted annual audits of the Firm. But he does not point to any record evidence in support of that claim.

Jeffrey Lane argues that he provided all information that was within his control and that the only outstanding items included the Bloomberg authorization form and the Firm's hard drive, both of which were under Marcus Lane's control. But FINRA's Rule 8210 requests, which were sent to both Applicants, instructed that either of the Lanes could sign the Bloomberg authorization form, and it is undisputed that neither signed the form until approximately three months later. Moreover, FINRA did not receive timely ownership information about the Controlled Accounts, which either of the Applicants could have provided.

Rule 8210 is the principal means by which FINRA obtains information from FINRA member firms and associated persons in order to detect and address industry misconduct.[86] The rule therefore is consistent with the purposes of the Exchange Act.[87] Here, FINRA found that

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85 The NAC did not include Applicants' failure to produce the Bloomberg authorization form in its findings regarding the Rule 8210 violation. The NAC found that "Market Regulation agreed to modify its request based on cost considerations, and the Lanes provided the Bloomberg authorization form once Market Regulation addressed those cost concerns in a clear manner." But we find the record demonstrates otherwise. Beginning with the June 26, 2009 Rule 8210 request, FINRA staff made it clear that either of the Applicants needed only to sign a Bloomberg authorization form in order for FINRA to gain access to the Firm's Bloomberg messages and that any charges Bloomberg ordinarily would assess would be waived. Over the next three months, FINRA staff repeatedly explained the circumstances to Applicants, but Applicants refused to cooperate. As with the other outstanding categories of information, the record demonstrates that Applicants could have responded much sooner than they did, and this provides additional support for the NAC's finding of a Rule 8210 violation.

86 *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (Nov. 8, 2007) (stating that SROs lack subpoena power and instead must rely on Rule 8210 as a "vitally important" tool to acquire information and satisfy an obligation to police the activities of its members and associated persons).

87 *See* Exchange Act Section 15A(b)(6) (requiring that registered securities association's rules be designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities, and, in general, to protect investors and the public interest); *Order Approving Proposed Rule Change*, Exchange Act Release No. 42036, 1999 WL 961340, at *2 (Oct. 19, 1999) (finding that amending the definition of "person associated with a member" in the By-Laws of the NASD would expand Rule 8210's applicability and thereby "promote the objectives of Section 15A(b)(6) of the Act by helping the NASD obtain necessary information to conduct its regulatory investigations and proceedings").

Marcus Lane violated Rule 8210 by hampering FINRA's ability to investigate possible improprieties with respect to the Trade Sets. We therefore find that FINRA applied Rule 8210 in a manner consistent with the purposes of the Exchange Act.

E. Procedural Arguments

Applicants make various challenges to the fairness of these proceedings, including that the panel members who considered the case were incompetent and biased against them; that FINRA's procedures were (and the statutory scheme that provides for Commission review is) weighted in favor of Market Regulation staff; and that resolution of the matter was, according to Jeffrey Lane, "unreasonably delay[ed]" due to FINRA staff's "negligence in pursuing an extended fishing expedition . . . ." As discussed below, we find no merit to Applicants' various arguments.

Jeffrey Lane claims that the chief hearing officer "displayed an unusual bias and hostility towards the Petitioners at the same time exhibiting a favored bias toward" FINRA staff who, he further claims, were "determined to manufacture a case against Petitioner[s] to validate its authority." According to Jeffrey Lane, FINRA "has pursued the case as a vendetta for challenging the conduct of its review . . . ." He also asserts that Market Regulation "dominated over 80% of the time allowed for the Hearing" and "had at least four witnesses, PowerPoint presentations and four attorneys burning the time." As discussed above, we believe there was a strong basis for the allegations against Applicants. We also find that the proceedings were conducted in a fair manner and that Applicants were given a full opportunity to develop a defense to FINRA's allegations.[88]

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88 Jeffrey Lane claims that Applicants were prevented from "drawing out the glaring dissimilarities between the present case and the cases upon which FINRA provided for authority and upon which they based their case." But, as FINRA pointed out in its opposition brief, the transcript page count demonstrates that Applicants' cross-examination was more than fifty percent longer than Market Regulation's direct examination. Moreover, Applicants were able to cross-examine witnesses on both days of the hearing and were afforded latitude in their manner of cross-examination. As the NAC noted, "when [Marcus Lane's] questioning of a FINRA analyst drew objections, the Hearing Officer explained at length why his questioning was inappropriate and guided him on what proper questioning would consist of." Applicants also had the opportunity to distinguish authority cited by Market Regulation by including such arguments in their briefs. Rule 9235 grants the hearing panelists broad discretion to "do all things necessary and appropriate to discharge his or her duties," including "regulating the course of the hearing" and "resolving any and all procedural and evidentiary matters." It is also well established that "[a]dverse rulings, by themselves, generally do not establish improper bias." *Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 WL 1362796, at *9 (May 15, 2009) (citing *Scott Epstein*, Exchange Act Release No. 59238, 2009 WL 223611, at *18 (Jan. 30, 2009), *aff'd*, No. 09-1550 (3rd Cir. 2010)).

Nor is there support for Marcus Lane's contention that the panel members were not qualified to decide the case because of their lack of expertise regarding the kind of distressed debt securities at issue in the case. Indeed, there is nothing in the record regarding the panel members' background or experience. The panel's decision, moreover, was well-reasoned, suggesting that the panel was qualified. Further, only the NAC's decision is before us.[89] And in any event, Applicants had a full opportunity to introduce evidence regarding the particular circumstances surrounding the trades at issue and the market for such securities—but largely declined to do so. Moreover, we have carefully reviewed the record and, as discussed, find ample support for FINRA's findings of violation.[90]

Applicants also complain generally about the regulatory structure governing FINRA disciplinary actions. Marcus Lane stated that "the plaintiff's organization hire[d] the judge and jury to support monetary awards for itself," and Jeffrey Lane asserted that, because the Commission is "supportive" of FINRA, Applicants cannot get a fair hearing. But courts repeatedly have rejected such challenges to the FINRA disciplinary structure, and Applicants have offered no supportable basis for a contrary conclusion.[91]

Finally, although there was an extended period between when FINRA's investigation began and when the final FINRA decision was issued, as discussed above, at least some of the fault for that delay rests with Applicants, who failed to cooperate with FINRA staff. Marcus

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89 "'[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review.'" *Erenstein*, 2007 WL 3306103, at *8 n.26 (citing *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 4958612 (Nov. 8, 2006)). Marcus Lane supports his claim of FINRA's incompetence by observing that FINRA's "convoluted multi-leg trading analysis also illustrates [its] lack of understanding in trading." As indicated above, we consider FINRA's approach in analyzing the pricing at issue entirely appropriate.

90 The NAC conducted a *de novo* review of the record and made its own independent findings, including a determination to reduce the sanctions imposed on Applicants. As we have noted, the Hearing Panel decision is largely irrelevant in an appeal before the Commission. Moreover, our *de novo* review mitigates any harm that may have resulted. *Erenstein*, 2007 WL 3306103, at *8 (rejecting applicant's challenges to Hearing Panel decision and noting that the NAC conducted its own *de novo* review, which coupled with the Commission's review, mitigates any harm that may have resulted).

91 *See Siegel v. SEC*, 592 F.3d 147, 152-53 (D.C. Cir. 2010) (discussing statutory provisions authorizing NASD to conduct disciplinary proceedings against its members, subject to the requirement that it provide fair process, and noting the Commission's oversight of such proceedings); *see also Saad v. SEC*, 718 F.3d 904, 907 (D.C. Cir. 2013) (acknowledging FINRA's power to "adopt rules governing the conduct of its members and of persons associated with its members," and to "bring[ ] disciplinary proceedings to adjudicate violations, which are subject to review by the Commission").

Lane also delayed the proceedings when he requested that the hearing be rescheduled.[92] We also note that, while Jeffrey Lane asserts generally that "the more time that passes the harder it becomes to represent any defense," he identifies no specific instances in which Applicants were prejudiced, and we are unaware of any.[93]

III. Sanctions

Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[94] As discussed below, we find the sanctions imposed on both Applicants to be consistent with the statutory requirements and sustain them.

A. FINRA's bar of Marcus Lane in all capacities and its order that he pay disgorgement of $218,582, plus prejudgment interest, is neither excessive nor oppressive.

We agree with FINRA's characterization of Marcus Lane's markup violations as egregious and, based on our assessment of all factors bearing on the remedial nature of the sanctions FINRA imposed, we find them to be neither excessive nor oppressive. As we have stated, "[t]he charging of excessive markups [i]s a serious breach of [an applicant's] obligation to deal fairly with its customers."[95] Marcus Lane's interpositioning of the Controlled Accounts between the market and the Firm's retail customers, which resulted in excessive and fraudulent

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92 In order to accommodate Marcus Lane's request, FINRA continued a pre-hearing conference and rescheduled the hearing, resulting in a delay of approximately five months.

93 *See Pellegrino*, 2008 WL 5328765, at *16 & n.58 (finding no prejudice resulted from length of proceeding and rejecting applicant's claim that passage of time was unfair) (citing *Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2004) (evaluating whether length of delay in filing NASD complaint prejudiced applicant and finding no prejudice where applicant's ability to present a defense was not harmed by the passage of time since the alleged misconduct)); *Larry Ira Klein*, Exchange Act Release No. 37835, 1996 WL 597776, at *6 (Oct. 17, 1996) (finding no prejudice resulted from NASD's three-year investigation). We note that FINRA proceedings are not subject to any statute of limitations. *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *22 (July 2, 2013) (finding that "the disciplinary authority of private self-regulatory organizations ('SROs') such as [FINRA] is not subject to any statute of limitation") (citation omitted), *petition denied*, 751 F.3d 472 (7th Cir. 2014).

94 15 U.S.C. § 78s(e)(2). Applicants do not allege, and the record does not show, that FINRA's sanctions imposed an undue burden on competition.

95 *Nicholas A. Codispoti*, Exchange Act Release No. 24946, 48 SEC 842, 1987 WL 755546, at *4 (Sept. 29, 1987).

markups, showed a complete disregard for this obligation.[96] Marcus Lane acted with scienter, committed repeated violations over the course of several months, and benefitted financially from the violations, as the owner of the Controlled Accounts and eighty percent owner of the Firm.

There are no mitigating circumstances that warrant reducing the sanctions FINRA imposed. Marcus Lane contends that we should treat as mitigating that the customers "generated extraordinary returns" on these transactions, but the customers would have made even more money if he had not charged fraudulent, excessive markups. FINRA treated the sophistication of the customers as somewhat mitigating,[97] but such a finding does not justify the violations Marcus Lane committed and does not cause us to question FINRA's decision to bar him.[98] Under the circumstances, Marcus Lane's actions pose too great a risk to the markets and investors to allow him to remain in the securities industry.

Marcus Lane also challenges FINRA's disgorgement order, which was based on the amount of money that Marcus Lane personally gained from the markups,[99] by claiming that "taxes were paid on the compensation [disgorgement amount] [FINRA] is seeking to extort."[100]

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96 *See, e.g., Sheldon*, 1992 WL 353048, at *13 (finding that "interpositioning of favored accounts between the dealer market and non-favored accounts [that] resulted in fraudulent, effective markups of as much as ten percent" was "particularly egregious"); *Palumbo*, 1995 WL 630926, at *9 (stating that recklessly overcharging customers without justification demonstrates "a marked insensitivity to [the] obligation to deal fairly with customers").

97 *See FINRA Sanction Guidelines*, at 7 (listing as one of the principal considerations in determining sanctions, as a potentially mitigating factor, "the level of sophistication of the injured or affected customer").

Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013). We also acknowledge that the Sanction Guidelines "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute." *Guidelines*, at 1.

98 *See Lester Kuznets*, Exchange Act Release No. 23525, 48 SEC 551, 1986 SEC LEXIS 1001, at *7 (Aug. 12, 1986) (holding that the fact that customers were "experienced investors" does not give a registered representative "license to make fraudulent representations"), *aff'd*, 28 F.2d 844 (D.C. Cir. 1987).

99 FINRA calculated the disgorgement amount by adjusting all profits that exceeded a five percent markup (which FINRA found "might still be excessive"), to reflect Marcus Lane's ownership of eighty percent of the Firm and 100 percent of the Controlled Accounts, resulting in a "reasonable approximation of [Marcus Lane's] ill-gotten gains" at $218,582, to which it added prejudgment interest.

100 In cases where, as here, the record demonstrates that the respondent obtained a financial benefit from his misconduct, the Sanction Guidelines state that adjudicators may properly "order

(continued...)

But we have held that a registered representative is entitled to no modification "based upon taxes . . . paid."[101] He also contends that the disgorgement order "disregards the need to fund operations," but as discussed above, the Firm cannot use excessive markups to make up for losses on other transactions.

In assessing the appropriate sanction to impose on Marcus Lane, FINRA looked to its Sanction Guidelines, which it promulgated to achieve greater consistency, uniformity, and fairness in its sanctions.[102] The Guidelines do not address interpositioning violations directly, but they discuss violations involving excessive markups and fraudulent or reckless omissions. FINRA appropriately looked to the Guidelines for excessive markups and fraud in fashioning its sanction for Marcus Lane's violations for the markups the Firm charged in the Trade Sets. For excessive markups, the Guidelines recommend a 30-day suspension or, in egregious cases, up to two years or a bar, plus a fine of $5,000 to 10,000, plus the gross amount of the excessive markups. For fraudulent or reckless omissions, such as Marcus Lane's failure to disclose the markups at issue here, the Guidelines recommend a fine of $10,000 to 100,000 and, in egregious cases, a bar. For all of the violations at issue here (including interpositioning), FINRA also looked to the principal considerations applicable to all sanction determinations under the Guidelines. We agree that the sanctions FINRA imposed on Marcus Lane are consistent with the Guidelines. We further find that the sanctions will "have the salutary effect of deterring others from engaging in the same serious misconduct."[103]

(...continued)
that the respondent's ill-gotten gain be disgorged and that the financial benefit . . . derived by the respondent be used to redress harms suffered by customers." *Guidelines*, at 5. The Guidelines also recommend disgorgement in cases, such as this one, where "the case involves widespread, significant, and identifiable customer harm and the respondent has retained substantial ill-gotten gains." *Guidelines*, at 10.

On appeal, Marcus Lane further contends that disgorgement is inappropriate because none of the customers is requesting "reimbursement" and that the customers "would have difficulty claiming any damages" in a court of law. The assertion that the customers would not be able to establish damages from Marcus Lane's misconduct is disputable. But, in any event, the purpose of a disgorgement order is to deny the respondent the benefit of ill-gotten gains. *See, e.g., Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *13 n.51 (Oct. 23, 2009) (citing *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)), *aff'd*, 398 F. App'x 603 (D.C. Cir. 2010).

101 *Laurie Jones Canady*, Exchange Act Release No. 41250, 54 SEC 65, 1999 WL 183600, at *10 (Apr. 5, 1999), *aff'd*, 230 F.3d 362 (D.C. Cir. 2000).

102 *Neaton*, 2011 WL 5001956, at *12 & n.38.

103 *Gordon*, 2008 WL 1697151, at *13 & n.75 ("[W]e are mindful that although 'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" (quoting *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007))).

B. Jeffrey Lane's bar from associating with member firms in a principal capacity is neither excessive nor oppressive.

We also find barring Jeffrey Lane in a principal capacity for his supervisory failures to be neither excessive nor oppressive. As discussed above, the Firm's WSPs contained no provision for interpositioning, nor did they include specific procedures for the review of markups, including the specific steps and reviews to be undertaken by supervisory personnel and the frequency of such reviews. FINRA correctly found that these omissions "may have played some part in allowing Marcus Lane's violative conduct to escape detection." As discussed above, the lack of such provisions in the WSPs denied investors of crucial "frontline" defenses to help prevent the types of violations that occurred here.[104] Jeffrey Lane also failed reasonably to supervise Marcus Lane by ignoring numerous red flags. Jeffrey Lane reviewed all of the Trade Sets and was aware of the markup amounts Marcus Lane was charging to customers by interpositioning the Controlled Accounts he wholly owned between the Firm and its customers. The underlying violations were repeated, involved a significant amount of money, and occurred over a span of several months, involving eleven separate Trade Sets.

FINRA's Sanction Guidelines set out sanction recommendations for violations of Rule 3010 for both deficient WSPs and failure to supervise, the two types of violations we have found that Jeffrey Lane committed here.[105] The Guidelines recognize the following principal considerations in determining sanctions for deficient WSPs: (1) whether deficiencies allowed violative conduct to occur or to escape detection; and (2) whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.[106] The Guidelines recognize the following principal considerations in determining sanctions for a failure to supervise: (1) whether the respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny and whether individuals responsible for

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104 *See supra* note 64 and accompanying text.

105 For deficient WSPs, the Guidelines recommend a fine of $1,000 to $25,000 and, in egregious cases, recommend suspending the individual responsible in any or all capacities for up to one year. For failure to supervise, the Guidelines recommend a fine of $5,000 to $50,000 and, in egregious cases, recommend suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual. *Guidelines*, at 104.

106 *Id.* As discussed above, we agree with FINRA that the deficient WSPs allowed Marcus Lane's violations to occur, in that they did not address interpositioning and included language (without supporting authority) indicating that the 5% Policy did not apply in sales of distressed bonds.

Although the WSPs did not specifically identify Jeffrey Lane as the person responsible for supervision at the Firm, because Jeffrey Lane was designated as the Firm's FINOP and Chief Compliance Officer—coupled with the fact that Jeffrey Lane was one of only two principals at the Firm—we do not find that the deficient WSPs made it difficult to determine that he was in charge of supervision. Jeffrey Lane does not dispute his supervisory role.

underlying misconduct attempted to conceal misconduct from the respondent; (2) the nature, extent, size, and character of the underlying misconduct; and (3) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.[107]

As discussed above, this case presented numerous red flags that should have resulted in additional supervisory scrutiny of Marcus Lane's trading practices. Jeffrey Lane was aware of all elements of the Trade Sets, including the timing of each leg, the amounts of the markups at each step, and the fact that Marcus Lane alone set the prices for the relevant transactions by using the Controlled Accounts. Further, Jeffrey Lane owned twenty percent of the Firm, so his supervisory failures resulted in personal financial gain, which is an aggravating factor.[108]

There are no mitigating factors. Jeffrey Lane's claim of appropriate supervision with respect to other elements of the Firm's business—which we cannot assess based on the record before us—would not excuse his failures here. Likewise, his claim that he was not aware of what interpositioning was, even if true, does not provide any mitigation because participants in the securities industry "cannot be excused for lack of knowledge, understanding, or appreciation of [compliance] requirements."[109] Jeffrey Lane himself acknowledges that he "had over twenty years of experience in working with the NASD and FINRA as a FINOP and Compliance Officer." He also acknowledged that the Firm regularly engaged in transactions in which the Controlled Accounts purchased distressed bonds from the Firm and sold them back to the Firm before the bonds were sold to retail customers. This experience further undermines any argument that he was unaware of the rules regarding interpositioning.

C. The suspension and fine imposed for Jeffrey Lane's violations of Rule 8210 are neither excessive nor oppressive.

Rule 8210 "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations."[110] This rule is at the "heart of the self-regulatory system for the securities industry"[111] and is an "essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced."[112] "Failures to comply are serious violations because they subvert [FINRA's] ability to carry out its

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107 *Id.* at 103.

108 *Id.* at 7 (Principal Considerations in Determining Sanctions No. 17).

109 *Epstein*, 2009 WL 223611, at *21.

110 *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009).

111 *Id.*

112 *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 (Aug. 25, 2006).

regulatory responsibilities," threatening investors and the markets.[113] Rather than respond to FINRA's Rule 8210 requests, Applicants repeatedly asked FINRA to explain why it was requesting the information and offered up the entirety of the Firm's records without reviewing those records themselves. It is well established that an individual may not "second guess [ ]" a Rule 8210 request or "set conditions on their compliance."[114] The suspension and fine imposed on Jeffrey Lane is remedial because those sanctions will protect the investing public by encouraging timely cooperation essential to the prompt discovery and remediation of industry misconduct.[115] The sanctions also will deter others from ignoring FINRA's information requests.

The sanctions imposed on Jeffrey Lane are consistent with the Sanction Guidelines. If the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request made pursuant to Rule 8210, the Guidelines recommend suspending an individual "in any or all capacities for up to two years" and imposing a fine of $2,500 to $25,000.[116] The Guidelines identify three principal considerations for determining sanctions: the "[i]mportance of the information requested as viewed from FINRA's perspective"; the "[n]umber of requests made and the degree of regulatory pressure required to obtain a response"; and the "[l]ength of time to respond."[117]

We agree with FINRA that, "[f]rom FINRA's perspective, obtaining the requested ownership and investment authority information was critical to its investigation of the interpositioning scheme."[118] We acknowledge that Jeffrey Lane responded fully to FINRA's 2007 and 2008 Rule 8210 requests and belatedly provided some information a couple of months after FINRA's March 2009 Rule 8210 request, but he failed to provide timely information in response to four outstanding categories of information requested. The information covered by those categories was necessary to aid FINRA's investigation of the Controlled Accounts and how trades in the accounts affected the customers involved. Indeed, it was only after Applicants finally provided the outstanding information that FINRA was able to discern that the Controlled Accounts were proprietary and used in a manner that resulted in the violations at issue.

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113 *Plunkett*, 2013 WL 2898033, at *9 (citations omitted).

114 *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *8 (Jan. 30, 2009) (citations omitted).

115 The NAC determined not to sanction Marcus Lane in light of the bar that it imposed on him for the interpositioning and excessive and fraudulent markups.

116 *Guidelines*, at 33.

117 *Id.*

118 NAC Decision at 36.

We also agree with FINRA that the degree of regulatory pressure required to obtain a response "was substantial and is a highly aggravating factor."[119] FINRA made five Rule 8210 requests between March and July 2009 in an attempt to get responses to four of the categories of information requested. It took the institution of a disciplinary proceeding, the threat of an imminent suspension, and another Rule 8210 request before Applicants provided the responsive information several months later, in October 2009. That responsive information consisted of two sentences explaining ownership details about the Controlled Accounts, a signature on a Bloomberg authorization form, access to the Firm's hard drives, and production of a new account form for one of the Controlled Accounts.[120] Jeffrey Lane fails to offer any persuasive reason why he could not have provided this information in March 2009.

Jeffrey Lane argues on appeal that the $25,000 fine is a "misguided attempt to force [him] to pay FINRA's costs for manufacturing these false charges . . . ." But nothing in the record supports his argument. As discussed above, the record amply supports the imposition of a fine. Moreover, FINRA is entitled to, and did, assess costs separate and apart from the fine. The complaint informed Jeffrey Lane that he might be ordered to "bear such costs of [the] proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330." We find that FINRA acted well within its discretion in assessing the costs following the decision.[121]

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119 NAC Decision at 36-37.

120 As discussed above, these are the only documents included in the record, but FINRA found that Marcus Lane and Jeffrey Lane provided the new account form for the second Controlled Account "in some other fashion." *See supra* note 79.

121 *See* FINRA Rule 8330 (stating that disciplined member shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances); *Oppenheim*, 2005 WL 770880, at *5 & n.26 (citing *John M. W. Crute*, Exchange Act Release No. 40474, 53 SEC 1112, 1998 WL 652110, at *5 (Sept. 24, 1998), *aff'd*, 208 F.3d 1006 (5th Cir. 2000) recognizing NASD's broad discretion to impose costs and upholding imposition of costs)).

We find the sanctions imposed on Jeffrey Lane to be neither excessive nor oppressive.

An appropriate order will issue.[122]

By the Commission (Chair WHITE and Commissioners AGUILAR and PIWOWAR; Commissioners GALLAGHER and STEIN not participating).

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

122 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

APPENDIX

Trade Set	Date	Bond	Firm Purchases From	Firm Sells To	Quantity	Buy Trade Price	Sell Trade Price	Aggregate Markup Percentage	Aggregate Profit
1	10/20/2006 (12:02 – 12:41 PM)	Werner	B-D	Controlled Account	1020	8.6875	9.25	15.11%	$13,387.50
			Controlled Account	Customer	1020	9.75	10.00		
2	10/24/2006 (2:31 – 3:31 PM)	Werner	B-D	Controlled Account	1500	8.50	8.75	11.76%	$15,000.00
			Controlled Account	Customer	1500	9.25	9.50		
3	10/31/2006 (11:35 AM –12:10 PM) (As noted in opinion, Trade Set 3 was divided into two separate sales transactions to the same customer).	Werner	B-D	Controlled Account	3000	8.375	8.75		
			Controlled Account	Customer	2000	8.875	9.00	7.46%	$12,500.00
			Controlled Account	Customer	1000	9.250	9.50	13.43%	$11,250,00
4	12/20/2006 (12:46 – 12:55 PM)	Collins & Aikman	B-D	Controlled Account	1130	3.375	3.375	7.41%	$2,625.00
			Controlled Account	Customer	1130	3.5	3.625		
5	1/10/2007 (3:47 – 3:59 PM)	Collins & Aikman	B-D	Controlled Account	2000	3.875	4.00	6.45%	$5,000.00
			Controlled Account	Customer	2000	4.125	4.125		
6	2/23/2007 (12:00 – 12:15 PM)	Werner	B-D	Controlled Account	1900	7.25	7.50	10.34%	$14,250.00
			Controlled Account	Customer	1900	7.75	8.00		
7	3/20/2007 (12:35 – 2:53 PM)	Tower	B-D	Controlled Account	2000	10.64	11.30	20.02%	$42,600.00
			Controlled Account	Customer	2000	12.30	12.77		
8	3/29/2007 (11:35 AM – 12:01 PM)	Tower	B-D	Controlled Account	2000	7.33	7.65	40.93%	$60,000.00
			Controlled Account	Customer	2000	9.91	10.33		
9	3/29/2007 (12:36 – 1:10 PM)	Tower	B-D	Controlled Account	3000	6.425	6.70	39.92%	$76,950.00
			Controlled Account	Customer	3000	8.65	8.99		

Trade Set	Date	Bond	Firm Purchases From	Firm Sells To	Quantity	Buy Trade Price	Sell Trade Price	Aggregate Markup Percentage	Aggregate Profit
10	3/29/2007 (2:38 – 3:00 PM)	Tower	B-D Controlled Account	Controlled Account Customer	4052	6.425 7.38	6.70 7.71	20.00%	$52,068.20
11	5/2/2007 (10:17 - 11:00 AM)	Tower	B-D Controlled Account	Controlled Account Customer	1000	7.71 8.50	8.00 8.83	14.53%	$11,200.00

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74269 / February 13, 2015

Admin. Proc. File No. 3-15701

In the Matter of the Application of

ROBERT MARCUS LANE
and
JEFFREY GRIFFIN LANE

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Robert Marcus Lane and Jeffrey Griffin Lane is hereby sustained.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74276 / February 13, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4025 / February 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16388

In the Matter of

Joseph A. Caramadre, CPA

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Joseph A. Caramadre ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 1995 through at least December 2010, Respondent was the President, Chief Executive Officer and majority owner of Estate Planning Resources, Inc. For a portion of the time in which he engaged in the conduct underlying the plea agreement described below, Respondent was also a registered representative of registered broker-dealers, several of whom were

also registered as investment advisers, making him an associated person of the investment advisers. Specifically, the Respondent was a registered representative during the following periods: from October 1997 through September 1998; from April 1999 through March 2001; from February 2002 through August 2003; and from July 2005 through December 2005. Respondent is 54 years old and is a former resident of Cranston, Rhode Island, and is currently incarcerated at FMC Devens in Ayers, Massachusetts.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On November 19, 2013, Caramadre pled guilty to one count of wire fraud in violation of Title 18 United States Code, Section 1343 and one count of conspiracy in violation of Title 18 United States Code, Section 371 before the United States District Court for the District of Rhode Island, in United States v. Joseph Caramadre, 11cr186-S. On December 16, 2013, a judgment in the criminal case was entered against him. He was sentenced to a prison term of six years followed by three years of supervised release. On February 3, 2014, Caramadre was ordered to make restitution in the amount of $46,330,077.61.[1]

3. In connection with that plea, Respondent admitted that from 1995 through August 2010, he executed a scheme to defraud financial institutions and terminally-ill individuals. On his own behalf and on the behalf of investors, friends and family members, Caramadre purchased variable annuities from insurance companies and designated terminally-ill individuals as annuitants. Caramadre fraudulently obtained significant sums of money from the insurance companies that issued these variable annuity policies by making or causing to be made material misrepresentations and omissions to terminally-ill individuals, their family members and care-givers, in order to obtain identity information and signatures for the annuity opening documents. Indeed, Caramadre concealed from the terminally-ill individuals and their family members that their identities would be used on annuities that Caramadre and others purchased. Caramadre also took steps to prevent the terminally-ill individuals from understanding the nature of the documents they were signing.

4. Further, Caramadre made or caused to be made material misrepresentations and omissions to various insurance companies, falsely informing the insurance companies that some of the annuity owners were "friends," "clients" or "acquaintances" of the terminally-ill individuals who were named as annuitants.

5. Caramadre's was convicted of a felony involving the purchase or sale of a security and arose out of the conduct of the business of a broker-dealer. His misconduct occurred when he was a registered representative of registered broker-dealers, several of whom were also registered as investment advisers, making him an associated person of the investment advisers.

[1] The court found that Caramadre and his co-defendant, Raymour Radhakrishnan, were jointly and severally liable for $33,197,425.26 and Caramadre was solely liable for the remaining $13,132,652.35 because these losses were sustained before Radhakrishnan's involvement in the scheme.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act; and

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9725 / February 13, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74273 / February 13, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3638 / February 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16386

In the Matter of

TRACI J. ANDERSON, CPA,
TIMOTHY W. CARNAHAN,
AND
CYIOS CORPORATION

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted against: (i) Traci J. Anderson, CPA ("Anderson") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and 102(e)(1)(iii)[2] of the Commission's

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1 Section 4C provides, in relevant part, that:

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

2 Rule 102(e)(1)(iii) provides, in pertinent part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found...to have willfully violated, or

Rules of Practice; and (ii) Timothy W. Carnahan ("Carnahan") and CYIOS Corporation ("CYIOS") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Exchange Act.

II.

After an investigation, the Division of Enforcement and the Office of the Chief Accountant allege that:

A. RESPONDENTS

1. **Traci J. Anderson, CPA,** age 46 and a resident of Charlotte, North Carolina, has functioned as a contract CFO to CYIOS Corporation since July 2007. From 2003 through August 2010 Anderson was the sole proprietor of a PCAOB-registered public accounting firm and was engaged as CYIOS Corporation's auditor from September 2005 until she resigned in July 2007 to become the company's internal accountant. Anderson consented to a PCAOB order dated August 12, 2010 pursuant to which she was barred from being an associated person of a registered public accounting firm. Additionally, Anderson consented in January 2012 to an order pursuant to which she forfeited her CPA license in North Carolina. Anderson remains licensed as a CPA in Florida.

2. **Timothy W. Carnahan,** age 47 and a resident of Pompano Beach, Florida, is the founder and is disclosed as the sole officer and director of CYIOS. Between 2006 and November 2012, Carnahan signed and certified each of CYIOS's periodic filings in the capacities of principal executive and principal financial officer.

3. **CYIOS Corporation,** a Nevada corporation headquartered in Washington D.C., is a Department of Defense contractor providing: systems integration; web and database development; business process management and improvement; and solutions for compliance with Sarbanes-Oxley regulations and Defense Contract Audit Agency and performance-based contracting for government contractors. Its common stock was registered under Section 12(g) of the Exchange Act and was traded on the OTC Bulletin Board (Symbol: CYIO). After receiving a letter dated May 12, 2014 from the Commission's Division of Corporation Finance informing CYIOS that it was not in compliance with its reporting requirements under Section 13(a) of the Exchange Act, CYIOS filed a Form 15-12G on May 30, 2014 terminating the registration of its common stock.

B. ANDERSON WAS UNLAWFULLY ASSOCIATED WITH CYIOS AFTER THE PCAOB BARRED HER FROM ASSOCIATING WITH A REGISTERED PUBLIC ACCOUNTING FIRM

4. Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") states that it is "unlawful for any person that is ... barred from being associated with a registered public accounting firm [...] willfully to become or remain associated with any issuer [...] in an accountancy or financial management capacity [...] without the consent of the [PCAOB] or the

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willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

Commission." Section 105(c)(7)(B) also states that it is unlawful for any "issuer [...] that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission."

5. On August 12, 2010, the PCAOB filed a settled action against Anderson and her firm, Traci Jo Anderson, for multiple deficiencies in audit work performed between 2007 and 2009 on public companies engagements unrelated to CYIOS (the "PCAOB Order").[3] The PCAOB Order, which was and is available on its website, revoked the registration of her accounting firm and barred Anderson from being an associated person of a registered public accounting firm.

6. Following the issuance of the PCAOB Order, Anderson advised each of her firm's public company audit clients that she must withdraw because she had been barred by the PCAOB as a result of violations of PCAOB rules and auditing standards.

7. Around the same time, Anderson orally notified Carnahan—who was already aware of the PCAOB's investigation of Anderson— and CYIOS's then Director of Finance about the existence of the PCAOB Order and directed him to the PCAOB website. Consequently, CYIOS and Carnahan knew or, in the exercise of reasonable care, should have known that Anderson had been barred from associating with a registered public accounting firm.

8. After the PCAOB Order was issued, Anderson continued to perform accountancy and financial management services for CYIOS. It was Carnahan's decision to maintain CYIOS's business relationship with Anderson. Anderson's services included providing CFO and general accounting services, assisting CYIOS's CEO in preparing Commission filings – including Forms 10-Q and 10-K – as well as other prohibited services. CYIOS paid Anderson at least $244,035 for her services between August 2010 and June 2014.

9. Anderson never requested or received consent from the PCAOB or the Commission to remain associated with CYIOS in this capacity.

C. <u>CYIOS FAILED TO MAKE PERIODIC FILINGS REQUIRED UNDER SECTION 13(A) OF THE EXCHANGE ACT</u>

10. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Rules 13a-1 and 13a-13 require, respectively, the filing of accurate annual and quarterly reports (i.e., Forms 10-K and 10-Q).

11. CYIOS ceased making filings required under Section 13(a) of the Exchange Act after it filed its third quarter 2012 Form 10-Q in November 2012. Specifically, CYIOS failed to file its 2012 Form 10-K, its 2013 Forms 10-Q and 10-K, and its first quarter 2014 Form 10-Q.[4] CYIOS filed a Form 15-12g on May 30, 2014 which terminated the registration of its common

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[3] *See* PCAOB Release No. 105-2010-007, available at http://pcaobus.org/Enforcement/Decisions/Documents/Traci_Jo_Anderson.pdf.

[4] CYIOS filed Forms 12b-25 to disclose it was unable to file its 2012 Form 10-K or first quarter 2013 Form 10-Q when due, but did not do so for subsequently due filings.

stock. Carnahan authorized each filing CYIOS made with the Commission and was responsible for CYIOS not making filings required under Section 13(a) of the Exchange Act.

D. CARNAHAN FAILED TO ASSESS INTERNAL CONTROLS

i. Legal Requirements

12. In relevant part, Rule 13a-15(a) states that every issuer with a class of securities registered under Section 12 of the Exchange Act and was either required to file an annual report pursuant to Section 13(a) or 15(d) of the Exchange Act for the prior fiscal year or had filed an annual report for the prior fiscal year, must maintain internal control over financial reporting ("ICFR"). Rule 13a-15(f) defines ICFR as process designed by the issuer's executive management to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.

13. Rule 13a-15(c) requires management of such issuers to evaluate, with the participation of the principal executive and principal financial officers (or persons performing similar functions) the effectiveness of the issuer's ICFR as of the end of each fiscal year. Rule 13a-15(c) states that there are many different ways to conduct an evaluation of internal controls over financial reporting to meet the requirements of this rule, and that an issuer can comply with this requirement by conducting an evaluation in accordance with interpretive guidance issued by the Commission in Release No. 34-55929, *Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, (the "2007 Guidance").

14. The registrant "must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting," as stated in the instructions to Regulation SK, Item 308, *Internal Control over Financial Reporting*. The 2007 Guidance similarly states "Management is responsible for maintaining evidential matter, including documentation to provide reasonable support for its assessment.

15. Rule 13a-14, *Certification of Disclosure in Annual and Quarterly Reports*, requires each Form 10-Q and 10-K to include certifications signed by each principal executive and principal financial officer of the issuer (or persons performing similar functions). Among other things, the certifying officers must confirm that the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by [the] report.

ii. Carnahan's Assessments of Internal Control over Financial Reporting

16. CYIOS's Forms 10-K for the fiscal years ended December 31, 2009, 2010, and 2011 include management's report on ICFR, as required by Exchange Act Rule 13a-15(c) and Item 308 of Regulation S-K. CYIOS also included management's report on ICFR in its 2010, 2011, and

2012 Forms 10-Q.[5] CYIOS stated in each report that management had assessed ICFR using the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission in Internal Control – Integrated Framework (the "COSO Framework").

17. These statements were false. CYIOS either did not evaluate ICFR, or did not evaluate ICFR using the COSO Framework.

18. In addition, CYIOS did not maintain any documentation of management's assessments of ICFR. As discussed in the 2007 Guidance and stated in the instructions to Regulation S-K, Item 308, a registrant "must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting."

19. For these reasons, Carnahan's certifications that CYIOS had assessed ICFR using the COSO Framework were false.

E. <u>OFFERS AND SALES OF SECURITIES</u>

20. After filing its 2009 Form 10-K on February 26, 2010, CYIOS issued, in exchange for consulting services and debt conversions, common stock under a registration statement filed on Form S-8 (No. 333-147695, filed November 29, 2007). This registration statement incorporated by reference subsequent filings, including CYIOS's 2009 Form 10-K and 2010 Forms 10-Q.

F. <u>VIOLATIONS</u>

21. As a result of the conduct described above, Anderson willfully violated, CYIOS violated, and Carnahan caused CYIOS's violation of, Section 105(c)(7)(B) of Sarbanes-Oxley, which prohibits a person barred from associating with a registered public accounting firm from willfully becoming or remaining associated with an issuer in an accountancy or financial management capacity without consent of the PCAOB or the Commission and prohibits an issuer that knew or, in the exercise of reasonable care, should have known of such a bar, to permit such an association, without the consent of the PCAOB or the Commission.

22. As a result of the conduct described above, CYIOS violated, and Carnahan caused CYIOS's violations of, Sections 17(a)(2) and 17(a)(3) of the Securities Act. Section 17(a)(2) makes it unlawful to, in the offer or sale of securities, obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order make the statements made, in light of the circumstances under which they were made, not misleading. Section 17(a)(3) makes it unlawful to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

23. As a result of the conduct described above, CYIOS violated, and Carnahan caused CYIOS's violations of, Section 13(a), and Rules 13a-1 and 13a-13 thereunder, which require

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[5] Issuers are not required to disclose its assessment of ICFR in quarterly filings, but CYIOS nonetheless included and asserted in each 2012 Form 10-Q that management had conducted an assessment of ICFR and concluded that it was "effective."

issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission.

24. As a result of the conduct described above, Carnahan violated Rule 13a-14 of the Exchange Act, which requires an issuer's principal executive and principal financial officer to attest that the company's "report does not contain any untrue statement of a material fact."

25. As a result of the conduct described above, Carnahan violated Rule 13a-15(c) of the Exchange Act, which requires each issuer's management, with the participation of the principal executive and principal financial officer, or persons performing similar functions, to perform an evaluation of the company's ICFR as of the end of each fiscal year.

III.

In view of the allegations made by the Division of Enforcement and the Office of the Chief Accountant, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford each Respondent an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing any violation and any future violation of Section 105(c)(7)(B) of Sarbanes-Oxley.

C. Whether, pursuant to Section 8A of the Securities Act, CYIOS and Carnahan should be ordered to cease and desist from committing or causing any violation and any future violation of Sections 17(a)(2) and 17(a)(3) of the Securities Act;

D. Whether, pursuant to Section 21C of the Exchange Act, CYIOS and Carnahan should be ordered to cease and desist from committing or causing any violation and any future violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder;

E. Whether, pursuant to Section 21C of the Exchange Act, Carnahan should be ordered to cease and desist from committing or causing any violation and any future violation of Rules 13a-14 and 13a-15;

F. Whether, pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice, Anderson should be censured or denied, temporarily or permanently, the privilege of appearing or practicing before the Commission as an accountant;

G. Whether, pursuant to Section 8A of the Securities Act and Section 21B of the Exchange Act, civil penalties should be levied against Respondents; and

H. Whether, pursuant to Section 8A of the Securities Act and Sections 21B and 21C, respectively, of the Exchange Act, CYIOS and Anderson should be subject to disgorgement with prejudgment interest.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If a Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9726 / February 13, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74275 / February 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16387

In the Matter of **SHIVBIR S. GREWAL, Esq.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Shivbir S. Grewal, Esq. ("Respondent" or "Grewal") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III, paragraph 3, below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Grewal, age 54, is and has been an attorney admitted to practice law in the State of California. Grewal served as outside counsel to Spectrum Pharmaceuticals, Inc. ("Spectrum") from at least January 1, 2010 through at least March 31, 2013. Spectrum is a biotechnology company engaged in the business of acquiring, developing, and commercializing drug products, including an oncology drug known as FUSILEV.

2. Spectrum is a Delaware corporation with its principal place of business in Henderson, Nevada. At all relevant times, Spectrum's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ National Market.

3. On January 19, 2015, a final judgment was entered against Grewal, permanently enjoining him from future violations of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933 ("Securities Act") in the civil action entitled <u>Securities and Exchange Commission v. Shivbir S. Grewal et al.</u>, Civil Action Number SACV 14-02026-JLS (DFMx), in the United States District Court for the Central District of California. In addition, Grewal was ordered to pay $30,343.17 in disgorgement, $997.68 in prejudgment interest, and a civil money penalty of $30,343.17.

4. The Commission's complaint alleged, among other things, that Grewal, in his capacity as outside counsel to Spectrum, learned on March 5, 2013 that Spectrum expected sales of FUSILEV – by far Spectrum's best selling drug – to be significantly lower in 2013 than previously anticipated; that Grewal sold 8,000 shares of Spectrum stock on March 7, 2013 based on that information; that Spectrum announced its reduced expectations concerning FUSILEV sales to the public on March 12, 2013, before which that information was non-public; that the price of Spectrum's common stock fell approximately thirty-seven percent following that announcement; and that Grewal avoided $30,343.17 in losses by selling Spectrum stock when he did. The Complaint also alleged that Grewal tipped his wife to sell Spectrum stock before the

March 12, 2013 announcement and that his wife sold 3,500 shares of Spectrum stock on March 11, 2013, thereby avoiding $14,499.05 in losses.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that Grewal is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-74277; File No. 4-681]

Proxy Voting Roundtable

AGENCY: Securities and Exchange Commission

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: The Securities and Exchange Commission will host a roundtable to explore ways to improve the proxy voting process. The roundtable will focus on universal proxy ballots and retail participation in the proxy process. Roundtable panelists will discuss the state of contested director elections and whether changes should be made to the federal proxy rules to facilitate the use of universal proxy ballots by management and proxy contestants. In addition, panelists will discuss the state law, logistical and disclosure issues presented by a possible universal proxy ballot process. Roundtable panelists also will discuss strategies for increasing retail shareholder participation in the proxy process, including how technology might affect retail participation and whether the format of disclosure could be improved to increase the engagement of shareholders and how the mechanics of voting could be improved to affect retail shareholder participation.

The roundtable discussion will be held in the multi-purpose room of the Securities and Exchange Commission headquarters at 100 F Street, NE, Washington DC on February 19, 2015 from 9:30 a.m. to approximately 1:00 p.m. The public is invited to observe the roundtable discussion. Seating will be available on a first-come, first-serve basis. The roundtable discussion will also be available via webcast on the Commission's website at www.sec.gov.

DATES: The roundtable discussion will take place on February 19, 2015. The Commission will accept comments regarding issues addressed at the roundtable until March 31, 2015.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (http://sec.gov/rules/other.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number 4-681 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-681. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please only use one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, Division of Corporation Finance, at 202-551-3440, or Raymond Be, Special Counsel, Division of Corporation Finance, at 202-551-3500, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

By the Commission.

Jill M. Peterson
Assistant Secretary

Dated: February 13, 2015

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Commissioner Stein
Disapproved

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74299; File No. SR-NASDAQ-2014-065)

February 18, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt New Rule 5713 and List Paired Class Shares Issued by AccuShares® Commodities Trust I

I. Introduction

On June 11, 2014, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to: (1) adopt listing standards for Paired Class Shares in new Rule 5713; and (2) list and trade Paired Class Shares ("Shares") issued by AccuShares® Commodities Trust I ("Trust") relating to the following funds pursuant to new Rule 5713: (a) AccuShares S&P GSCI® Spot Fund; (b) AccuShares S&P GSCI® Agriculture and Livestock Spot Fund; (c) AccuShares S&P GSCI® Industrial Metals Spot Fund; (d) AccuShares S&P GSCI® Crude Oil Spot Fund; (e) AccuShares S&P GSCI® Brent Oil Spot Fund; (f) AccuShares S&P GSCI® Natural Gas Spot Fund; and (g) AccuShares Spot CBOE® VIX® Fund (each individually, "Fund," and, collectively, "Funds").

The proposed rule change was published for comment in the Federal Register on June 23, 2014.[3] On August 6, 2014, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 72412 (June 17, 2014), 79 FR 35610 ("Notice").

4 15 U.S.C. 78s(b)(2).

change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On September 18, 2014, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change,[6] and on December 16, 2014, the Commission extended the deadline for Commission action until February 18, 2015.[7] The Commission received six comment letters regarding the proposal, including one from the Exchange and two from AccuShares Investment Management LLC ("Sponsor"), the sponsor of the Funds.[8] On February 10, 2015, the Exchange submitted Amendment No. 1 to the proposed rule change.[9]

This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

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5 See Securities Exchange Act Release No. 72779, 79 FR 47162 (Aug. 12, 2014). The Commission designated a longer period within which to take action on the proposed rule change and designated September 19, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

6 See Securities Exchange Act Release No. 73142, 79 FR 57150 (Sept. 24, 2014) ("OIP").

7 See Securities Exchange Act Release No. 73843, 79 FR 76428 (Dec. 22, 2014).

8 See Letter from Jack Fonss, CEO and Co-Founder of the Sponsor, to Kevin O'Neill, Deputy Secretary, Commission (Sept. 25, 2014) ("Sponsor Letter"); Letter from Robert E. Whaley, Valere Blair Potter Professor of Finance, Director, Financial Markets Research Center, Vanderbilt Owen Graduate School of Management, to Kevin O'Neill, Deputy Secretary, Commission (Oct. 8, 2014) ("Whaley Letter"); Letter from David B. Allen to Commission (Oct. 11, 2014) ("Allen Letter"); Letter from Mark Kassner to Commission (Oct. 13, 2014) ("Kassner Letter"); E-mail from Ned Cataldo, Chief Operating Officer and Co-Founder of the Sponsor, to Heather Seidel, Associate Director, Commission (Oct. 24, 2014) ("Sponsor E-mail"); Letter from Jurij Trypupenko, Associate General Counsel, Exchange, to Brent J. Fields, Secretary, Commission (Oct. 28, 2014) ("Exchange Letter"). All comment letters are available at: http://www.sec.gov/comments/sr-nasdaq-2014-065/nasdaq2014065.shtml.

9 In Amendment No. 1, the Exchange (a) corrected references to the entity that will be calculating and publishing the CBOE Volatility Index®, (b) deleted Commentary .05 to Rule 5713 due to its inapplicability to Paired Class Shares, and (c) made technical re-numbering changes to Rule 5713 as a result of the deletion of Commentary .05. Amendment No. 1 provided clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change, Amendment No. 1 is not subject to notice and comment.

II. Description of the Proposal

The Exchange proposes to adopt new Rule 5713, which permits the listing of Paired Class Shares, and to list and trade Shares of the Funds.

A. General Description of Paired Class Shares[10]

Paired Class Shares will be structured with the objective of providing investors with exposure to changes in an index or other numerical variable ("Underlying Benchmark"). Paired Class Shares will be issued by a trust on behalf of a fund, and each fund will be a segregated series of that trust.[11] Paired Class Shares will have values that are based on an Underlying Benchmark where the value of the underlying benchmark reflects the value of assets, prices, price volatility, or other economic interests ("Reference Asset").[12]

The trust for each fund of Paired Class Shares will always issue and redeem Paired Class Shares in pairs of shares of opposing classes of each fund: Up Shares and Down Shares. The values of the opposing classes will move in opposite directions as the value of the fund's Underlying Benchmark varies from its starting level. Up Shares will be positively linked to the fund's Underlying Benchmark, and Down Shares will be negatively linked to the fund's Underlying Benchmark.[13] The rate of linkage or leverage of a fund's Up Shares and Down Shares performance to the performance of the fund's referenced Underlying Benchmark will be

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10 A complete description of Rule 5713 and Paired Class Shares can be found in the Notice, supra note 3.

11 See NASDAQ Rule 5713(c).

12 See id. The Exchange states that other economic interests would include, for example, currencies, interest rates, non-investable economic indices, and other measures of financial instrument value. See Notice, supra note 3, 79 FR at 35611, n.11. The Exchange will file separate proposals under Section 19(b) of the Act before listing and trading each series of Paired Class Shares. See Commentary .02 to NASDAQ Rule 5713.

13 See NASDAQ Rule 5713(c).

one-to-one.[14] Each fund will use a mathematical formula to calculate the liquidation value attributable to each of its classes of Paired Class Shares ("Class Value") and to each share of each class ("Class Value per Share").[15]

Each fund will engage in regular distributions[16] and may also engage in special distributions[17] or corrective distributions.[18] Immediately after each distribution, the fund's

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14 See Notice, supra note 3, 79 FR at 35611.

15 See id. The Exchange represents that the mathematical formula is based on the following factors: (1) the value of the fund's assets; (2) the allocation of that value based on changes in the level of the fund's Underlying Benchmark, which may be limited, reduced, capped, or otherwise modified according to formula or pre-set parameters; and (3) the daily accrual of gain and income or loss on the assets of the fund, less the liabilities of the fund, as such gains, income losses, and liabilities are allocated to each class of the fund. See id. at n.12.

16 On a scheduled basis, funds would make regular distributions, paying a dividend to the class of shares that had increased in value since the last distribution. According to the Exchange, regular and special distributions will be made in the form of cash during the first six months of trading in Paired Class Shares. Thereafter, each fund will pay all or any part of any regular or special distribution in Paired Class Shares instead of cash, where further cash distributions would adversely affect the liquidity of the market for the fund's shares or impact the fund's ability to meet minimum Exchange distribution requirements. See id. at 35619 (further stating that all payments made in Paired Class Shares will be made in equal numbers of Up and Down Shares, and that, to the extent a share distribution would result in the distribution of fractional Paired Class Shares, cash in an amount equal to the value of the fractional Paired Class Shares will be distributed rather than fractional Paired Class Shares).

17 Funds would make special distributions when movement in the Underlying Benchmark exceeded a specified rate of change since the previous distribution. Special Distributions are designed to prevent rapid movements in the Underlying Benchmark from transferring all value in the fund either to the Up Shares or to the Down Shares. See id. (describing regular and special distributions to be made in the form of cash during the first six months of trading in Paired Class Shares, and thereafter, in Paired Class Shares instead of cash).

18 Funds would make corrective distributions when the trading price of a class of shares deviates from its class value by a specified amount for a specified period. Corrective distributions are designed to prevent the Up Shares and Down Shares from becoming locked in a persistent state of equal and opposite deviations from class value. In a

Underlying Benchmark participation or exposure will be reset, and the fund's Class Value per Share for each of its classes will be set to equal the lowest Class Value per Share of the two classes of Paired Class Shares.

Paired Class Shares of a fund will be created and redeemed in specified aggregations of equal quantities of Up Shares and Down Shares[19] at their respective Class Values per Share. Paired Class Shares can only be created or redeemed by authorized participants ("Authorized Participants").[20] Paired Class Shares creation and redemption transactions will only occur (a) for cash consideration, and (b) in equal pre-determined quantities of Up Shares and Down Shares.

B. The Exchange's Description of the Funds

The Exchange has made the following representations and statements in describing, among other things, the Funds, the corresponding Underlying Benchmarks, arbitrage, and distributions.[21]

The Shares will be offered by the Trust, which is a Delaware statutory trust.[22] Wilmington Trust, N.A., a national banking association, will serve as the trustee ("Trustee") and

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corrective distribution, a fund will issue each holder of Up Shares an equal number of Down Shares, and each holder of Down Shares an equal number of Up Shares.

19 A Creation Unit for each Fund will comprise 25,000 Up Shares and 25,000 Down Shares. See id. at 35612, n.14.

20 See id. at 35612.

21 The Commission notes that additional information regarding the Trust, the Funds, and the Shares, including risks, information relating to the Underlying Benchmarks and Reference Assets, Class Value and Class Value per Share calculations, creation and redemption procedures, trading halts and pauses, applicable Exchange trading rules, surveillance, information circulars, fees, disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. See Notice, supra note 3, and Registration Statement, infra note 22, respectively.

22 The Exchange states that the offer and sale of Paired Class Shares of each Fund will be registered with the Commission by means of the Trust's registration statement on Form

the investment advisor ("Investment Advisor") for each Fund. The Investment Advisor, which is chosen by the Sponsor, is responsible for investing each Fund's available cash in bills, bonds, and notes issued and guaranteed by the United States Treasury ("United States Treasury Securities") with remaining maturities of 90 days or less ("Eligible Treasuries") and over-night repurchase agreements collateralized by United States Treasury Securities ("Eligible Repos," and together with cash and Eligible Treasuries, collectively, "Eligible Assets"). State Street Bank and Trust Company ("State Street"), a Massachusetts trust company, will serve as the custodian, administrator, and transfer agent ("Custodian," "Administrator," or "Transfer Agent") for each Fund.[23]

The Underlying Benchmark of each Fund, other than the AccuShares Spot CBOE VIX Fund ("VIX Fund"), is constructed, calculated, and published by S&P® Dow Jones Indices LLC ("Index Provider").[24] The CBOE Volatility Index® ("VIX"), which is the Underlying

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S-1 under the Securities Act of 1933 ("Securities Act"). According to the Exchange, the Registration Statement was filed on March 18, 2014 and will be effective as of the date of such offer and sale. See Notice, supra note 3, 79 FR at 35615. The Commission notes that a pre-effective amendment No. 1 to the registration statement ("Registration Statement") was filed on July 17, 2014 (File No. 333-194666).

23 The Custodian will hold each Fund's securities and cash and will perform each Fund's Class Value and Class Value per Share calculations. As Administrator, State Street will, among other things, perform or supervise the performance of services necessary for the operation and administration of the Funds (other than making investment decisions or providing services provided by other service providers), including accounting and other fund administrative services. As Transfer Agent, State Street will, among other things, provide transfer agent services with respect to the creation and redemption of Creation Units. The Transfer Agent will receive from Authorized Participants creation and redemption orders and deliver acceptances and rejections of such orders to Authorized Participants as well as coordinate the transmission of such orders and instructions among the Sponsor and the Authorized Participants.

24 The Underlying Benchmarks for all of the Funds other than the VIX Fund are: (1) the S&P GSCI Spot index; (2) the S&P GSCI Agricultural and Livestock Spot index; (3) the S&P GSCI Industrial Metals Spot index; (4) the S&P GSCI Crude Oil Spot index; (5) the

Benchmark of the VIX Fund, is calculated and published by CBOE. According to the Exchange, both the Index Provider and CBOE are unaffiliated with the Trust and the Sponsor.[25] To the extent that an Underlying Benchmark is maintained by a broker-dealer or investment advisor, such broker-dealer or investment advisor will erect a "firewall" around personnel who have access to information concerning changes and adjustments to the Underlying Benchmark.[26]

As described above, the Trust will issue Shares on behalf of each Fund in offsetting pairs, where one constituent of the pair, the Up Shares, is positively linked to the Fund's Underlying Benchmark, and the other constituent, the Down Shares, is negatively linked to the Fund's Underlying Benchmark. Once created, a Fund's Paired Class Shares will trade independently of each other on the Exchange. The cash proceeds from the creation of Paired Class Shares may be held by a Fund only in Eligible Assets designed to preserve capital while earning an investment return that is consistent with the preservation of capital. Upon any redemption of a Fund's Creation Units by an Authorized Participant, the cash of the Fund will be used to pay the proceeds of the redemption to the redeeming Authorized Participant.

Each Fund engaging in a regular distribution,[27] a special distribution,[28] a corrective distribution,[29] or a net income distribution[30] will provide at least three business days' advance

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S&P GSCI Brent Crude Oil Spot index; and (6) the S&P GSCI Natural Gas Spot index, (collectively, "S&P GSCI Commodity Indices").

25 See Notice, supra note 3, 79 FR at 35615.

26 See id.

27 See supra note 16.

28 See supra note 17.

29 See supra note 18.

30 In a net income distribution, cash is distributed to investors based on income (after expenses) from the financial instruments held by the Fund.

notice (or longer advance notice as may be required by the Exchange)[31] of such an event. Each Fund engaging in a share split[32] will provide at least ten calendar days' advance notice (or longer advance notice as may be required by the Exchange) of such an event. In each instance, the Sponsor will notify the Exchange, and post a notice of such event and its details on the Sponsor's website (www.AccuShares.com). For regular distributions that occur on schedule, the Sponsor will cause a press release to be issued identifying the receiving class, the amount of cash, the amount of Paired Class Shares (if any), and any other information the Sponsor deems relevant regarding the distribution and will post this information on the Sponsor's website. With respect to special distributions, corrective distributions, and share splits, the information provided will include the relevant ex-, record, and payment dates for each such event and relevant data concerning each such event. These events will also be reported in press releases, on the Sponsor's website, and in current reports on Form 8-K as material events, as well as in the Fund's periodic reports.

C. Summary of the Comments

In the OIP, the Commission posed questions regarding the proposed rule change. Commenters responded to those questions and offered other comments as well. The comments are summarized below.

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[31] The Exchange states that it may determine that a longer notice is advisable in certain circumstances (e.g., an extended, or unexpected, market break).

[32] Reverse share splits will be declared to maintain a positive Class Value per Share for either the Up Shares or the Down Shares of an AccuShares Fund should the Class Value per Share of either class approach zero. Reverse share splits are expected to occur in the context of special distributions and are expected to be triggered after Class Value per Share declines below a specified dollar threshold as set forth in the applicable Fund prospectus.

1. The Effect of the Distributions on the Premiums and Discounts Between the Trading Price and Class Value Per Share

In response to Commission questions about the effect of the Funds' distributions on premiums and discounts,[33] the Sponsor asserts that the presence of regular, special, and corrective distributions will aid in the reduction of premiums and discounts.[34] With regard to both regular and special distributions, the Sponsor asserts that a Fund will make these types of distributions based on the movement of the Underlying Benchmark since the last distribution date, and will then reset the index to the current market level.[35] According to the Sponsor, two positive effects relating to potential discounts or premiums from regular and special distributions are: (1) an investor will enjoy an actual distribution relating to the index move rather than having to rely on trading out of an intrinsic gain that could be subject to market lags, frictions, or a lack of realizable trading price responsiveness; and (2) the index reset will re-equate the intrinsic share prices, having the effect of further highlighting any deviations between trading prices and Class Values, and consequently all investors (not just market professionals) will more clearly observe any premium or discount, and any investor can execute a trade in response to these deviations.[36]

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33 See OIP, supra note 6, 79 FR at 57157.

34 See Sponsor Letter, supra note 8, at 4. Similarly, the Exchange states that the corrective distribution feature is designed to prevent losses that have occurred in other ETPs in the past. See Exchange Letter, supra note 8, at 22-23. See also Notice, supra note 3, 79 FR at 35611 ("Immediately after each regular, special and corrective distribution, the Fund's Underlying Benchmark participation or exposure will be reset and the Fund's Class Value per Share for each of its classes will be set to equal the lowest Class Value per Share of the two classes of Paired Class Shares.").

35 See Sponsor Letter, supra note 8, at 4.

36 See id.

The Sponsor states its view that almost all premium and discount combinations of the Up Shares and Down Shares of a Fund will be readily cured by conventional arbitrage. According to the Sponsor, the corrective distribution is an investor safety feature, above and beyond conventional arbitrage, designed to remedy those unique scenarios where the material discount amount of one Fund share is exactly equal to the material premium amount of the opposing share.[37]

The Sponsor states that the corrective distribution[38] is expected to have both a preventative effect and a curative effect relating to premiums and discounts between trading prices and Class Values per Share.[39] The Sponsor asserts that the possibility of a corrective distribution will disincentivize market participants from buying or selling shares at material premiums or discounts to the Class Values per Share.[40] Relating to the curative impact, the Sponsor states that following the corrective distribution: (1) the discount class holder, potentially stranded by low available bid prices, would have the correct aggregate value (inclusive of index movements) in a 50/50 position in the discount shares and premium shares; and (2) a premium class holder would also have the correct aggregate value (inclusive of index movements) in a 50/50 position in discount shares and premium shares.[41] The Sponsor asserts that these positions would be unaffected by a single share class premium or discount, and would be readily saleable

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37 See id.

38 A corrective distribution will result in: (1) the investors holding the share class associated with the favorable index move to realize a gain equal to the realized move in the index; and (2) all investors receiving an equal quantity of each share class of a Fund. See id. at 5.

39 See id. at 4.

40 See id.

41 See id. at 5.

at a stable and readily identifiable price (especially because the Fund is limited to holding cash equivalents).[42] Authorized Participants, the Sponsor notes, may redeem these positions in sufficient aggregate amount.[43]

One commenter, who recommends that the Commission approve the proposed rule change, asserts that the regular, special, and corrective distributions will help prevent the significant premiums and discounts that have occurred in other ETPs in recent years.[44]

Another commenter expressed concern that the structure of Paired Class Shares will result in persistent premiums and discounts that will fundamentally invalidate the premise of the products in the market, making them misleading to investors.[45] This commenter asserts that the arbitrage mechanism will not work to keep each of the products trading closely to its intrinsic value; instead, the commenter argues that the arbitrage mechanisms will, in theory, keep the sum of the discount on one class and the premium on the other at zero. The commenter states its view that it is not economically possible to maintain intrinsic value in the secondary market, and predicts that any attempt to do so will lead to massive speculation in the products until they are pushed to a breaking point, at which point less-sophisticated investors will suffer significant losses.[46] To support these conclusions, the opposing commenter provides a number of hypothetical situations involving the trading relationship between the VIX index, VIX futures,

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42 See id.

43 See id.

44 See Whaley Letter, supra note 8, at 1-2.

45 See Kassner Letter, supra note 8, at 1.

46 See id. This commenter further states that, while his assertions regarding the possibility of persistent premiums and discounts and the potential failure of an effective arbitrage mechanism for Paired Class Shares focus on the proposed VIX Fund and VIX futures, the commenter points out that the same economic principles apply to any futures. See id.

and the proposed VIX Fund.[47] According to the commenter, the core of the issue is that the products are simply not hedgeable.[48] The commenter predicts that there will be very significant arbitrage pressures attempting to exploit the "economic perversity of the products" and significant activity around prices that reflect a corrective distribution.[49]

The Exchange asserted that underlying the opposing commenter's arguments regarding ineffective arbitrage is the misunderstanding that spot levels and futures levels are equivalent and interchangeable.[50] The Exchange agrees that global markets will be broadly inter-related, including spot markets, futures markets, stock markets, and bond markets, but argues that, in the case of volatility, and VIX in particular, the spot market is not "in line" and directly comparable with VIX futures prices.[51] To support this assertion, the Exchange cites guidance from the CBOE VIX Primer Basics on the educational section of CBOE's website.[52] Additionally, the Exchange states that, contrary to the assumptions implicit in the opposing commenter's numerical examples, the Fund's creations, redemptions, and other operations are not limited by VIX futures expiration dates.[53] The Exchange asserts that, uniquely, the intrinsic Class Values of the Funds

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47 See id. at 1-3.

48 See id. at 2.

49 See id.

50 See Exchange Letter, supra note 8, at 17.

51 See id. at 18. The Exchange asserts that the willingness of market participants to trade options overlying both the spot VIX and VIX futures demonstrates that the market understands the differences between spot VIX and the range of VIX futures prices. See id. at 19.

52 See id. at 18.

53 See id. at 16, n.28, 18.

are not dependent upon successful trading, rolling, or otherwise rebalancing of securities or futures contracts.[54]

The Exchange also asserts that one part of the arbitrage process for Paired Class Shares will operate the same way as it does for all exchange-traded funds ("ETFs"); namely, a share trading above or below an intrinsic Class Value can be transacted, hedged, and traded. Paired Class Shares have an additional arbitrage mechanism, according to the Exchange: intra-fund arbitrage—through the valuation and trading of both Up and Down Shares—limits the discounts, premiums, or any combination thereof of the share classes to a value indicated by the readily determinable net asset value of the Fund's cash equivalent assets.[55] The Exchange argues that arbitrage opportunities are uniquely easy to identify because of the direct observability of the Underlying Benchmark, the direct linkage of the intrinsic Class Values to the Underlying Benchmark, and the simplicity and very limited number of the moving parts in a creation or redemption—i.e., the two Fund Share prices versus the readily determinable value of the Fund's cash equivalent assets.[56]

2. The Ability of Investors to Understand the Operation of the Funds

The Sponsor asserts that retail investors and other market participants will be able to understand the Fund's redemption mechanics and the types and timing of distributions.[57] Generally, the Sponsor states that the Funds' distributions are limited to scheduled dates or the

54 See id. at 17.

55 See id.

56 See id.

57 See Sponsor Letter, supra note 8, at 6.

occurrence of large and rare underlying index moves.[58] The Sponsor asserts that movements of the underlying indexes will be easy to track using public sources and therefore concludes that investors will have the information necessary to transact in the Shares and respond to distributions.[59] In addition, the Sponsor represents that the consensus of qualified investors and market makers is that the frequency of the Funds' distributions is consistent with customary review (e.g., monitoring prices and returns) and customary reevaluation of share positions.[60]

The Sponsor states that the prospectus contains detailed examples, and the Funds' website will contain infographics describing each distribution as well as the courses of action available to investors.[61] The Sponsor also states that, except in limited and unanticipated conditions (listed in the prospectus), regular and special distributions will be made to shareholders in cash, and therefore investors will generally be making a straightforward decision with respect to deploying or maintaining received cash.[62] With respect to corrective distributions, the Sponsor states that they are a direct response to retail investor experiences in ETPs where obscure technical forces or market illiquidity have caused both large premiums and large discounts to persist.[63] The Sponsor asserts that these distributions, as a self-policing and self-

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58 See id. at 2.

59 See id.

60 See id. The Sponsor states that its opinions and views expressed in the Sponsor Letter were informed by conversations with the Exchange, prospective authorized participants, other market makers, traders, and qualified investors. See id.

61 See id. at 6.

62 See id.

63 See id.

corrections measure, are an alternative to real-time estimates of indicative portfolio values, which investors may not necessarily consider before transacting in ETP shares.[64]

The Sponsor also states that: (1) corrective distributions are expected to be rare; (2) without them, retail investors otherwise may be exposed to either paying a material premium relating to a purchase or suffering a material discount relating to a sale of Shares; (3) before receipt of a distribution, investors will see a Form 8-K, a notice from the Exchange, and a notice on the Fund's website; and (4) upon receipt of a corrective distribution, investors may take any of the following actions, all of which the Sponsor asserts are not materially different from the options available to investors upon the receipt of cash or shares from any distribution or traditional corporate action: (a) sell their entire positions for cash, (b) sell a portion of their positions for cash for a modulated exposure to the Fund index, or (c) sell part of a position and reinvest proceeds to maximize a particular market exposure.[65] According to the Sponsor, prospective investors view the corrective distribution feature as an effective balance of "newness" and "benefit" for the entire range of Fund shareholders.[66] The Sponsor states that the corrective distribution is expected to encourage more active and accurate market making and more liquidity-enhancing position-taking by Authorized Participants, all of which are more likely to actually reduce the likelihood and occurrences of a corrective distribution declaration.[67]

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64 See id.

65 See id. at 6-7.

66 Specifically, the Sponsor states that, while prospective participants with expertise in retail investing believed the corrective distribution feature to be engineered solely for the benefit of the retail investor and questioned whether institutional traders would lose profitable trading opportunities, market makers (including Authorized Participants) applauded the addition of a corrective distribution. See id. at 7. See supra note 60 (regarding with whom the Sponsor consulted).

67 See id.

The opposing commenter asserts that, because of the persistent premiums and discounts he predicts, investors would have to be extremely diligent in tracking their positions because the Up Shares might frequently turn into both Up Shares and Down Shares, which would result in inattentive investors paying fees to the issuer but not receiving any notional exposure whatsoever.[68] According to the commenter, an investor in the Shares would require extensive knowledge of the financial markets to understand why, when being required to re-enter the market after a distribution to reestablish a position, the product could be trading already at a significant premium or discount.[69] The commenter also states its view that the investor would have to have intimate knowledge of the VIX futures market to understand from where the premium or discount was actually derived.[70] The opposing commenter states that investors would likely receive Shares with the opposite economics for some distributions, and predicts that this would confuse them.[71] The commenter distinguishes regular share distributions, with which the commenter concedes investors are familiar, by stating that Share distributions would include Shares with the opposite economics and different tickers.[72] Further, the opposing commenter asserts that, unlike products that trade at or close to their intrinsic value, an investor in Shares needs to know a considerable amount of information at every point in time when investing in the product, including for example the coefficient of variation and the number of days there has been a premium or discount (in light of the corrective distribution threshold).[73] The opposing

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68 See Kassner Letter, supra note 8, at 3.

69 See id.

70 See id.

71 See id.

72 See id.

73 See id. at 4.

commenter also asserts that the investor also must check his or her account every day, to see if there has been a Special Distribution, and on every Distribution Date, to see what is in his or her account (i.e., whether there is cash or a neutral basket, which may be subject to fees).[74]

3. The Ability of Investors to Understand the Funds' "Resets" to the Then-Current Reference Index Value

The Sponsor states its view that the Funds are similar to comparable ETPs in the market and that, accordingly, it expects that both retail investors and other market participants will understand the effect of resets (which will occur when regular, special, or corrective distributions are made) on their investments in a Fund.[75] The Sponsor states that in other comparable ETFs and exchange-traded notes ("ETNs") the impact of resetting comes through the re-trading of futures, options, or other contracts either daily, monthly, or on another cycle, and that this conventional resetting has transaction costs that are often difficult to isolate within the context of overall fund performance.[76] Additionally, according to the Sponsor, because the traditional method of resetting is accomplished through the trading of underlying positions at telegraphed times under prescribed fund rules, ETFs and ETNs can be disadvantaged from having to be a "price taker" in possibly adverse or challenging markets.[77] The Sponsor states that the Funds' resets allow the Funds to reduce their transaction expenses and eliminate the need to transact in underlying positions. The Sponsor also asserts that individual investors will be able to more easily track and monitor the resets of the Funds than the resetting impact in conventional funds.[78]

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74 See id.

75 See id. at 7.

76 See id.

77 See id. at 7-8.

78 See id. at 8.

A supporting commenter asserts that the Funds would deliver exact holding period returns, which he contrasts to the returns of levered and inverse funds that implicitly rebalance daily and which he asserts can be a source of confusion for retail customers.[79]

4. The Adequacy of the Exchange's Suitability Rules

The Sponsor states its view that the Exchange's rules governing sales practices adequately ensure the suitability of recommendations regarding the Shares and that enhancement is unnecessary.[80] The Sponsor states that NASDAQ Rule 2111A requires that an exchange member have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the exchange member to ascertain the customer's investment profile.[81] According to the Sponsor, a customer's investment profile would, in general, include the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, and risk tolerance.[82] The Sponsor also states that the rule explicitly covers recommended investment strategies involving securities, including recommendations to "hold" securities.[83]

The Sponsor also discusses the Exchange's information circular. Prior to the commencement of trading of Fund shares, the Exchange will inform its members through an information circular of the suitability requirements of NASDAQ Rule 2111A. Specifically the information circular will remind members that, in recommending transactions in Shares, they

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79 See Whaley Letter, supra note 8, at 2.

80 See Sponsor Letter, supra note 8, at 8, 9.

81 See id. at 8.

82 See id.

83 See id.

must: (1) have a reasonable basis to believe that (a) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member, and (b) the customer can evaluate the special characteristics and is able to bear the financial risks of an investment in the shares; and (2) make reasonable efforts to obtain the following information: (a) the customer's age; (b) the customer's other investments; (c) the customer's financial situation and needs; (d) the customer's tax status; (e) the customer's investment objectives, experience, time horizon, liquidity needs and risk tolerance; and (f) such other information used or considered to be reasonable by such members or registered representatives in making recommendations to the customer.[84]

5. The Relationship Between the Funds' Holdings and Their Investment Objective

The Sponsor states its view that investors will understand that the Funds hold cash and cash equivalent securities, and the Cash Values per Share will be directly responsive to changes in the underlying index.[85] The Sponsor asserts that ETNs are similar to the Shares in that an ETN does not have identified "portfolio assets" and that this aspect of ETNs has been well understood.[86]

The Sponsor asserts that the Funds' structure is appropriate, and will result in certain advantages: (1) lower fund operating costs, because the Class Value per Share amounts are

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84 See id. at 8-9. In its comment letter, the Exchange repeated the Sponsor's statements regarding the Exchange's rules and information circular. See id. at 13-14.

85 See id. at 9.

86 See id. The Sponsor, however, distinguishes the Shares from ETNs in that, with ETNs, an investor is subject to the performance risk of the obligor and a market maker is subject to ETN creation and redemptions processes which are sometimes less standardized than ETF processes. See id. at 10.

directly related to an independent and readily observable index and there is no need for a Fund to incur trading costs over assets in an effort to track the index; (2) improved fund performance transparency, because the return of Shareholders will not be impacted by transactions costs that are difficult to observe and underlying assets whose pricing is opaque; (3) a higher certainty of redemption values because the Shares will be readily created and redeemed at a certain and readily determinable value, thereby eliminating the frictions often caused where (a) a potentially large number of in-kind securities are challenging to value or (b) a cash creation or redemption is based on trading illiquid securities or trading securities in a fast-moving market; and (4) direct indexing, which the Sponsor states prospective investors believe to be more easily followed through readily observable and free data services.[87]

6. Other Comments

One commenter recommends that the Commission approve the proposed rule change because, in its view, the AccuShares' products are simple and transparent, and will provide investors, institutions and retail customers alike with the returns that they want.[88] He also recommends approval of the proposed rule change because: (1) the Shares would provide exposure to spot market benchmarks that are popular to large segments of the asset management community; (2) the Up Shares and Down Shares are direct investments that track readily-observable spot market benchmarks, unlike the futures indexes, which he characterizes as complicated dynamic futures trading strategies; (3) changes in the values of the Up Shares and Down Shares would be purely mechanical and would correspond directly to the price changes in the underlying index, which is distinctly different from many current products; (4) unlike ETNs,

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87 See id. at 9-10.

88 See Whaley Letter, supra note 8, at 2.

investors in the Funds would have no credit risk; and (5) actively-managed products add market complexity, and the Paired Class Shares would not be actively-managed.[89]

Similarly, another commenter asserts that the Funds would be both highly relevant to a wide range of investors and highly approachable to all of them.[90] He asserts that indexes underlying the Funds are arguably better for individual investors because they are easier to follow than the indexes that underlie some existing products.[91] This commenter also asserts that the market has been clamoring for better spot market proxies since the beginning of the ETF market.[92] Further, the commenter recommends approval of the proposed rule change because the "best ETFs also help solve existing structural problems for traders and investors regarding term structure of price and/or volatility, beta to cash prices and tracking errors, and rebalancing inefficiencies…"[93]

The opposing commenter asserts that the premiums and discounts, which he predicts will result in corrective distributions that are more frequent than the Exchange has suggested, will

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89 See id. at 1-2.

90 See Allen Letter, supra note 8.

91 See id.

92 See id.

93 Id.

result in high implicit fees and large tracking errors.[94] He argues that the products are not suitable for any investor.[95]

In response, the Exchange asserts that the Daily Amount is not a charge, fee, or amount that leaves the Fund, but rather is an amount applied to both share classes.[96] The Exchange characterizes the Daily Amount as "one of the unique structural features of the Funds which leads to complete transparency of intrinsic Class Value entitlements."[97]

III. Discussion and Commission's Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[98] In particular, and as discussed further below, the Commission finds that the proposed rule change is consistent with: (1) the requirements of Section 6(b)(5) of the Act,[99] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade; to foster cooperation and coordination with persons

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94 See Kassner Letter, supra note 8, at 3. For example, the commenter characterizes the "Daily Amount" as a fee. During any single distribution measurement period that starts with the prior distribution date and to create a balanced market for the Up Shares and Down Shares of the VIX Fund, the Class Value per Share of each Up Share of the VIX Fund will be reduced and the Class Value per Share of each Down Share of the VIX Fund will be increased by an additional daily amount, the "Daily Amount." See Notice, supra note 3, 79 FR at 35617. The opposing commenter asserts that the investors in the Up Shares of the VIX Fund will be charged will be charged 4.5% in Daily Amount charges.

95 See Kassner Letter, supra note 8, at 3.

96 See Exchange Letter, supra note 8, at 19.

97 Id. at 22.

98 In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

99 15 U.S.C. 78f(b)(5).

engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and (2) Section 11A(a)(1)(C)(iii) of the Act,[100] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

A. NASDAQ Rule 5713

NASDAQ Rule 5713 sets forth provisions regarding the listing and trading of Paired Class Shares on the Exchange. The rule defines Paired Class Shares,[101] establishes specific recordkeeping and reporting requirements for registered market makers in Paired Class Shares,[102]

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100 15 U.S.C. 78k-1(a)(1)(C)(iii).

101 See NASDAQ Rule 5713(c). The operation of Paired Class Shares is described above. See supra section II.A.

102 In accordance with NASDAQ Rule 5713(h), market makers in Paired Class Shares must file with the Exchange and keep current a list identifying all accounts for trading in the applicable securities or physical commodities included in, or options, futures or options on futures on, the Reference Asset of the Underlying Benchmark of any Paired Class Shares or any other derivatives based on such Reference Asset or based on any security or Reference Asset included in the Underlying Benchmark, which the registered market maker may have or over which it may exercise investment discretion. In addition, market makers are prohibited from trading in the applicable securities or physical commodities included in, or options, futures or options on futures on, the Reference Asset of the Underlying Benchmark of any Paired Class Shares or any other derivatives based on such Reference Asset or based on any security or Reference Asset included in the Underlying Benchmark, in an account in which a market maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof. See NASDAQ Rule 5713(h)(i). In addition, market makers in Paired Class Shares are required to make available to the Exchange any and all books, records, or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the applicable securities or physical commodities included in, or options, futures or options on futures on, the Reference Asset

and sets forth initial and continued listing criteria, some of which are more fully discussed below.[103] In addition, Commentary .05 to Nasdaq Rule 5713 states that the Exchange will implement written surveillance procedures for trading Paired Class Shares.[104]

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of the Underlying Benchmark of any Paired Class Shares or any other derivatives based on such Reference Asset or based on any security or Reference Asset included in the Underlying Benchmark, as may be requested by the Exchange. See NASDAQ Rule 5713(h)(ii).

103 The Commission notes that any securities listed in the future under NASDAQ Rule 5713 must be the subject of a rule filing by the Exchange under Section 19(b) of the Exchange Act—providing the Commission with the opportunity to review and to approve or disapprove that rule filing—and that all securities listed under NASDAQ Rule 5713 will be subject to the full set of bylaws and other rules and procedures of the Exchange. While Nasdaq Rule 5713(e) provides that Paired Class Shares may have values based on assets, prices, price volatility, or other economic interests, such as currencies, interest rates, non-investable economic indices, and other measures of financial instrument value, the specific products approved for listing pursuant to this order will have values based on price volatility and commodity indices. The Commission staff will consider any future proposals to list products under Nasdaq Rule 5713 with values based on these and other types of benchmarks and reference assets, evaluating the specific facts and circumstances associated with each proposal under Section 19(b) of the Exchange Act. Further, the Commission staff will continue to analyze the development of exchange-traded products and their impact on market structure and will monitor the development of the market for Paired Class Shares.

104 The Exchange stated that trading in Paired Class Shares will be subject to the existing trading surveillances, administered by both the Exchange and FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. See Notice, supra note 3, 79 FR at 35621. FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, and the Exchange is responsible for FINRA's performance under this regulatory services agreement. See Notice, supra note 3, 79 FR at 35621, n.51. The Exchange represented that FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Paired Class Shares and in the securities in which the Fund will invest with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG") or with which the Exchange has in place a comprehensive surveillance sharing agreement. See Notice, supra note 3, 79 FR at 35621. Additionally, the Exchange represented that FINRA may obtain trading information regarding trading in the Shares from markets and other entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. See Notice, supra note 3, 79 FR at 35621. For a list of the current members of ISG, see http://www.isgportal.org/.

Pursuant to NASDAQ Rule 5713(f)(i)(B), the Exchange will obtain a representation from the Trust on behalf of each Fund that the Class Value per Share of each of its Up Shares and Down Shares will be calculated daily and that these Class Values per Share and information about the assets of the Fund will be made available to all market participants at the same time.[105] NASDAQ Rule 5713(f)(ii)(B) permits the Exchange to suspend trading in or remove from listing Paired Class Shares whose Underlying Benchmark, or a substitute or replacement Underlying Benchmark based on the same Reference Asset,[106] is no longer calculated or available on at least a 15-second delayed basis during the Regular Market Session from a major market data vendor unaffiliated with the sponsor, the custodian, the trustee of the Trust, the Fund, or NASDAQ. Further, NASDAQ Rule 5713(f)(ii)(C) permits the Exchange to suspend trading in or remove from listing Paired Class Shares whose Class Value per Share becomes no longer available on a daily basis to all market participants at the same time. NASDAQ Rule 5713(f)(ii)(D) permits the Exchange to suspend trading in or remove from listing Paired Class Shares whose Intraday Indicative Value is no longer made available on at least a 15-second delayed basis by a major market vendor during the Exchange's Regular Market Session. The Commission also notes that

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105 The Commission notes that these requirements are substantively identical to provisions applicable to other exchange-traded derivative securities products, including Managed Fund Shares under NASDAQ Rule 5735(d)(1)(B). See Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039) (approving NASDAQ listing standards applicable to Managed Fund Shares). For a specific product approved for listing under NASDAQ Rule 5735, see Securities Exchange Act Release No. 73480 (October 31, 2014), 79 FR 66022 (November 6, 2014) (SR-NASDAQ-2014-090) (approving the listing and trading of Shares of the Validea Market Legends ETF under NASDAQ Rule 5735).

106 Commentary .04 to Rule 5713 states that, prior to a substitute or replacement Underlying Benchmark being selected for the Fund, NASDAQ must file a related proposed rule change pursuant to Rule 19b-4 under the Exchange Act to continue trading the Paired Class Shares.

NASDAQ Rules 5713(f)(i)(C) and 5713(f)(ii)(E) require the establishment of information barriers concerning changes and adjustments to the Underlying Benchmark.[107]

Based on the foregoing, the Commission believes that the requirements of NASDAQ Rule 5713, taken together with other NASDAQ Rules regarding the trading of equity securities on the Exchange, are consistent with the requirement of Section 6(b)(5) of the Act that requires that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and to promote just and equitable principles of trade and to protect investors and the public interest.

B. Issues Raised by the Opposing Commenter

1. Effectiveness of Arbitrage

In the OIP, the Commission asked for commenters' views on the effect that Paired Class Share distributions would have on premiums and discounts between the trading price of the Paired Class Shares and their respective Class Value per Share.[108]

The opposing commenter asserts that the structure of Paired Class Shares will result in significant and persistent premiums and discounts because "it is not economically possible to construct a two sided market for spot exposure that does not trade in line with VIX futures prices."[109] This commenter argues that the arbitrage mechanism of the Funds will not work to keep Up Shares and Down Shares trading close to their intrinsic value, but will instead "in theory

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[107] The Commission notes that these provisions are substantively identical to the firewall requirements in NASDAQ Rule 5705(b)(2)(B)(i), which governs the listing and trading of Index Fund Shares.

[108] See OIP, supra note 6, 79 FR at 57157.

[109] Kassner Letter, supra note 8, at 1. See also supra notes 45-48 and accompanying text.

keep the sum of the premium on one and the discount on the other at zero."[110] To support these conclusions, the opposing commenter provides a number of hypothetical situations involving the trading relationship between the VIX index, VIX futures, and the proposed VIX Fund.[111] Further, the opposing commenter argues that the "daily amount" applied to the VIX Fund—a 15 basis point amount transferred from Up Shares to Down Shares when the VIX is at 30 or below—means that investors in Up Shares will suffer a 4.5% loss over a 30-day period, even if the VIX does not move.[112] The opposing commenter also argues that, because the arbitrage mechanism will not work as described by the Exchange, multiple corrective distributions will be required per year, causing investors to incur reinvestment expenses to maintain their desired position.[113]

The Exchange argues in response that, underlying this commenter's argument is a mistaken assumption that spot levels and futures levels are equivalent and interchangeable.[114] The Exchange agrees that markets such as spot markets, futures markets, stock markets, and bond markets will be broadly inter-related, but argues that, in the case of volatility in general and VIX in particular, the spot market is not "in line" and directly comparable with VIX futures prices. The Exchange cites the willingness of market participants to trade options overlying both the spot VIX and VIX futures as evidence that the market would understand the differences between spot VIX and the range of VIX futures prices. The Exchange notes that the website of CBOE, the provider of the VIX, states, "The price of a VIX futures contract can be lower, equal

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110 Id.

111 See Kassner Letter, supra note 8.

112 Id.

113 Id. at 2-3.

114 See Exchange Letter, supra note 8, at 17.

to or higher in the 30-day forward period covered by the VIX futures contract than in the 30-day spot period covered by VIX."[115] The Exchange also notes that, unlike VIX futures, "because the shares of the Fund are both available for creation and redemption daily, the Fund provides for spot VIX positions to be created or redeemed daily, and for returns to be realized on a daily basis."[116]

Additionally, the Exchange argues that the existence of the Daily Amount applied to the VIX Fund is disclosed clearly and referenced more than 90 times in the prospectus for the VIX Fund, and the Exchange argues that the amount of the Daily Amount is closely aligned with the estimates of several market experts as to the roll cost incurred by long positions in volatility futures (e.g., VIX futures).[117] As a result, the Exchange argues, the expected premiums and discounts encountered by the VIX Fund should be substantially less that the opposing commenter predicts.[118] The Exchange also argues that the corrective distribution mechanism is designed to prevent the type of investor losses that occurred when an ETN designed to track the VIX moved substantially away from the value of the VIX.[119]

The Commission believes that the Exchange has met its burden to demonstrate that its proposal is consistent with the Act. The Exchange has reasonably explained in the Notice, the Exchange's response letter,[120] and, as to the VIX Fund, in the Registration Statement for the VIX

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115 Id. at 18.

116 Id. at 21.

117 See id. at 20-21.

118 See id. at 21.

119 See id. at 22-23.

120 See Exchange Letter, supra note 8.

Fund,[121] the methodology for the calculation of the Underlying Benchmarks and the differences between the value of the Underlying Benchmark indexes and the prices of the relevant near-month futures contracts. In particular the Exchange explains that, with respect to the VIX Fund, the purpose and derivation of the 0.15% Daily Amount by which the Up Shares will be reduced and the Down Shares increased, which, as cited by the Exchange, is consistent with price patterns historically observed when comparing VIX futures and spot prices.[122] The Exchange further notes the extent to which the Registration Statement discloses the Daily Amount transfer.[123] The Exchange has also reasonably explained the operation of the Funds; the creation and redemption process and procedures; the regular, special, and corrective distributions to be employed by the Funds; and the resulting resetting process.

In addition, with respect to arbitrage in Fund Shares, and, consistent with Section 11A(a)(1)(C)(iii) of the Act,[124] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities, the Commission notes that market information regarding the value of the Shares and of the Underlying Benchmarks will be continuously available to market participants. Quotation and last-sale information for the Shares will be available via NASDAQ proprietary quote and trade services, as well as in accordance with any UTP plans for a Fund's

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121 See Registration Statement, supra note 22.

122 See Exchange Letter, supra note 8, at 22.

123 See id.

124 15 U.S.C. 78k-1(a)(1)(C)(iii).

Shares.[125] Additionally, information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.[126] Further, information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.[127]

The value of each Fund's Underlying Benchmark, as well as information about each Fund's Underlying Benchmark constituents, the weighting of the constituents, the Underlying Benchmark's methodology, and the Underlying Benchmark's rules, will be available at no charge on the Index Provider's website at us.spindices.com or, in the case of the VIX Fund, the CBOE's Web site at www.cboe.com/VIX.[128] The value of each Fund's Underlying Benchmark also will be published by one or more major market data vendors on at least a 15-second delayed basis during the Regular Market Session.[129] An Intraday Indicative Value for each Fund will be disseminated and made available by a major market vendor, and will be updated and widely disseminated and broadly displayed on at least a 15-second delayed basis during the Regular Market Session.[130] Class Values and Class Values per Share of each Fund will be calculated by the Fund's Custodian at the end of each Regular Market Session.[131]

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125 See Notice, supra note 3, 79 FR at 35621.

126 See id.

127 See id.

128 See id.

129 See NASDAQ Rule 5713(f)(2)(B).

130 See Notice, supra note 3, 79 FR at 35622.

131 NASDAQ Rule 5713(f)(ii)(C) is designed to ensure that the Class Values and Class Values per Share of each Fund will be made available to all market participants at the same time.

Under NASDAQ Rule 5713(f)(i)(B), the Exchange will obtain a representation from the Trust on behalf of each Fund that the Class Value per Share of each of its Up Shares and Down Shares will be calculated daily and that these Class Values per Share and information about the assets of the Fund will be made available to all market participants at the same time.[132] In addition, NASDAQ Rule 5713(f)(2)(B) permits the Exchange to suspend trading in or remove from listing Paired Class Shares whose Underlying Benchmark, or a substitute or replacement Underlying Benchmark based on the same Reference Asset,[133] is no longer calculated or available on at least a 15-second delayed basis during the Regular Market Session from a major market data vendor unaffiliated with the sponsor, the custodian, the trustee of the Trust, the Fund or NASDAQ.

The Commission believes that, in light of the continuous dissemination of information about the Shares' current market prices, the Funds' Underlying Benchmarks, and the Funds' intraday estimated Class Value per Share, arbitrage opportunities will be readily identifiable to market participants. The Commission also believes that the creation and redemption process, which, under Rule 5713(c), uses a neutral basket of Up Shares and Down Shares, is reasonably designed to allow market participants to arbitrage away premiums and discounts that may

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132 The Commission notes that these requirements are substantively identical to provisions applicable to other exchange-traded derivative securities products, including Managed Fund Shares under NASDAQ Rule 5735(d)(1)(B).

133 Commentary .04 to Rule 5713 states that, prior to a substitute or replacement Underlying Benchmark being selected for the Fund, NASDAQ must file a related proposed rule change pursuant to Rule 19b-4 under the Act to continue trading the Paired Class Shares.

develop, as long as the Up Shares and Down Shares do not become locked in a persistent state of approximately equal and opposite premiums or discounts.[134]

The Commission acknowledges, however, that the normal arbitrage mechanism of the Funds will not be effective if equal and opposite premiums and discounts persist between the Up Shares and Down Shares of a Fund. Because no existing exchange-traded products use a paired-class structure, the Commission does not have a basis for comparison from which to predict how frequently such conditions are likely to occur. As noted above, however, the Funds would provide for a corrective distribution when the magnitude of the equal and opposite premiums and discounts exceeds a certain threshold.[135] The Exchange has represented that, "[e]ven if a corrective distribution is not triggered, the existence of a Fund's corrective distribution feature is expected to modify investor and Authorized Participant behavior to prevent persistent and material premium and discount conditions for Paired Class Shares from becoming locked."[136] Based on the Exchange's representation, the Commission believes that the corrective distribution mechanism is reasonably designed to limit the magnitude of such premiums and discounts and that, when triggered, it will provide investors with a market neutral position that should allow them to exit the affected Fund at Class Value. Further, the underlying value of the Funds and the extent of the premiums and discounts would not be subject to uncertainty, because, as explained

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134 Because the funds would create and redeem their shares only in equal amounts of Up Shares and Down Shares, if one class of shares traded at a premium, and the other class traded at an approximately equal discount, arbitrage using the creation or redemption process could not eliminate those price deviations. For example, if Up Shares traded at a $0.50 premium, and down shares traded at a $0.50 discount, the value per share of a creation unit, composed of equal amounts of each class, would be equal to the NAV of the fund (i.e., the premium would cancel out the discount).

135 See supra note 18.

136 See Notice, supra note 3, at 9, 79 FR at 35612.

above,[137] the Funds' market prices, Class Values per Share, and reference benchmark values and methodologies would be publicly available in real time. In addition, and significantly, to the extent that equal and opposite premiums and discounts persist within a Fund's threshold for a corrective distribution, all investors in the affected Fund would be subject to the same pricing conditions, and Authorized Participants would not be able to use the creation and redemption process to trade in the primary market for the shares at prices more favorable than those available to investors trading at market prices on the Exchange.

Thus, for the reasons described above, the Commission believes that the Exchange's rules are reasonably designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

2. Investor Understanding and Suitability

In the OIP, the Commission solicited comments about whether retail investors and other market participants would be able to understand the types and timing of distributions as well as the periodic resets of Paired Class Shares' exposure to their Underlying Benchmarks.[138]

The opposing commenter argues that the operational complexity of Paired Class Shares renders them unsuitable for any investor. As discussed above, this commenter argues that extreme diligence would be required of investors in tracking their positions because the Up Shares might frequently turn into both Up Shares and Down Shares, and that investors would

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137 See supra text accompanying notes 125-133.

138 See OIP, supra note 6, 79 FR at 57157.

need to know a considerable amount of information at every point in time when holding Shares.[139]

The Sponsor asserts that retail investors and other market participants will be able to understand the types and timing of fund distributions. The Sponsor states that the Registration Statement contains detailed examples, and the Funds' website will contain infographics describing each distribution, as well as the courses of action available to investors. According to the Sponsor, distributions will generally be limited to scheduled dates or the occurrence of large and rare underlying index moves, and movements of the underlying indexes will be easy to track using public sources. The Sponsor states that the consensus of qualified investors and market makers to whom it has spoken is that the frequency of the Funds' distributions is consistent with customary review (e.g., monitoring prices and returns) and customary re-evaluation of share positions. Additionally, the Sponsor states that, except in limited and unanticipated conditions which are identified in the Registration Statement, regular and special distributions will be made to shareholders in cash, and therefore investors generally will face a straightforward decision with respect to deploying or maintaining received cash. With respect to corrective distributions (in which a fund would issue each holder of Up Shares an equal number of Down Shares, and each holder of Down Shares an equal number of Up Shares), the Sponsor asserts that such distributions are expected to be rare and to encourage among Authorized Participants both more active and accurate market making and more liquidity-enhancing position-taking. The Sponsor also argues that corrective distributions, as a self-policing and self-correcting measure, are a better alternative to detailed disclosures about premiums and discounts in prospectuses, which investors may not necessarily read and which would require affirmative investor action, and the

139 See Kassner Letter, supra note 8, at 3-4.

dissemination of real-time estimates of indicative portfolio values, which investors may not necessarily consider before transacting in other types of ETP shares. Further, the Sponsor states that prospective investors to whom it has spoken believe that the corrective distribution will benefit the entire range of shareholders.

With respect to the resets, the Sponsor states that the Funds are similar to comparable ETPs in the market and that it expects that both retail investors and other market participants will understand the effect of Paired Class Share resets on their investments.[140] The Sponsor also asserts that individual investors will be able to more easily track and monitor Paired Class Share resets than the resetting impact in other types of ETPs.

The Sponsor also argues that the Exchange's sales practice rules adequately ensure the suitability of sales recommendations regarding the Funds' Shares, citing NASDAQ Rule 2111A, which requires that an exchange member have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for a given customer, based on information obtained through reasonable diligence.[141] Additionally, the Sponsor notes that, before trading in the

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140 Specifically, the Sponsor states that for comparable ETPs that seek commodity or volatility exposure through trading in derivative products, the impact of resetting comes through the "re-trading" of futures, options, or other contracts. These ETFs effect the resetting either daily, monthly, or on another cycle. This conventional resetting has transaction costs, which are often difficult to isolate within the context of overall fund performance. The Sponsor adds that, since the traditional method of resetting is accomplished through the trading of underlying positions at telegraphed times under prescribed fund rules, ETFs can be disadvantaged from having to be a "price taker" in possibly adverse or challenging markets. The Sponsor asserts that these resetting considerations in these other types of ETPs are well known by retail investors. See Sponsor Letter, supra note 8, at 7-8.

141 See id. at 8-9.

Shares begins, the Exchange will inform its members in an information circular of the special characteristics and risks associated with trading Paired Class Shares.[142]

The Commission notes that the Exchange's suitability rule, NASDAQ Rule 2111A, requires that Exchange members and associated persons of a member comply with Financial Industry Regulatory Authority ("FINRA") Rule 2111, which requires member firms and their associated persons to "have a reasonable basis to believe" that a transaction or investment strategy involving securities that they recommend is suitable for the customer. Specifically, this reasonable belief must be based on the information obtained through the reasonable diligence of the firm or associated person to ascertain the customer's investment profile. The rule requires firms and associated persons to seek to obtain information about the customer's age; other investments; financial situation and needs, which might include questions about annual income and liquid net worth; tax status, such as marginal tax rate; investment objectives, which might include generating income, funding retirement, buying a home, preserving wealth, or market speculation; investment experience; investment time horizon, such as the expected time available to achieve a particular financial goal; liquidity needs, which is the customer's need to convert investments to cash without incurring significant loss in value; and risk tolerance, which is a

142 The Exchange has represented that the information circular will discuss (a) the procedures for purchases and redemptions of Paired Class Shares; (b) Rule 2111A, which imposes suitability obligations on Exchange members with respect to recommending transactions in Paired Class Shares to customers; (c) how information regarding the Underlying Benchmark and Intraday Indicative Value is disseminated; (d) the risks involved in trading Paired Class Shares during the Pre-Market and Post-Market sessions when an updated Underlying Benchmark and Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Paired Class Shares; (g) trading information; and (h) how information regarding distributions and share splits is disseminated and the requirements of public notification of these events.

customer's willingness to risk losing some or all of the original investment in exchange for greater potential returns.

Additionally, the Commission notes that the Funds will issue specific, public notifications regarding the unique distributions that the Funds would provide. Each Fund engaging in a regular distribution,[143] a special distribution, a corrective distribution, or a net income distribution[144] will provide at least three business days' advance notice (or longer advance notice as may be required by the Exchange)[145] of such an event. Each Fund engaging in a share split will provide at least ten calendar days' advance notice (or longer advance notice as may be required by the Exchange)[146] of such an event. In each instance, the Sponsor will notify the Exchange and post a notice of the event and its details on the Sponsor's website.

The Commission further notes that the prospectus disclosures for the Funds state prominently that the Funds are not suitable for all investors, and include the following disclosures: (1) stating that the funds may not be suitable for all investors; (2) describing the

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143 With respect to regular distributions, the information provided will consist of the schedule of distributions and associated distribution dates, and a notification, as of the record date for such regular distribution, on the Sponsor's website (www.AccuShares.com) as to whether or not the regular distribution will occur. See Notice, supra note 3, 79 FR at 35620. For regular distributions that occur on schedule, the Sponsor will cause a press release to be issued identifying the receiving class, the amount of cash, the amount of Paired Class Shares (if any), and any other information the Sponsor deems relevant regarding the distribution and post such information on the Sponsor's website. See id.

144 With respect to special distributions, corrective distributions, and share splits, the information provided will include the relevant ex-, record, and payment dates for each such event and relevant data concerning each such event. In addition, notice of net income distributions for each class of a Fund, if any, will also be included in the notifications of regular, special, and corrective distributions. See id.

145 The Exchange may determine that longer notice is advisable in some circumstances (e.g., an extended, or unexpected, market break). See id. at 35620, n.46.

146 See id.

effect of distributions on an investor's exposure; and (3) stating that "Investors who do not intend to actively manage and monitor their Fund investments at least as frequently as each distribution date should not buy shares of the Fund." (Emphasis in original.)

Based on all of the foregoing, the Commission believes that the Exchange has adequately responded to the opposing commenter's concerns about investor understanding and suitability, and that the Exchange's proposal is consistent with the public interest and the protection of investors.

For the foregoing reasons, the Commission finds that the Exchange's proposal to adopt NASDAQ Rule 5713 and to list and trade the Funds pursuant to that rule is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[147]

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[148] that the proposed rule change (SR-NASDAQ-2014-065), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

By the Commission.

Brent J. Fields
Secretary

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147 This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice.

148 15 U.S.C. 78s(b)(2).

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74248 / February 11, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16382

In the Matter of EFSTRATIOS "ELIAS" D. ARGYROPOULOS, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Efstratios "Elias" D. Argyropoulos ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, And Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Argyropoulos, age 67, is a resident of Santa Barbara, California. Argyropoulos is Prima Capital Group, Inc.'s ("Prima") founder, president and sole shareholder. He passed Series 000 and 1 exams in 1972, a Series PC exam in 1977, and a Series 63 exam in 1985. Argyropoulos is not currently associated with a broker-dealer or investment adviser and the last time he was associated with a broker-dealer was in 1993. In 1983, the NASD censured and fined Argyropoulos $500 for depositing personal funds into a customer's account to cover losses generated in the account. In 1995, the NASD censured, barred, and fined Argyropoulos $200,000 for use of discretion over customer accounts without written authority, unauthorized and unsuitable transactions, sharing and guaranteeing against customers' losses, and manipulation and deceptive practices.

2. On January 6, 2015, a judgment was entered by consent against Argyropoulos, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 15(a)(1) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled <u>Securities and Exchange Commission v. Efstratios "Elias" D. Argyropoulos, et al.</u>, Civil Action Number 2:14-cv-09800, in the United States District Court for the Central District of California.

3. The Commission's complaint alleged, among other things, that Argyropoulos perpetrated a fraud in the sale of pre-IPO Facebook and Twitter shares on the secondary market and acted as an unregistered broker-dealer. From October 2010 through October 2013, Argyropoulos raised $3,435,406 from 143 investors and received transaction-based compensation. Beginning in October 2010, Argyropoulos offered investors the ability to pool their money with Prima to purchase Facebook shares through two entities that facilitated the purchase of Facebook shares in the secondary market. Argyropoulos then failed to deliver virtually any of the shares. Instead of informing his investors that one of the entities had refunded Prima's investment in pre-IPO Facebook stock, Argyropoulos transferred nearly half of the refunded amount to Prima's brokerage account and used the proceeds to day trade stocks and options. Similarly, in July 2012, without informing any investors, Argyropoulos sold two-thirds of the Facebook shares Prima had purchased through the other entity, and used them to day trade stocks and options in companies other than Facebook. From July 2013 through October 2013, Prima and Argyropoulos solicited investment in pre-IPO Twitter shares through a similar arrangement. Prima and Argyropoulos never purchased Twitter shares and have not refunded any money to the Twitter investors. Instead, Argyropoulos transferred most of the Twitter investors' funds to Prima's brokerage account and used them for his personal trading.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Argyropoulos' Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Argyropoulos be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Argyropoulos be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74300 / February 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16161

In the Matter of

SABA SOFTWARE, INC.

Respondent.

ORDER MAKING FINDINGS AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors to accept the Offer of Settlement submitted by Saba Software, Inc. ("Saba" or "Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission for the purpose of settlement of these proceedings instituted against Respondent on September 24, 2014, pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

Saba has submitted an Offer of Settlement of Saba Software Regarding Administrative Proceedings Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Offer"). Solely for the purpose of these proceedings, and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Saba consents to the entry of this Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Exchange Act of 1934 ("Revocation Order") as set forth below:

III.

On the basis of this Revocation Order and Saba's Offer, the Commission finds[1] that:

A. Saba Software, Inc. is a Delaware corporation based in Redwood Shores, California. At all relevant times, Saba's common stock has been registered pursuant to Section 12 of the Exchange Act. From its IPO in April 2000 until July 31, 2006, its common stock was registered pursuant to Section 12(g). Thereafter, until June 2013, it was registered pursuant to Section 12(b). It traded on the Nasdaq Global Market until it was suspended on April 9, 2013, and then it was delisted effective June 17, 2013 for failure to remain compliant with its SEC reporting obligations. Upon its delisting and deregistration from Section 12(b), it reverted to its previous Section 12(g) registration. Its common stock is currently registered pursuant to Section 12(g) and traded on the OTC Markets. Saba has not filed any periodic reports since January 6, 2012, when it filed its Form 10-Q for the quarter ended November 30, 2011.

B. Saba has failed to comply with Exchange Act Section 13(a), and Rules 13a-1 and 13a-13 thereunder, because it has not filed any periodic reports since it filed on January 6, 2012 its Form 10-Q for the period ending November 30, 2011.

IV.

Section 12(j) of the Exchange Act provides that the Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the forgoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in Saba's Offer.

Accordingly, it is hereby ORDERED that, pursuant to Section 12(j) of the Exchange Act, registration of each class of Saba's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Commissioner Gallagher
Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74305 / February 19, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4026 / February 19, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31459 / February 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16389

In the Matter of

VCAP Securities, LLC, and
Brett Thomas Graham,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b)(4), 15(b)(6), AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against VCAP Securities, LLC ("VCAP"), and Sections 15(b)(6) and 21C of the Exchange Act, Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Brett Thomas Graham ("Graham").

II.

In anticipation of the institution of these proceedings, VCAP and Graham (collectively, "Respondents") have submitted Offers of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b)(4), 15(b)(6), and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

1. This matter involves a scheme by VCAP and Graham to acquire certain securities from auctions of collateralized debt obligations ("CDOs") that VCAP was conducting as liquidation agent. VCAP and Graham's actions in the auctions improperly benefitted funds managed by Vertical Capital, LLC ("Vertical"), VCAP's affiliated investment adviser. The conduct involved Graham arranging for a separate broker-dealer ("Third-Party B-D") to place bids on behalf of Vertical in the CDO liquidations run by VCAP, as VCAP and its affiliates were not permitted to bid under the terms of the relevant engagement agreements. As the liquidation agent for the auctions, VCAP had access to confidential bidding information from other bidders. Taking advantage of this access and information, Graham waited for the majority of the bids to come in from the other auction participants, and then instructed Third-Party B-D to bid on the bonds Graham wanted for Vertical-managed funds, at prices that were often slightly higher than the highest bid from other participants. After winning the bonds in the auction, Third-Party B-D would then immediately sell the bonds to the Vertical funds at a small markup.

2. In the course of this conduct, Graham and VCAP made material misrepresentations to the trustees of the various CDOs for which VCAP served as liquidation agent. Graham executed, on behalf of VCAP, various engagement agreements in which he falsely represented that VCAP and its affiliates would not bid in the auctions and would not misuse confidential information and/or bidding information afforded to VCAP as the liquidation agent. At the time he executed the final agreements, however, Graham had already communicated multiple times with Third-Party B-D about submitting bids on behalf of Vertical. VCAP also provided the various trustees with documents that did not disclose that its affiliate Vertical was the winning bidder.

3. In addition, in one particular auction, Graham provided one non-affiliated bidder with favorable treatment with respect to a security that that bidder was very interested in obtaining.

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Although the sales person at the bidding entity told Graham that his traders were anxious to win the bond, and that the bidder could increase its bid if necessary, Graham instead instructed him to cut the bid in half. Graham neither sought permission from the trustee nor informed it about his instructions to halve the bid. As a result, the trustee received half as much in proceeds for that bond as it would have otherwise.

Respondents

4. VCAP Securities, LLC ("VCAP") is a broker-dealer registered with the Commission. On December 24, 2014, it filed a Form BD-W. It was organized in Georgia, and maintains its principal place of business in New York, New York. VCAP is over 99% indirectly owned by Graham through a holding company called BD Partner Holdings, LLC. The economic interest in and control over VCAP are shared by Graham and three other partners.

5. Brett Thomas Graham ("Graham") is currently the CEO of VCAP, and the managing partner, Chief Investment Officer, and a portfolio manager of Vertical. He has no disciplinary history. Graham indirectly owns over 99% of VCAP and 55.8% of Vertical, and has an economic interest of 33% and a voting interest of 25% in each. He holds Series 7, 24, and 63 licenses. Graham is 51 years old, and a resident of New York, New York.

Other Relevant Entities

6. Vertical Capital, LLC ("Vertical") is a registered investment adviser. It is organized in Delaware, and maintains its principal place of business in New York, New York. Vertical is wholly owned by VCAP Partners LLC, which is 55.8% owned by Graham. The economic interest in and control over Vertical are shared by Graham and the same three partners that also share in the economic interest and control of VCAP.

Background

7. This matter concerns five auctions that VCAP conducted as liquidation agent during 2012. For each of these auctions, VCAP was hired to liquidate the assets of a CDO by the respective CDO trustees. Prior to each liquidation, VCAP entered into an agreement with the trustee governing the terms of VCAP's role as liquidation agent. As the CEO of VCAP, Graham had the primary responsibility for reviewing and executing these agreements on behalf of VCAP.

8. During the relevant time period, Graham was a portfolio manager and the chief investment officer of Vertical, a registered investment adviser and asset manager. The main focus of Vertical's investment management activities has been two private funds: Resolution Credit Opportunities Fund I, which was formed in the fall of 2009, and Resolution Credit Opportunities Fund II, which was formed in late 2011 (collectively, the "Funds"). In addition, during the relevant time period, Vertical served as the investment manager for four separately managed accounts (collectively, the "SMAs").

Vertical Bidding in VCAP-Run Liquidations

9. Since their inception, Vertical's Funds and SMAs have generally invested in illiquid, non-agency mortgage-backed securities. Graham has been principally responsible for these investment decisions. These same types of securities were often included in the CDOs that VCAP was hired to liquidate.

10. Graham knew or was reckless in not knowing that VCAP and its affiliates could not bid in a liquidation for which VCAP served as liquidation agent. The liquidation agent agreements that Graham signed as CEO on behalf of VCAP for each of the five CDO liquidations all prohibited VCAP or its affiliates from bidding in the liquidations, and required VCAP to keep the bidding information it received confidential during the auction. One of the agreements also expressly prohibited giving preferential or favorable treatment to any bidder.

11. In addition to the prohibitions in the liquidation agent agreements, VCAP's own compliance manual also prohibited bidding by VCAP and its affiliates. The VCAP compliance manual, dated December 19, 2011, provided, among other things, the following:

> *Possible Conflicts of Interest*
> To prevent even the appearance of any conflict of interest, VCAP and its affiliates and employees will not bid in an auction liquidation run by VCAP.

VCAP's compliance manual was provided to each employee of VCAP on at least an annual basis.

12. To carry out his plan to have Vertical bid in VCAP-run auctions, Graham contacted an individual that he had worked with previously ("Broker"), who currently worked at Third-Party B-D, which was based in the United Kingdom. Graham never consulted with counsel or with VCAP's chief compliance officer to discuss the permissibility of the arrangement. Nor did Graham or anyone else at VCAP discuss with any of the CDO trustees that hired VCAP whether Vertical could bid in the VCAP-run auctions through Third-Party B-D.

13. Before the first liquidation in which Third-Party B-D bid on behalf of Vertical, Broker asked Graham whether the trustee was aware of the arrangement. Broker asked, "[W]ill the seller know or care that a B/D maybe be [sic] biddin for some of your funds?" To which, Graham responded, "[N]o…Auction, so high bid wins. Auction was published in WSJ." Broker understood Graham's response to mean that the arrangement was permissible.

14. A few weeks thereafter, Broker inquired a second time about the permissibility of the arrangement. Broker asked, "[Third-Party B-D's compliance] understands the confidentiality issue and why you are in the middle, but wants to confirm therefore your seller allows your funds to bid in the bwic, for us to facilitate…"[2] Graham responded, "[Y]es," even though Graham had never asked any of the CDO trustees whether this arrangement was permissible.

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[2] The term "bwic" means, "bid wanted in competition."

15. Graham generally followed the same pattern with respect to each of the five CDO liquidations in which he had Third-Party B-D bid on behalf of Vertical. Graham generally waited until he had received the majority of the bids from the other auction participants, and then would tell Third-Party B-D which bonds in the CDO liquidation to bid on and at what price. Having access to the other auction participants' bids, Graham was able to, and in several instances did, give bid prices to Third-Party B-D that were slightly higher than the highest bid from the other bidders. This conduct is illustrated in Table 1 below, which shows the time and amounts for some of Vertical's bids through Third-Party B-D in an auction list from one of the five CDO liquidations at issue.

TABLE 1

	Bidder	Bid	Time
Bond A	Bidder A1	8.0781	2:24 p.m.
	Third-Party B-D	8.5000	2:58 p.m.
Bond B	Bidder B1	3.0156	2:24 p.m.
	Third-Party B-D	3.2500	2:59 p.m.
Bond C	Bidder C1	7.59375	2:23 p.m.
	Third-Party B-D	7.75000	3:04 p.m.

As demonstrated above, Third-Party B-D bid after the other auction participants' bids were received by VCAP. In addition, Third-Party B-D's bids were often slightly higher than the high bid from the other auction participants, ensuring that Vertical would win the bonds Graham wanted but not pay too much.

16. After receiving instructions from Graham, Third-Party B-D would then submit the bids in the same manner as all of the other auction participants. However, unbeknownst to the trustees, Third-Party B-D was bidding on behalf of Vertical. Third-Party B-D was usually the last, or one of the last, participants to submit its initial bids in the auction.

17. At times, another auction participant would submit or improve a bid after Graham had given his instructions to Third-Party B-D. If a later bid was higher than Third-Party B-D's bid for a bond that Graham was interested in winning, Graham at times instructed Third-Party B-D to resubmit its bid at an amount higher than that other bid. This conduct is illustrated in Table 2 below, which shows some of Third-Party B-D's bids for another list in one of the five CDO liquidations at issue. On this list, Graham instructed Third-Party B-D to resubmit bids in several instances, in order to top subsequent higher bids from other auction participants.

TABLE 2

	Bidder	Bid	Time
Bond A	Third-Party B-D	42.01	11:25 a.m.
	Bidder A1	45	11:33 a.m.
	Third-Party B-D	45.15	12:01 p.m.
Bond B	Bidder B1	43.03125	10:48 a.m.
	Third-Party B-D	43.25	11:30 a.m.
	Bidder B2	43.375	12:10 p.m.
	Third-Party B-D	43.45	12:20 p.m.
Bond C	Third-Party B-D	34.01	11:23 a.m.
	Bidder C1	34.53125	11:29 a.m.
	Third-Party B-D	34.625	11:50 a.m.

18. In one particular instance, Graham instructed Third-Party B-D to resubmit its bid for a lower amount because Graham subsequently received bidding information indicating that the next high bid for that particular bond had decreased. Thus, he knew that Third-Party B-D could win the bond for less than what it had initially bid. This is illustrated in Table 3 below.

TABLE 3

	Bidder	Bid	Time
Bond X	Third-Party B-D	28.50	11:21 a.m.
	Bidder X1	24.00	12:00 p.m.
	Third-Party B-D	24.50	12:09 p.m.

19. Immediately after each auction, Vertical's Funds and SMAs purchased from Third-Party B-D any of the bonds that Third-Party B-D won in the auction, in allocations designated by Graham and at a slight mark-up as determined by Graham.

20. At the conclusion of the auction for each list, VCAP sent an e-mail to the trustee attaching a spreadsheet listing the winner and second highest bid for each bond, as well as listing each participant and their final bids. This was the manner in which VCAP communicated the bids to the trustee, and requested the trustee's approval for awarding the winners. Graham never told the trustee that Third-Party B-D was bidding on behalf of Vertical, nor did he inform the trustee that he was using pricing information from other bids to determine the amount of the bid price for Third-Party B-D.

21. Overall, Vertical's Funds and SMAs acquired 23 securities, paying nearly $12 million, through the 5 CDO liquidations by placing prohibited bids. In total, VCAP received

$1,182,839 in fees from the CDO trustees for conducting the 5 liquidations, and Graham personally received 10% of this amount, approximately $120,000, for originating the business.

VCAP Gives An Auction Participant Preferential Treatment

22. During the course of a CDO liquidation for which VCAP was the liquidation agent, Graham gave preferential treatment to one auction participant ("Preferred Participant") that resulted in lower proceeds to the trustee.

23. After the start of the auction, the sales person at Preferred Participant ("Salesman") who was responsible for covering Vertical, sent a Bloomberg instant message to inform Graham that Preferred Participant was especially interested in winning a particular bond. Salesman messaged Graham that the bond was very important to Preferred Participant, and asked Graham to let him know where Preferred Participant needed to be in order to win, indicating that Preferred Participant would be willing to bid higher if necessary. Graham, seeing that the other bids for that particular bond were just fractions of Preferred Participant's bid, responded to Salesman and told him to cut Preferred Participant's bid in half.

24. Preferred Participant thereafter changed its bid for the bond to half of its original bid, and resubmitted the bid. Preferred Participant won the bond at the reduced price, which was about 10 points higher than the next highest bid.

25. Prior to instructing Preferred Participant to cut its bid in half, Graham did not seek permission from the trustee of the CDO that was being liquidated. Graham also never informed the trustee that it was receiving half of what it would have otherwise received for the bond, had Graham not instructed Preferred Participant to cut its bid in half.

26. As a result of the conduct described above, VCAP willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which make it unlawful, in connection with the purchase or sale of any security, to employ any device, scheme, or artifice to defraud; or to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

27. As a result of the conduct described above, Graham willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which make it unlawful, in connection with the purchase or sale of any security, to employ any device, scheme, or artifice to defraud; or to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Civil Penalties

28. VCAP has submitted a sworn Statement of Financial Condition dated November 21, 2014, and other evidence and has asserted its inability to pay a civil penalty.

Undertakings

29. Graham has undertaken to provide written certification, signed by Graham under penalty of perjury, that he is in compliance with item IV.C. below. Such certification must be provided to the Commission staff every ninety days from the date of entry of this Order, for a period of one year thereafter.

30. Graham has undertaken to retain, not at the Commission's expense, a qualified independent consultant (the "Consultant") not unacceptable to the Commission staff to do the following:

a. Provide a memorandum that is to be distributed to all employees and partners of Vertical prior to or by the date of entry of this Order: (i) outlining the parameters of Graham's limited role in Vertical, as specified in item IV.C. below, and (ii) giving instructions that each employee and partner of Vertical must strictly comply with the terms of such limited role by Graham.

b. Provide training to all Vertical employees and partners regarding the limitations and restrictions placed on Graham's conduct with respect to Vertical, as specified in item IV.C. below.

c. Submit a report concerning Graham's compliance with the terms of item IV.C. below, to the Commission staff every ninety days from the date of entry of this Order, for a period of one year thereafter. In connection with the preparation of such reports, and to confirm that Graham is in compliance with item IV.C. below, Consultant will, at least: (i) conduct a review of all e-mail communications and instant messages to or from Graham, and (ii) interview Graham and the employees and partners of Vertical about Graham's activities.

d. Establish an e-mail hotline for Vertical employees and partners to report any potential violations of Graham's limited role with Vertical, as specified in item IV.C. below. Consultant will investigate any reports of potential violations, and disclose any such reports or investigations in its periodic reports to the Commission staff.

e. Require Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Vertical, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist Consultant in performance of its duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Vertical, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

31. Graham shall certify, in writing, compliance with the undertakings set forth above in items 30 and 31. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Graham agrees to provide such evidence. The certification and supporting material shall be submitted to Andrew Sporkin, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

32. In determining whether to accept the Offers, the Commission has considered these undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b)(4), 15(b)(6), and 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. VCAP cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Graham cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

C. Graham be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock; with the right to apply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission;

a. provided however, that Graham may, for a period of one year from the entry of this Order, continue to be employed by Vertical solely for the purpose of assisting Vertical in the sale, or transfer to independent managers, of securities and positions held by any funds or accounts managed by Vertical, as of the date of the entry of this Order. During the one-year carve-out period, all sales by Graham shall be subject to review and approval by Vertical prior to execution. During this one-year period of limited employment at Vertical, Graham may not carry out his employment activities on the premises of Vertical, and he must be located offsite from Vertical. Notwithstanding this limited employment role, the following restrictions will be placed upon Graham as of the date of the entry of this Order: (i) Graham may not serve on Vertical's Board of Directors, or in any officer, executive, or management role at Vertical; (ii) Other than for the limited purpose of selling securities and positions held by any funds or accounts managed by Vertical, as of the date of the entry of this Order, Graham may not have any role, input, authority, duties, or discussions as to the management of Vertical, any entity affiliated with Vertical, or any of Vertical's clients; (iii) Graham may not have any role in formulating, summarizing, discussing, or memorializing Vertical's marketing or management strategy; (iv) Graham may not have any authority to hire or fire employees of Vertical, or to negotiate or bind Vertical in any contracts; (v) Graham may not have any contact with current or prospective investors in any funds or accounts managed by Vertical regarding anything concerning Vertical or VCAP (other than current and former employees of Vertical who are also Vertical investors); (vi) Graham may not solicit capital on behalf of Vertical; (vii) Graham may not participate, consult, or assist with any purchase of securities; and (viii) Graham may not participate, consult, or assist with any sales of assets or positions that were purchased or acquired after the date of entry of this Order. Nothing herein shall prevent Graham from communicating with Vertical partners and counsel regarding any outstanding legal actions in which Vertical is a party.

D. VCAP is censured.

E. Any reapplication for association by Graham will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against Graham, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

F. VCAP shall, within ten (10) days of the entry of this Order, pay disgorgement of $1,064,555 and prejudgment interest of $85,044 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying VCAP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew Sporkin, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-6013.

G. Based upon VCAP's sworn representations in its Statement of Financial Condition dated November 21, 2014, and other documents submitted to the Commission, the Commission is not imposing a penalty against VCAP.

H. Graham shall, within ten (10) days of the entry of this Order, pay disgorgement of $118,284, prejudgment interest of $9,449, and a civil money penalty in the amount of $200,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 31 USC §3717. Payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch

HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Graham as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew Sporkin, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-6013.

I. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether VCAP provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest, and/or the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by VCAP was fraudulent, misleading, inaccurate, or incomplete in any material respect. VCAP may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest, or a penalty should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (4) contest the imposition of the maximum penalty allowable under the law; or (5) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

J. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Act, a Fair Fund is created for the disgorgement, interest and penalties referenced in paragraphs F and H above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Graham agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Graham's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Graham agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

K. Graham shall comply with the undertakings enumerated in Section III, items 29 through 31 above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Graham, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Graham under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Graham of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4027 / February 19, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31460 / February 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16390

In the Matter of

LOGICAL WEALTH MANAGEMENT, INC. and DANIEL J. GOPEN,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Logical Wealth Management, Inc. ("Logical Wealth") and Daniel J. Gopen ("Gopen" collectively with Logical Wealth, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

Summary

This proceeding arises out of improper registration, compliance, and recordkeeping by Logical Wealth, an investment adviser registered with the Commission. Between 2006 and 2011, Logical Wealth overstated its assets under management in filings with the Commission, thereby creating the appearance that it qualified for registration with the Commission when it did not. In June 2012, Logical Wealth falsely represented that its principal office and principal place of business was in Wyoming, a state that does not regulate investment advisers, to maintain the firm's Commission registration after rules went into effect restricting such registration to advisers with more assets under management. In addition, although Logical Wealth had registered as an investment adviser with the Commission, it failed to adopt and implement required compliance policies and procedures and to maintain and make available to the Commission's staff books and records required under the Advisers Act. Logical Wealth's owner, Daniel Gopen, was responsible for all of Logical Wealth's filings, compliance procedures, and recordkeeping, and aided and abetted and caused all of its violations.

Respondents

1. Logical Wealth Management, Inc. is a Wyoming corporation and conducts its business from offices in Nevada and New Jersey. Logical Wealth has been registered with the Commission as an investment adviser from 2006 to the present.

2. Daniel J. Gopen, age 49, is a resident of Sparks, Nevada. Gopen is the owner, President and Chief Compliance Officer of Logical Wealth.

Respondents Misrepresented Logical Wealth's Qualifications to Register with the Commission

3. In 2002, Gopen's father organized Logical Wealth as a Massachusetts corporation and operated it from Massachusetts. Following the death of his father in 2006, Gopen assumed ownership of the firm and registered Logical Wealth with the Commission as an investment adviser.

4. Logical Wealth was never qualified for Commission registration. Between 2006 and 2012, Gopen prepared and filed with the Commission Forms ADV for Logical Wealth claiming false bases for registration with the Commission.

5. Gopen reported in Item 2.A.3 of Part 1A of Logical Wealth's Form ADV filed on September 7, 2006, September 19, 2006, March 27, 2007, September 25, 2007, March 31, 2008,

June 1, 2009, September 23, 2009, May 17, 2010, and June 30, 2011 that Logical Wealth's basis for registration with the Commission was having assets under management of over $25 million.[1] This statement was false, and Logical Wealth never had more than $25 million in assets under management. Logical Wealth was prohibited from registering with the Commission as an investment adviser during this period.

6. In 2010, the Advisers Act was amended to increase the threshold for an investment adviser's assets under management required for registration with the Commission. However, registration with the Commission was still required for advisers not regulated by the states where they maintained their principal offices and places of business. Because Wyoming does not regulate investment advisers, any investment adviser with a principal office and place of business in Wyoming, regardless of its assets under management, is required to register with the Commission.

7. On June 23, 2011, shortly before the Advisers Act amendment became effective, Gopen registered Logical Wealth as a Wyoming corporation. In Item 1.F of Part 1A of Logical Wealth's Form ADV filed on June 28, 2012, Logical Wealth claimed its principal office and principal place of business was in Cheyenne, Wyoming, and based its continued registration with the Commission on its Wyoming location. However, Logical Wealth has never operated from any location in Wyoming. Because Logical Wealth did not have a principal office or place of business in Wyoming and had no other basis for Commission registration, it was prohibited from registering with the Commission as an investment adviser.

8. Gopen was solely responsible for preparing, signing, and filing Logical Wealth's filings with the Commission. Gopen was aware of the value of the firm's assets under management and the location of the firm's principal office or place of business. Accordingly, Gopen knew that the representations in Item 2.A.3 of Logical Wealth's Forms ADV filed on September 7, 2006, September 19, 2006, March 27, 2007, September 25, 2007, March 31, 2008, June 1, 2009, September 23, 2009, May 17, 2010, and June 30, 2011 and the representations in Item 1.F. of Logical Wealth's Form ADV filed on June 28, 2012 were false when filed and that Logical Wealth was not eligible for SEC registration.

Compliance/Code of Ethics Failures

9. Despite Logical Wealth's registration as an investment adviser, throughout the relevant period, the firm failed to adopt and maintain written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and failed to establish, maintain and enforce a written code of ethics.

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1 During this period, Section 203A of the Advisers Act prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption. Effective July 21, 2011, Section 203A increased the minimum amount of assets under management for most advisers to qualify for SEC registration from $25 million to $100 million. *See* Advisers Act Section 203A(a)(2) amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Final Rule; Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011).

10. In Items 11 and 17 of Logical Wealth's Form ADV Part 2A filed on June 28, 2012, Logical Wealth falsely stated that it had adopted written trading policies and procedures, written policies and procedures governing voting of client securities, and a formal code of ethics. The written trading policies and procedures, however, did not exist. In addition, Logical Wealth could not produce its code of ethics.

11. Gopen was responsible for Logical Wealth's compliance policies and procedures and knew that Logical Wealth had not adopted and maintained such policies and procedures. Gopen acknowledged that, if Logical Wealth ever had a code of ethics, Logical Wealth had not reviewed or updated it for at least a decade.

Books and Records Failures

12. Logical Wealth failed to maintain certain books and records including, among other things, general ledgers and financial statements relating to its business, and records of accounts in which it was vested with discretionary power.

13. Gopen was responsible for Logical Wealth's books and records and knew that Logical Wealth failed to maintain these records.

Failures to Produce

14. Logical Wealth failed to make available to the Commission's staff certain books and records including, among other things, records relating to the firm's calculations of its assets under management. Logical Wealth also failed to respond within a reasonable time frame to other requests for books and records required to be kept under Rule 204-2 of the Advisers Act.

15. Gopen was responsible for Logical Wealth's books and records and knew that Logical Wealth failed to produce certain records.

Violations

16. As a result of the conduct described above, Logical Wealth willfully violated Section 203A of the Advisers Act by improperly registering with the Commission. Gopen willfully aided and abetted and caused Logical Wealth's violations.

17. As a result of the conduct described above, Logical Wealth and Gopen willfully violated Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

18. As a result of the conduct described above, Logical Wealth willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder, which require, among other things, that an investment adviser: (a) adopt and implement written policies and

procedures reasonably designed to prevent violations of the Advisers Act and its rules; and (b) review at least annually its written policies and procedures and the effectiveness of their implementation. Gopen willfully aided and abetted and caused Logical Wealth's violations.

19. As a result of the conduct described above, Logical Wealth willfully violated Section 204(a) of the Advisers Act, which requires that investment advisers "make and keep" certain records and furnish copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records of the investment adviser are subject to periodic examinations by the Commission. Gopen willfully aided and abetted and caused Logical Wealth's violations.

20. As a result of the conduct described above, Logical Wealth willfully violated Rules 204-2(a)(2), 204-2(a)(6), and 204-2(a)(8) adopted under Section 204(a) of the Advisers Act. Rule 204-2 requires that an investment adviser "make and keep, true, accurate and current" books and records relating to its advisory business. Rule 204-2(a)(2) requires an investment adviser to keep "general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income, and expense accounts." Rule 204-2(a)(6) requires an investment adviser to keep "all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser." Rule 204-2(a)(8) requires an investment adviser to keep a "list or other record of all accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client." Gopen willfully aided and abetted and caused Logical Wealth's violations.

21. As a result of the conduct described above, Logical Wealth willfully violated Section 204A of the Advisers Act and Rule 204A-1 adopted thereunder. Section 204A requires an investment adviser to "establish, maintain, and enforce written policies and procedures reasonably designed" to prevent the misuse of material, non-public information. Rule 204A-1 requires an investment adviser to "establish, maintain and enforce a written code of ethics." Gopen willfully aided and abetted and caused Logical Wealth's violations.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Logical Wealth and Gopen cease and desist from committing or causing any violations and any future violations of Sections 203A, 204(a), 204A, 206(4) and 207 of the Advisers Act and Rules 204-2(a)(2), 204-2(a)(6), 204-2(a)(8), 204A-1 and 206(4)-7 promulgated thereunder.

B. Respondent Logical Wealth's registration as an investment adviser be, and hereby is, revoked.

C. Respondent Gopen be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

D. Any reapplication for association by Respondent Gopen will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

E. Respondent Gopen shall pay civil penalties of $25,000 to the Securities and Exchange Commission. Payment shall be made in the following installments:

a. $2,500 within 10 days of the entry of this Order;
b. $2,500 within 40 days of the entry of this Order;
c. $2,500 within 70 days of the entry of this Order;
d. $2,500 within 100 days of the entry of this Order;
e. $2,500 within 130 days of the entry of this Order;
f. $2,500 within 160 days of the entry of this Order;
g. $2,500 within 190 days of the entry of this Order;
h. $2,500 within 220 days of the entry of this Order;
i. $2,500 within 250 days of the entry of this Order;
j. $2,500 plus interest on the payments described in Section IV.E(a)-(j) pursuant to 31 U.S.C. 3717 within 280 days of the entry of this Order.

Prior to making the payment described in Section IV.E(j), Respondent Gopen shall contact the Commission staff to ensure the inclusion of interest. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, at the discretion of the Commission staff, without further application. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Daniel J. Gopen as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas J. Krysa, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S. C. §523, the findings in this Order are true and admitted by Respondent Gopen, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Gopen under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Gopen of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 74315 / February 19, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15851

IN THE MATTER OF	:	**ORDER MAKING FINDINGS, IMPOSING REMEDIAL SANCTIONS PURSUANT TO RULE 102(e)(3), AND TERMINATING ADMINISTRATIVE PROCEEDING**
	:	
BRIAN WILLIAMSON, Esq.	:	
	:	
	:	

I.

On April 22, 2014, the Commission instituted public administrative proceedings and temporarily suspended Brian Williamson ("Williamson" or "Respondent") from appearing or practicing before the Commission as an attorney pursuant to Rule 102(e)(3)(i)(B) of the Commission's Rules of Practice.[1] On May 21, 2014, Williamson filed a Petition to Lift Temporary Suspension Pursuant to Rule 102(e)(3)(ii) of the Commission's Rules of Practice. On June 19, 2014, the Commission denied that motion and directed that the proceeding be set down for a public hearing before an administrative law judge.

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.1 thru III.5 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanction ("Order"), as set forth below.

[1] Rule 102(e)(3)(i) provides, in relevant part:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any attorney . . . who has been by name ... (B) ... found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Williamson, age 43, is an attorney with an inactive license to practice law in Pennsylvania and New Jersey. He is not currently eligible to practice law in either of those states because his status is "Retired."

2. Williamson was employed by Oppenheimer & Co. Inc. ("OPCO") and Oppenheimer Asset Management ("OAM"), and was a Managing Director at Oppenheimer Alternative Investment Management ("OAIM"). In those roles, he was the portfolio manager of Oppenheimer Global Resource Private Equity Fund I, L.P. ("OGR"), a fund of private equity funds.

3. On August 20, 2013, the Commission instituted an administrative proceeding against Williamson alleging that he made material false and misleading statements and omissions to investors and prospective investors concerning the valuation of OGR. *In the Matter of Brian Williamson*, Admin. Proc. File No. 3-15430, Exchange Act Release No. 34-70234.

4. On January 22, 2014, the Commission entered a consent Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(B) and 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 ("Order") against Williamson. The Commission found that Williamson made material false and misleading statements and omissions to investors and prospective investors concerning the valuation of OGR. Williamson did not admit or deny the findings. Exchange Act Release No. 34-71364.

5. The Commission also found that, through his conduct detailed in the Order and summarized above, Williamson willfully violated Section 17(a) of the Securities Act; Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. *Id.*

6. Williamson was thus found to have violated or aided and abetted the violation of the federal securities laws, rules, or regulations within the meaning of Rule 102(e)(3)(i)(B).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Williamson's Offer.

Accordingly, it is hereby ORDERED pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice, effective immediately, that:

A. Williamson is suspended from appearing or practicing before the Commission as an attorney for two (2) years beginning January 22, 2014.

B. After two years from January 22, 2014, Respondent may request that the Commission consider his application to resume appearing and practicing before the Commission as an attorney. The application should be sent to the attention of the Office of the General Counsel.

C. In support of such an application, Respondent must provide a certificate of good standing from each state bar where Respondent is admitted.

D. In support of such an application, Respondent must also submit an affidavit truthfully stating, under penalty of perjury:

1. that Respondent has complied with the Order;

2. that Respondent:

   a. is not currently suspended or disbarred as an attorney by a court of the United States (or any agency of the United States) or the bar or court of any state, territory, district, commonwealth, or possession; and

   b. since the entry of the Order, has not been suspended as an attorney for an offense involving moral turpitude by a court of the United States (or any agency of the United States) or the bar or court of any state, territory, district, commonwealth, or possession, except for any suspension concerning the conduct that was the basis for the Order;

3. that Respondent, since the entry of the Order, has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice; and

4. that Respondent, since the entry of the Order:

   a. has not been found by the Commission or a court of the United States to have committed a violation of the federal securities laws, except for any finding concerning the conduct that was the basis for the Order;

   b. has not been charged by the Commission or the United States with a violation of the federal securities laws, except for any charge concerning the conduct that was the basis for the Order;

   c. has not been found by a court of the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, or any bar thereof, to have committed an offense involving moral turpitude, except for any finding concerning the conduct that was the basis for the Order; and

d. has not been charged by the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, or any bar thereof, with having committed an offense involving moral turpitude, except for any charge concerning the conduct that was the basis for the Order.

E. If Respondent provides the documentation required in Paragraphs C and D, and the Commission determines that he truthfully attested to each of the items required in his affidavit, he shall by Commission order be permitted to resume appearing and practicing before the Commission as an attorney.

F. If Respondent is not able to truthfully attest to the statements required in Subparagraphs D(2)(b) or D(4), Respondent shall provide an explanation as to the facts and circumstances pertaining to the matter and the Commission may hold a hearing to determine whether there is good cause to permit him to resume appearing and practicing before the Commission as an attorney.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74323; File No. 4-631)

February 19, 2015

Joint Industry Plan; Order Approving the Eighth Amendment to the National Market System Plan to Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.

I. Introduction

On December 24, 2014, Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the following parties to the National Market System Plan: BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively with FINRA, the "Participants"), filed with the Securities and Exchange Commission ("Commission") pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 thereunder,[2] a proposal to amend the Plan to Address Extraordinary Market Volatility ("Plan").[3] The proposal represents the eighth amendment to the Plan ("Eighth Amendment"), and reflects proposed changes unanimously approved by the Participants. The Eighth Amendment was published for comment in the Federal Register on January 27, 2015.[4] The Commission has

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

3 See Letter from Christopher B. Stone, Vice President, FINRA, to Brent Fields, Secretary, Commission, dated December 24, 2014 ("Transmittal Letter").

4 See Securities Exchange Act Release No. 74110 (January 21, 2015), 80 FR 4321

received no comment letters regarding the Eighth Amendment. This order approves the Eighth Amendment to the Plan.

II. Description of the Proposal

A. Eighth Amendment to the Plan

The Eighth Amendment includes two proposed changes to the Plan. First, the Participants propose to amend the Plan to establish a requirement for the Participants to submit a Supplemental Joint Assessment to the Commission by May 29, 2015. Second, the Participants propose to extend the end date of the pilot period of the Plan from February 20, 2015 to October 23, 2015.

B. Background and Purpose of the Plan

The Plan, approved by the Commission in March 2012,[5] establishes a market-wide limit up-limit down mechanism that is intended to address extraordinary market volatility in "NMS Stocks," as defined in Rule 600(b)(47) of Regulation NMS under the Act.[6] The Plan sets forth limit up-limit down requirements designed to prevent trades from occurring outside specified Price Bands.[7] These limit up-limit down requirements are coupled with Trading Pauses, as defined in the Plan, to accommodate more fundamental price moves (as opposed to erroneous trades or momentary gaps in liquidity). The limit up-limit down mechanism is intended to reduce the negative impacts of sudden, unanticipated price movements in NMS Stocks, such as those experienced on May 6, 2010, thereby protecting investors and promoting a fair and orderly

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("Notice").

5 See Securities Exchange Act Release No. 67091, 77 FR 33498 (Jun. 6, 2012) (File No. 4-631).

6 17 CFR 242.600(b)(47). See also Section I(H) of the Plan.

7 See Section V of the Plan.

market. The initial date of Plan operations was April 8, 2013.[8]

III. Discussion and Commission Findings

After careful review, the Commission finds that the Eighth Amendment is consistent with the requirements of the Act and the rules and regulations thereunder.[9] Specifically, the Commission finds that the Eighth Amendment is consistent with Section 11A of the Act[10] and Rule 608 thereunder[11] in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and that it removes impediments to, and perfects the mechanism of, a national market system.

The Supplemental Joint Assessment will evaluate the impact of the Plan using the measures set forth in Appendix B of the Plan[12] and provide the Commission with an extensive

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8 See Securities Exchange Act Release No. 68953 (February 20, 2013), 78 FR 13113 (February 26, 2013).

9 In approving the Eighth Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

10 15 U.S.C. 78k-1.

11 17 CFR 242.608.

12 Appendix B of the Plan requires the Participants to: (a) assess the statistical and economic impact on liquidity of approaching Price Bands; (b) assess the statistical and economic impact of the Price Bands on erroneous trades; (c) assess the statistical and economic impact of the appropriateness of the Percentage Parameters used for the Price Bands; (d) assess whether the Limit State is the appropriate length to allow for liquidity replenishment when a Limit State is reached because of a temporary liquidity gap; (e) evaluate concerns from the options markets regarding the statistical and economic impact of Limit States on liquidity and market quality in the options markets; (f) assess whether the process for entering a Limit State should be adjusted and whether Straddle States are problematic; (g) assess whether the process for exiting a Limit State should be adjusted; and (h) assess whether the Trading Pauses are too long or short and whether the reopening procedures should be adjusted.

These areas are intended to capture the key measures necessary to assess the impact of the Plan and, if and where appropriate, to support recommendations relating to the calibration of the Percentage Parameters to help ensure that the stated objectives of the Plan are achieved.

cross-market data analysis using methodology agreed upon by the Participants.[13] The Participants stated that they intend to engage a third-party consultant to assist in conducting the cross-market analysis and preparing the Supplemental Joint Assessment.[14] The Participants believe that the Supplemental Joint Assessment will facilitate the development of unified recommendations, if and where appropriate, regarding operation of the Plan.[15] The Participants also state that they intend to make the Supplemental Joint Assessment publicly available.[16]

The Participants further believe that extending the end date of the pilot period will: (i) provide the Participants with time to use the information collected during the operation of the Plan to perform further analysis and recommend further amendments to the Plan, as necessary; (ii) provide a reasonable period of time for the public to comment on the Supplemental Joint Assessment and recommendations; and (iii) allow the Commission and the public adequate time to review the Supplemental Joint Assessment and any recommendations provided by the Participants, and to determine if any modifications to the Plan are appropriate.[17]

The Commission believes that the Supplemental Joint Assessment and any resulting recommendations for modifications to the Plan from the Participants, along with any public comment in response thereto, will assist the Commission in assessing the operation of the Plan and in considering any future determinations regarding the Plan.

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13 See Notice, supra, note 4 at 4323.

14 See id. More recently, however, the Participants notified Commission staff that they have engaged a third-party consultant. Telephone conversation between Chris Grobbel, Attorney-Adviser, Commission, and Thushara Therrien, Director - Transparency Services, FINRA (February 3, 2015).

15 See Notice, supra, note 4 at 4323.

16 See id.

17 See id.

For the reasons noted above, the Commission finds that the Eighth Amendment to the Plan is consistent with Section 11A of the Act[18] and Rule 608 thereunder.[19] The Commission reiterates its expectation that the Participants will continue to monitor the scope and operation of the Plan and study the data produced, and will propose any modifications to the Plan that may be necessary or appropriate.[20]

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act[21] and Rule 608 thereunder,[22] that the Eighth Amendment to the Plan (File No. 4-631) be, and it hereby is, approved.

Brent J. Fields
Secretary

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18 15 U.S.C. 78k-1.

19 17 CFR 242.608.

20 See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

21 15 U.S.C. 78k-1.

22 17 CFR 242.608.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74327 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16394

In the Matter of **Innovative Software Technologies, Inc., National Health Partners, Inc., The Laguna Group, Inc. (a/k/a Eco Energy Pumps, Inc.), and TYIN Group Holdings Limited,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Innovative Software Technologies, Inc. ("INIV") (CIK No. 1084047) is a Delaware corporation located in Tampa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). INIV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended March 31, 2010, which reported a net loss of $393,992 for the prior year. As of February 12, 2015, the common stock of INIV was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of each issuer's name is also its stock symbol.

2. National Health Partners, Inc. ("NHPR") (CIK No. 1306109) is an Indiana corporation located in Horsham, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NHPR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $603,397 for the prior nine months. As of February 12, 2015, the common stock of NHPR was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. The Laguna Group, Inc. (a/k/a Eco Energy Pumps, Inc.) ("EEPU") (CIK No. 1458725) is a Nevada corporation located in Carson City, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EEPU is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 30, 2011, which reported a net loss of $62,970 for the prior six months. As of February 12, 2015, the common stock of EEPU was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. TYIN Group Holdings Limited ("TYIN") (CIK No. 1512693) is a Nevada corporation located in Yuen Long, New Territories, Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TYIN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2012. As of February 12, 2015, the common stock of TYIN was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74325 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16393

In the Matter of **Calypte Biomedical Corporation,** **EC Development, Inc., and** **Information Architects Corporation** **(n/k/a Dakota Creative Group Corporation),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Calypte Biomedical Corporation ("CBMC") (CIK No. 899426) is a Delaware corporation located in Portland, Oregon with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CBMC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2012, which reported a net loss of $1,076,000 for the prior year. As of February 12, 2015, the common stock of CBMC was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1]The short form of each issuer's name is also its stock symbol.

2. EC Development, Inc. ("ECDI") (CIK No. 761034) is a delinquent Delaware corporation located in Shawnee, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ECDI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $1,333,296 for the prior nine months. As of February 12, 2015, the common stock of ECDI was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Information Architects Corporation (n/k/a Dakota Creative Group Corporation) ("IACH") (CIK No. 1018336) is a North Carolina corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IACH is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $1,397,232 for the prior nine months. On August 19, 2014, IACH changed its name to Dakota Creative Group Corporation without reporting the change to the Commission as required by Commission rules. As of February 12, 2015, the common stock of IACH was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74329 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16395

In the Matter of **Revonergy Inc.,** **Siberian Energy Group Inc.,** **Tao Minerals Ltd.** **(n/k/a Canam Gold Corp.), and** **Todays Alternative Energy Corp.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Revonergy Inc., Siberian Energy Group Inc., Tao Minerals Ltd. (n/k/a Canam Gold Corp.), and Todays Alternative Energy Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Revonergy Inc. (CIK No. 1452274) is a revoked Nevada corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Revonergy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended September 30, 2011, which reported a net loss of $2,369,784 from the company's April 9, 2008 inception through September 30, 2011. As of February 10, 2015, the company's stock (symbol "RNRG") was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had four market

makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Siberian Energy Group Inc. (CIK No. 1301299) is a revoked Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Siberian Energy Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $16,537,118 for the prior six months. As of February 10, 2015, the company's stock (symbol "SIBN") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Tao Minerals Ltd. (n/k/a Canam Gold Corp.) (CIK No. 1320338) is a defaulted Nevada corporation located in Medellin, Columbia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tao Minerals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 31, 2011, which reported a net loss of $2,409,262 for the prior nine months. As of February 10, 2015, the company's stock (symbol "TAON") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Todays Alternative Energy Corp. (CIK No. 1128581) is a revoked Nevada corporation located in Newark, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Todays Alternative Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2012, which reported a net loss of $3,481,399 from the company's November 1, 2007 inception through July 31, 2012. As of February 10, 2015, the company's stock (symbol "TAEC") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74331 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16396

In the Matter of Akesis Pharmaceuticals, Inc., Skye International, Inc., Stellar Resources, Ltd., and Thwapr, Inc., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Akesis Pharmaceuticals, Inc., Skye International, Inc., Stellar Resources, Ltd., and Thwapr, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Akesis Pharmaceuticals, Inc. (CIK No. 1042420) is a revoked Nevada corporation located in La Jolla, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Akesis Pharmaceuticals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of $4,109,185 for the prior nine months. As of February 10, 2015, the company's stock (symbol "AKESQ") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). On January 30, 2009, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was closed on December 27, 2013.

2. Skye International, Inc. (CIK No. 1095751) is a revoked Nevada corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Skye International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2010, which reported a net loss of $1,435,326 for the prior nine months. On December 16, 2009, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Nevada, and the case was closed on December 24, 2010. On April 28, 2011, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Nevada, and the case was still pending as of December 2, 2014.

3. Stellar Resources, Ltd. (CIK No. 1217027) is a Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Stellar Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended January 31, 2012, which reported a net loss of $630,595 for the prior six months. As of February 10, 2015, the company's stock (symbol "SRRL") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Thwapr, Inc. (CIK No. 1451598) is a revoked Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Thwapr is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $27,850,094 from the company's March 14, 2007 inception through June 30, 2012. As of February 10, 2015, the company's stock (symbol "THWI") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

Commissioner Aguilar
Not participating
Commissioner Piwowar,
Commissioner Gallagher
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Advisor and NRSRO
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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74346 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16397

In the Matter of

JUAN JOSE ALVAREZ DE LUGO AZPURUA,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Juan Jose Alvarez De Logo Azpurua ("Alvarez De Lugo" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. From approximately 2005 until January 2013, Alvarez De Lugo held himself out as the president of multiple successful businesses specializing in real estate development programs. Alvarez De Lugo regularly solicited and sold to numerous persons investments (*i.e.*, "Promissory Notes") in these businesses that promised a return of 20% per year. In fact, other than soliciting investors and selling these notes, Alvarez De Lugo performed no substantial other duties for his purported businesses. Alvarez De Lugo received at least $2 million from 10 investors. Instead of investing the money as promised, Alvarez De Lugo compensated himself by spending the invested funds on his own personal expenses and enriched himself and relatives. After the funds had been spent, Alvarez De Lugo wrote a letter to the victims that falsely claimed payments were delayed because one of his companies needed an "investor/broker license" before the plan could be put into effect. As a result of this conduct, Alvarez De Lugo was engaged in the business of effecting transactions in securities for the accounts of others and acted as a broker-dealer. Alvarez De Lugo was a resident of Branford, Connecticut, and is currently incarcerated.

2. On September 18, 2013, Alvarez De Lugo pled guilty to one count of wire fraud before the United States District Court for the District of Connecticut, [United States v. Juan Jose Alvarez De Lugo Azpurua, No.3: 13 CR-00177] and on February 4, 2014 was sentenced to 48 months in prison.

3. The count of the criminal information to which Alvarez De Lugo pled guilty alleged, inter alia, that Alvarez De Lugo made materially false representations to investors, did not invest the money as promised, and spent investment money on his own personal expenses.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Alvarez De Lugo's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Alvarez De Lugo be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9728 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74345 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4029 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31462 / February 20, 2015

Admin. Proc. File No. 3-15255

In the Matter of JOHN THOMAS CAPITAL MANAGEMENT GROUP LLC d/b/a PATRIOT28 LLC and GEORGE R. JARKESY, JR.	ORDER DENYING MOTION TO STAY ADMINISTRATIVE PROCEEDING

In December 2014, we granted the petition of respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. for review of an administrative law judge's initial decision.[1] Respondents have now filed a Motion to Stay Administrative Proceeding, which requests that the Commission stay the review proceeding until their federal appeal is resolved. We deny the motion for the reasons set forth herein.

I.

We begin by providing some context for respondents' motion.[2] At the outset, this administrative proceeding involved two other respondents (the "Settling Respondents") that later

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1 *John Thomas Capital Mgmt. Grp. LLC*, Securities Exchange Act Release No. 73819, 2014 WL 6985130 (Dec. 11, 2014).

2 In three previous orders, the Commission has set forth the background of this proceeding in more detail. *See John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 73375, 2014 WL 5282156 (Oct. 16, 2014) (*John Thomas III*) (denying interlocutory review with respect to law judge order rejecting respondents' request that the initial decision be maintained under seal until resolution of federal appeal); *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 71415, 2014 WL 294551 (Jan. 28, 2014) (*John Thomas II*) (denying interlocutory review with respect to law judge order rejecting prejudgment claim); *John Thomas Capital Mgmt. Grp.*

(footnote continued . . .)

submitted an offer of settlement to the Commission. The Commission's order accepting the settlement (the "Settlement Order") stated that the "findings herein are made pursuant to [the Settling Respondents'] Offer of Settlement and are not binding on any other person or entity in this or any other proceeding."[3]

In January 2014, JTCM and Jarkesy sought disqualification of the Commission on the basis that the Commission, in issuing the Settlement Order, purportedly had "conclusively prejudged the case" against them. The law judge denied the motion to disqualify and the Commission denied interlocutory review. The order denying review concluded, among other things, respondents' claims could effectively be reviewed following issuance of the initial decision in the event that it was adverse to them.[4] It also observed that respondents had not established that there was a "substantial ground for difference of opinion" because the Commission had in past decisions rejected claims of prejudgment premised upon its acceptance of settlements in multi-respondent proceedings, and respondents had not addressed or distinguished those decisions.[5] This precedent established that no prejudgment of the non-settling respondent's case occurs even though the agency may have acquired some familiarity with the underlying events at another stage of the proceedings involving other respondents.[6]

Later in January 2014, JTCM and Jarkesy sought a temporary restraining order ("TRO") from the United States District Court for the District of Columbia, seeking to stay the hearing before the law judge. Respondents advanced the prejudgment claim as well as claims based on asserted violations of the Due Process Clause, the Equal Protection Clause, and other constitutional provisions. The district court denied their request for a TRO, finding that its jurisdiction was doubtful; that respondents had failed to show that judicial review after the Commission's issuance of a final order would be an inadequate remedy; and that respondents had not established that they would be irreparably harmed.[7] Subsequently, in June 2014, the district court dismissed the case for lack of subject matter jurisdiction. The court observed that Section 25 of the Securities Exchange Act of 1934 confers federal-court jurisdiction over only "*final*

(. . . footnote continued)

LLC, Exchange Act Release No. 71021, 2013 WL 6384275 (Dec. 6, 2013) (*John Thomas I*) (denying interlocutory review with respect to law judge order rejecting *Brady* and due process claims).

3 *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 70989, 2013 WL 6327500, at *1 n.1 (Dec. 5, 2013).

4 *John Thomas II*, 2014 WL 294551, at *3 & nn.23-25.

5 *Id.* at *2 & nn.11-15 (collecting cases).

6 *Id.* at *2.

7 *Jarkesy v. SEC*, Case No. 1:14-cv-00114-BAH, Dkt. No. 22, at 73:1-79:21 (D.D.C. Jan. 31, 2014).

order[s]" of the Commission, and that it was undisputed that the Commission had not yet issued such a final order.[8] The court concluded that, although respondents asserted "violations of their constitutional rights[,] . . . those claims are inextricably intertwined with . . . the very enforcement proceeding," and that respondents would "have the opportunity to seek judicial review if they are aggrieved by the SEC's final order."[9]

JTCM and Jarkesy's appeal from the district court's ruling is pending in the United States Court of Appeals for the District of Columbia. In November 2014, the D.C. Circuit denied the Commission's motion for summary affirmance, directed that the appeal be calendared for oral argument in the present term, and set a briefing schedule that provides for respondents' final brief to be filed in mid-February 2015.

Meanwhile, the law judge held the hearing as scheduled and issued the initial decision in October 2014. Respondents petitioned for review and the Division cross-petitioned for review. The Division also requested expedited treatment of the review proceeding on the basis of asserted concerns about the ongoing disposition of assets in the funds. On December 11, 2014, the Commission granted review and granted the Division's request for expedited treatment consistent with the Commission's other responsibilities. Although the order granting review stated that "no motions for extensions of time to file briefs will be entertained," the briefing schedule afforded the parties more time to file briefs than they ordinarily would have received under Rule of Practice 450.[10]

In light of subsequent orders directing additional briefing and otherwise extending the briefing schedule, this review proceeding is not expected to be fully briefed until April 20, 2015.[11] Additionally, concurrently with the instant motion to stay, respondents also filed two other motions, a motion to adduce additional evidence and a renewed motion to recuse the Commission on prejudgment grounds, both of which remain pending.

II.

Respondents request that the Commission "stay the proceedings on review of the Initial Decision pending the decision" of the D.C. Circuit. Our Rules of Practice contain no specific

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8 15 U.S.C. § 78y(a)(1) (emphasis added).

9 *Jarkesy v. SEC*, ___ F. Supp. 2d ___, 2014 WL 2584403, at *5 (D.D.C. June 10, 2014).

10 17 C.F.R. §§ 201.450(a); *John Thomas Capital*, 2014 WL 6985130, at *1.

11 *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74100, 2015 WL 242391 (Jan. 20, 2015); *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74181, 2015 WL 399928 (Jan. 30, 2015).

provision governing stays of an administrative proceeding pending a related civil proceeding.[12] We accordingly construe respondents' motion as a request for a postponement or adjournment under Rule of Practice 161.[13] We adhere to a "'policy of strongly disfavoring such requests'" absent a strong showing of substantial prejudice and consider the "pendency of an appeal generally . . . an insufficient basis upon which to prolong a Commission proceeding."[14]

Respondents here assert that a stay is necessary to "mitigate any obstruction of the jurisdiction" of the D.C. Circuit and that a "Commission Final Decision entered prior to the decision of the Court of Appeals will effectively defeat the jurisdiction of that court." They also argue that continuation of administrative proceedings will cause them irreparable injury. We do not find these arguments persuasive.

To begin with, JTCM and Jarkesy have it backwards: Far from *defeating* the jurisdiction of the federal courts, the eventual issuance of a final Commission decision in this proceeding—assuming hypothetically that it was adverse to respondents—would *vest* the court of appeal with jurisdiction to resolve respondents' claims.[15] Section 25 of the Exchange Act provides that any

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12 *Cf.* Rules of Practice 161(c)(2), 210(c)(3), 401(c), 17 C.F.R. §§ 201.161(c)(2) (stay pending Commission consideration of an offer of settlement), 201.210(c)(3) (stay pending criminal investigation or prosecution), 201.401(c) (stay of effectiveness of final Commission order pending judicial review of that order).

13 *See, e.g.*, *Paul Free*, Exchange Act Release No. 66260, 2012 WL 266986, at *2 (Jan. 26, 2012); *Joseph John VanCook*, Exchange Act Release No. 59550, 2009 WL 605322, at *2 (Mar. 10, 2009); *Michael J. Markowski*, Exchange Act Release No. 40748, 1998 WL 960587, at *2 (Dec. 4, 1998). We note that respondents' stay motion does not cite any Rule of Practice.

14 *Paul Free*, 2012 WL 266986, at *2 (quoting Rule of Practice 161(b)(1), 17 C.F.R. § 201.161(b)(1)) (denying motion to stay proceedings); *cf. Michael S. Steinberg*, Investment Advisers Act Release No. 4008, 2015 WL 331125, at *1-2 (Jan. 27, 2015) (granting respondent's unopposed motion to postpone briefing where the Second Circuit granted his unopposed motion to hold his criminal appeal in abeyance pending en banc proceedings in *United States v. Newman* and where respondent argued that, "unless the panel's decision [in *Newman*]. . . is either vacated or modified, he will be entitled to reversal of his conviction . . . , thereby vitiating the basis for the bar imposed by the law judge").

15 If the Commission's eventual decision were *favorable* to respondents, they could not, of course, seek judicial review. But this does not mean that respondents' claims would be insulated from review in any pertinent sense. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 & n.11 (1980). Indeed, "the possibility that [respondents'] challenge may be mooted in adjudication warrants the requirement that [they] pursue adjudication, not shortcut it." *Id.* at 244 n.11; *cf. Deaver v. Seymour*, 822 F.2d 66, 71 (D.C. Cir. 1987) ("That [the plaintiff's] challenge . . . [has] constitutional implications does not support his argument for accelerated and unorthodox judicial review. Indeed, it substantially weakens it.").

"person aggrieved by a final order of the Commission . . . may obtain review of the order in the [appropriate] United States Court of Appeals."[16] As the D.C. district court stated in its order dismissing respondents' federal action for lack of jurisdiction, there "is no dispute that [JTCM and Jarkesy] will have the opportunity to raise all of their constitutional claims before a Court of Appeals should . . . the Commission issue orders adverse to them."[17]

Respondents have argued in other papers that issuance of a Commission decision would in practice foreclose *meaningful* judicial review of their constitutional claims because the administrative process, in their view, denies them the ability to develop an adequate record for a court to review.[18] They assert that there is "no procedural mechanism for the necessary development of evidence" in our Rules of Practice or under the Administrative Procedure Act. We cannot agree. Although the *law judge* did deny respondents' requests for the issuance of subpoenas regarding, *inter alia*, their prejudgment, *Brady*, and equal-protection claims—on the ground that the requests were unreasonable, untimely, and sought privileged material—they are free to seek *Commission* review of her rulings.

And JTCM and Jarkesy have done exactly that, both in their opening brief with the Commission and in their motion to adduce additional evidence pertaining to the asserted constitutional violations. They have argued, for example, that the law judge erred because "Rule [of Practice] 232 [governing the issuance of subpoenas] does not preclude the issuance of a subpoena after the hearing has begun" and because the scope of the subpoenas was "not unreasonable" within the meaning of Rule 232.[19] In short, respondents *thus far* have been unable to obtain the information that they seek because of the law judge's context-specific discovery rulings—which they can challenge on appeal to us—*not* because of a limitation inherent to the Commission's administrative procedures that would categorically place such discovery off limits.

We are not bound by the law judge's evidentiary or discovery rulings.[20] Nor would our prior denials of interlocutory review as to those rulings, *see supra* note 2, preclude respondents

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16 15 U.S.C. § 78y(a)(1).

17 *Jarkesy*, 2014 WL 2584403, at *4; *see also Chau v. SEC*, ___ F. Supp. 3d ___, 2014 WL 6984236, at *14 (S.D.N.Y. Dec. 11, 2014) (considering constitutional challenges to Commission administrative proceeding and concluding that "if [the respondents in that case] lose before the Commission, they will have a full opportunity to present their arguments in a court of appeals").

18 *E.g.*, Respondents' Motion to Adduce Additional Evidence at 6 (filed Jan. 13, 2015); Respondents' Opening Brief at 30-33 (filed Jan. 13, 2015).

19 Respondents' Motion to Adduce Additional Evidence at 4-5 (citing Rule of Practice 232, 17 C.F.R. § 201.232).

20 *See* 5 U.S.C. § 557(b); 15 U.S.C. § 78d-1(b); Rules of Practice 326, 411(a), 17 C.F.R. §§ 201.326, 201.411(a); S. Rep. No. 776 at p. 3, 87th Cong., Pub. L. No. 87-592 (Aug. 24, 1961); *Adopting Release, Rules of Practice*, 60 Fed. Reg. 32738, 32774-75 (June 23, 1995); *cf.*

(footnote continued . . .)

from renewing their arguments before the Commission now.[21] As a consequence, in the event that we were to conclude that we could not resolve respondents' constitutional claims on the present record, we could provide relief in the course of our review process. We have the authority, for example, to direct that the record be supplemented pursuant to Rule of Practice 452 and allow additional briefing before issuing a final Commission decision.[22] We also have the authority to remand for a new hearing before the law judge at which the parties would have access to all the evidence to which they are entitled.[23] For these reasons, the contention that as-applied constitutional claims turn on "extrinsic evidence [that] cannot be 'explored' within the administrative proceeding" lacks merit.[24]

Even assuming—again, solely for purposes of discussion—that the *Commission* ultimately were to reject respondents' attempts to expand the record and their other defenses, and then issue a final decision that was adverse to them, their claims still would be subject to meaningful *judicial* review. JTCM and Jarkesy could argue to the court of appeals that the administrative record was improperly limited; Section 25(a)(5) of the Exchange Act authorizes the reviewing court to "remand the case to the Commission for further proceedings," including the taking of new evidence before the Commission, if the evidence is shown to be material and other conditions are satisfied.[25] A judicial-review provision like this, the Supreme Court has explained, allows a "record which [otherwise] would be inadequate for [judicial] review" to be "made adequate" by the court of appeals, foreclosing any argument that agency "unlawfulness will be 'insulated' because the reviewing court will lack an adequate record."[26] Put another way,

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(. . . footnote continued)

Rapoport v. SEC, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not . . . binding" on the Commission); *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 431 F.3d 803, 806, 812 (D.C. Cir. 2005) (characterizing the Commission's review of initial decisions as "plenary").

21 *See John Thomas III,* 2014 WL 5282156, at *4 n.20; *see also Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 413 (D.C. Cir. 1998) ("An agency . . . may alter or modify its position in response to persuasive arguments[.]").

22 Rule of Practice 452, 17 C.F.R. § 201.452 (providing that the Commission "may accept or hear additional evidence").

23 *Id.* (providing that the Commission may "remand . . . the proceeding to a hearing officer for the taking of additional evidence as appropriate"); *John Thomas I*, 2013 WL 6384275, at *3 (citing, *inter alia*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009)).

24 *See Chau*, 2014 WL 6984236, at *11 (rejecting argument, raised by respondents in another Commission administrative proceeding, that evidence-based equal-protection claim was not amenable to meaningful judicial review after a final Commission decision).

25 15 U.S.C. § 78y(a)(5).

26 *Standard Oil Co. of Cal.*, 449 U.S. at 244-45 (discussing analogous provision of the Federal Trade Commission Act, 15 U.S.C. § 45(c)); *Shalala v. Ill. Council on Long Term Care,*

(footnote continued . . .)

respondents' constitutional claims—including any claim relating to their purported inability to develop an adequate record before the Commission—will be "ripe for appellate examination in due course in the event that [they] lose in the administrative arena."[27]

Finally, we do not believe that JTCM and Jarkesy have made a sufficient showing that irreparable harm (or, for that matter, any cognizable prejudice) would result from the Commission's continued consideration of this matter. Distilled to its essence, respondents' position is that they should not be forced to participate in the instant proceeding because they believe the Commission is an improper and biased decision-maker. But the Supreme Court long has recognized the "expense and disruption of defending . . . [a] protracted adjudicatory proceeding[]" does not constitute irreparable harm, even when the party questions the lawfulness of the agency's proceedings.[28] Generally speaking, the "burden of being haled" into an allegedly improper forum does not constitute an irreparable injury warranting interruption of an ongoing proceeding.[29] Review instead must be deferred until the proceeding has come to an end. That conclusion holds whether the forum is challenged on prejudgment,[30] due process,[31] equal protection,[32] Seventh Amendment,[33] separation of powers,[34] or some other venue or

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(. . . footnote continued)

Inc., 529 U.S. 1, 23-24 (2000) (explaining that a "court reviewing an agency determination under [a similar provision of the Medicare Act] has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide, including, where necessary, the authority to develop an evidentiary record") (citations omitted); *see also Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2138 (2012) (similar; Civil Service Reform Act).

27 *Chau*, 2014 WL 6984236, at *11.

28 *Standard Oil Co. of Cal.*, 449 U.S. at 244 (citing *Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209 (1938)).

29 *Deaver*, 822 F.2d at 69-70 (quotation marks omitted).

30 *E.g.*, *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 960, 962-64 (5th Cir. 1980); *Vuono v. United States*, 441 F.2d 271, 271 (4th Cir. 1971) (per curiam); *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980) (explaining that it is "well established that a [reviewing] court cannot entertain an attack upon the . . . partiality of arbitrators until after the conclusion of the arbitration").

31 *E.g.*, *Petroleum Exploration*, 304 U.S. at 211, 221-22; *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1094, 1101-02 (D.C. Cir. 1985); *see also United States v. Lewis*, 368 F.3d 1102, 1107, 1109 (9th Cir. 2004) (holding that *Brady* claims are subject to only post-trial appellate review because a "defendant's due process right to a fair trial" can be vindicated by disclosure of the evidence and a new trial).

32 *E.g.*, *Altman v. SEC*, 687 F.3d 44, 45 (2d Cir. 2012) (per curiam), *aff'g* 768 F. Supp. 2d 554, 558-62 (S.D.N.Y. 2011); *United States v. Juvenile Female*, 869 F.2d 458, 459-60 (9th Cir. 1989) (per curiam); *see also United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270

(footnote continued . . .)

jurisdictional ground.[35] Respondents have failed to justify a departure from this established legal principle.

We are not convinced that respondents have marshalled any sound reasons for arresting the Commission's ongoing review process. Quite the contrary, we believe that allowing that process to play out—*e.g.*, through the completion of briefing on the petition and the cross-petition, the presentation of oral argument before the Commission,[36] the disposition of respondents' other pending motions, and the issuance of a final decision by the Commission—will provide all parties with a fair opportunity to present their arguments and ensure that the issues in this proceeding are fully considered.[37]

* * *

(. . . footnote continued)

(1982) (holding that the right to be free from vindictive prosecution "is simply not one that must be upheld prior to trial if it is to be enjoyed at all").

33 *E.g.*, *Germain v. Conn. Nat'l Bank*, 930 F.2d 1038, 1039 (2d Cir. 1991); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261-62 (7th Cir. 1978).

34 *E.g.*, *Deaver*, 822 F.2d at 67, 70-71; *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 739-41 (D.C. Cir. 1987) (op. of Edwards, J.); *id.* at 750 (op. of Williams, J.); *id.* at 752 (op. of Green, J.); *Hastings*, 770 F.2d at 1102-03.

35 *E.g.*, *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003); *Harvey v. Seevers*, 626 F.2d 27, 31-32 (7th Cir. 1980); *State of Cal. ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323-24 (9th Cir. 1977).

36 As a matter of custom and practice, the Commission ordinarily grants any request for oral argument on review from a law judge's initial decision. *Rules of Practice*, 60 Fed. Reg. at 32780. The Commission also may direct oral argument on its own motion. *See* Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

37 Respondents have elsewhere complained about purported irregularities in the manner in which they were served with the Commission's briefing orders. Their contention that service of such orders by first-class U.S. mail violates Rule of Practice 141(b) or due process is without merit. 17 C.F.R. § 201.141(b) (directing service by "any method . . . authorized under . . . Rule 150(c)(1)-(3)"); *id.* § 201.150(c)(2) (providing for service "through the U.S. Postal Service by first class . . . mail"); *see, e.g.*, *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146-47 (4th Cir. 2014) (holding that service by first-class mail accords with due process); *Bachynskyy v. Holder*, 668 F.3d 412, 415, 420-21 (7th Cir. 2011) (same); *United States v. Andrews*, 221 F.3d 894, 895 (6th Cir. 2000) (same). Nor, in any event, can respondents show that they have been deprived of the opportunity to present arguments to the Commission. *See also supra* note 11 (orders providing for additional briefing and extending briefing deadlines).

Accordingly, the Motion to Stay Administrative Proceeding is DENIED. We express no view regarding the parties' arguments on the merits.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 9727 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74344 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4028 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31461 / February 20, 2015

Admin. Proc. File No. 3-14684

In the Matter of

ANTHONY FIELDS, CPA d/b/a
ANTHONY FIELDS & ASSOCIATES and d/b/a
PLATINUM SECURITIES BROKERS

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Registration Violations

Respondent, the founder, chief executive officer, chief compliance officer, and sole control person of a registered investment adviser and a formerly registered broker-dealer, made material misrepresentations and omissions in the offering for sale of fictitious "prime bank" instruments via social media websites. Respondent also registered his firm as an investment adviser without satisfying the requirements for Commission registration and made material misstatements in registration filings and other communications. *Held*, it is in the public interest to: (i) enter a cease-and-desist order; (ii) bar respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; (iii) revoke the investment adviser's registration; and (iv) assess a $150,000 third-tier civil money penalty.

APPEARANCES:

Anthony Fields, pro se.

Duane K. Thompson and *Donna K. Norman*, for the Division of Enforcement.

Appeal filed: December 27, 2012
Last brief received: April 4, 2013

I.

This administrative proceeding presents a new twist (the use of social media websites such as LinkedIn and TradeKey to reach potential victims) on an old scam (the offering of fictitious "prime bank" securities promising impossibly high returns at no risk). Anthony Fields appeals from an administrative law judge's initial decision finding that he had committed numerous violations of the securities laws.[1] Conducting an independent review of the record with respect to the findings challenged on appeal, we find that Fields fraudulently offered nonexistent "bank guarantees" and "medium-term notes." We find also that Fields acted as an unregistered broker, registered one of his sole proprietorships as an investment adviser without satisfying the requirements for Commission registration, operated that firm without a compliance manual, and made material misstatements in his filings with the Commission and in other communications. For these violations, we conclude that it is in the public interest to impose rigorous sanctions, including a bar and a $150,000 civil money penalty.

II.

A. Fields and his sole proprietorships, Anthony Fields & Associates and Platinum Securities Brokers

Fields resides in Illinois and is an accountant whose license as a Certified Public Accountant lapsed in 2003. With the exception of $100 in U.S. Treasury bills that he purchased

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1 *Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers*, Initial Decision Release No. 474, 2012 WL 6042354 (Dec. 5, 2012).

on TreasuryDirect in 2009 or 2010 to, in his words, "see how the system worked," he has never owned any publicly traded stocks or bonds.[2]

Fields did business as two sole proprietorships, Anthony Fields & Associates ("AFA"), a registered investment adviser, and Platinum Securities Brokers ("Platinum"), a formerly registered broker-dealer. Fields was AFA's founder, chief executive officer, chief compliance officer, and control person. In years past, AFA provided accounting and tax preparation services and, in that connection, employed a number of accountants, bookkeepers, and secretaries. However, as of March 2010, when Fields registered AFA as an investment adviser with the Commission, AFA had no paid employees and operated out of Fields's personal residence. AFA's sole employee was Fields's ex-wife, who was AFA's titular vice president but performed no services. AFA did not have (and never has had) any investment advisory clients, assets under management, or revenues from investment advisory services. Fields testified that two entities, "First Traders Group" and another one whose name Fields could not recall, supposedly made overtures about signing up with AFA. It is undisputed that neither entity received any investment advice from, deposited any funds for management by, or paid any fees to AFA.

Also in March 2010, Fields registered Platinum as a broker-dealer with the Commission. He withdrew Platinum's registration in September 2010 when FINRA informed him that Platinum—which had at most $5,000 in capital—did not meet the net capital requirements. Although Fields testified that he later resubmitted Platinum's application to the Commission, he offered no evidence in support of this assertion and the Commission's records do not reflect any re-application. As with AFA, Fields is Platinum's founder, chief executive officer, chief compliance officer, and control person. Platinum was operated out of Fields's residence and has never had any employees besides Fields's ex-wife, who was listed as Platinum's secretary but did no work. Platinum had no revenue and never provided brokerage services to any client.

B. Prime bank investment schemes

An overview of prime bank investment schemes will help situate the remainder of this discussion.[3] Prime bank schemes have attracted significant attention from regulators, in part

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2 The TreasuryDirect website allows individuals to buy and redeem Treasury securities directly from the government in paperless electronic form.

3 We discuss prime bank schemes in more detail *infra* at pages 10-15. *See also* U.S. Securities and Exchange Commission, *How Prime Bank Frauds Work, available at* http://www.sec.gov/divisions/enforce/primebank/howtheywork.shtml (last visited Feb. 19, 2015). Both here and elsewhere, we (like the law judge) have taken official notice of statements published by federal agencies pursuant to Rule of Practice 323. *See* 17 C.F.R. § 201.323; *520 S. Michigan Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008) ("A court may take judicial notice of . . . documents contained in the public record[] and reports of administrative bodies . . . .") (quotation marks omitted); *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (holding that judicial notice of "records and reports

(continued on next page)

because their victims collectively have lost billions of dollars worldwide. Although the details of these schemes vary, the broad outlines are the same. Potential investors are told that their money will be used to purchase instruments supposedly representing obligations of well-known international banks—which the promoters call "prime banks"—at a steep discount. The schemes derive their credibility from supposed association with reputable financial institutions, while at the same time their promoters often insist on secrecy, thereby making it impossible to verify the claims with the banks themselves. Other common features of prime bank schemes include the use of complex-sounding jargon (*e.g.*, "rolls," "tranches," "fresh cut," "slightly seasoned"); the involvement of many layers of participants and intermediaries; and the very large size of the purported transactions (often running into the hundreds of millions and billions of dollars).

Prime bank instruments promise implausibly high returns at no risk. The purported instruments go by many different names; for example, the Division's expert had encountered prime bank schemes peddling "bank guarantees," "letters of credit," "bank notes," "bank debentures," and a "hodgepodge of similar-sounding" products. He explained that the perpetrators of prime bank frauds frequently change the names of the instruments offered to avoid regulatory scrutiny. As we shall explain, whatever the nomenclature, the prime bank instruments offered in these fraudulent schemes are imaginary, as is the secondary market on which they purportedly trade.

C. Fields's social media postings offering prime bank instruments

The fictitious prime bank instruments at issue in this proceeding are "bank guarantees" (or BGs) and "mid-term notes" (or MTNs) offered by Fields in postings on the social media websites LinkedIn and TradeKey.[4]

LinkedIn is a social networking site. After establishing a profile on LinkedIn, an individual or company can join discussion groups and post messages that will be disseminated to all of the groups' members. Fields began using LinkedIn to make postings about bank guarantees and mid-term notes in October 2010 and continued to do so until "[s]ometime in 2011." The LinkedIn postings were undated, and Fields does not recall when exactly in 2010 or 2011 he made them.

(. . . continued)

of administrative bodies" is proper). We also have drawn upon the hearing testimony of the Division's expert.

4 During the hearing, Fields admitted that he also advertised that he had access to BGs and MTNs on E-2/Commerce, an online business-to-business marketplace. He claimed that his failure to produce copies of those postings to the Division during the investigation was an unintentional "oversight."

For example, Fields posted a message with the subject "FRESH CUT BGs" to the LinkedIn group "Trade Platforms – Private Placement Programs (PPPs) – High Yield." This message stated:

> Bank Guarantees, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JP Morgan Chase, BNP Paribas, UBS, RBS or Barclays. One (1) year and one (1) day, Fresh Cut USD 500 Billion (USD 500,000,000,000) with Rolls and Extensions 40% or better plus 1% commission fee to be paid, to buy side and sell side consultants 50/50. First Tranche: 500M USD. If you are interested you can email for particulars at [Fields's email address].

Fields explained that a price quoted as "40% plus 1%" meant that the purported instrument—in this case, $500 billion in bank guarantees in "tranches" (or batches) of $500 million each—was available for purchase at 40% of the face value of the instrument, plus a commission of one percent to be paid to "consultants," including himself.

Another of Fields's postings to the same LinkedIn discussion group with the subject "FRESH CUT MTNs 30+1" stated:

> Medium Term Notes, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JPMorgan Chase, BNP Paribas, UBS, RBS or Barclays, Ten (10) years and one (1) day. Fresh Cut 7.5% coupon. USD 500 Billions (USD 500,000,000,000) with Rolls and Extensions. 30% or better plus 1% Commission Fees to be paid, to Buy Side and Sell Side consultants 50/50. First Tranche 500 M USD. All interested parties can email me for particulars at [Fields's email address].

Fields testified that this posting was intended to advertise the availability of $500 billion in mid-term notes paying 7.5% interest rate for purchase at "better" than (*i.e.*, less than) 30% of their face value, plus a one percent commission.

Fields also posted a notice to the over 1,000 members of a LinkedIn discussion group named "Real Deals for MTN's and BG's" that advertised that he was:

> [D]irect to seller of fresh cut BGs 40+1 and slightly seasoned BGs at 57+1, cash backed, top 10 world banks, 50B contracts.

According to Fields, this message was meant to convey that $50 billion in bank guarantees was available for purchase at 40% of face value (for "fresh cut" bank guarantees) or 57% of face value (for "slightly seasoned" bank guarantees), and that there would be a one percent commission.

TradeKey is an online business-to-business marketplace that allows companies to connect with and do business with one another. As with LinkedIn, members of TradeKey create profiles and then post messages that can be viewed by other TradeKey users. On October 13, 2010, Fields posted an advertisement on TradeKey that read:

> My name is Anthony Fields. I'm a CPA in the United States and I have a client interested in buying $50 billion bank guarantees. If this is something that you are interested in, please call me at [Fields's telephone number.]

The "From" indicator of the message read "Company: Anthony Fields & Associates." Fields testified that he expected to receive one-third of one percent of $50 billion—*i.e.*, over $166 million—in commissions upon the completion of this proposed transaction.

Fields received a total of approximately twenty to forty responses to his postings on LinkedIn and TradeKey. No purchases or sales of BGs or MTNs were ever actually carried out, and Fields never obtained any funds from potential investors.

D. Fields's statements regarding AFA and Platinum

In AFA's filings with the Commission, Fields made a number of representations regarding AFA's assets under management, clients, and other operational characteristics. Both AFA and Platinum also had websites that were publicly accessible until at least May 2011. The content of these websites, which were designed and controlled by Fields, is described below. Fields testified that these statements were intended to reach potential clients and reflected his "marketing concept" about AFA and Platinum.

1. AFA's Form ADV

Form ADV is the uniform form used by investment advisers to register with the Commission. The effective version of AFA's Form ADV, which Fields filed with the Commission on July 15, 2010, stated that AFA had four clients and more than $25 million in assets under management. It also stated that AFA had $400 million under management, half in discretionary accounts and half in non-discretionary accounts, and that AFA's clients included high-net-worth individuals, pooled investment vehicles, and hedge funds. Attached to the Form ADV was AFA's brochure, which similarly stated that AFA "provides discretionary and nondiscretionary advisory services . . . to high net worth individuals and institutional investors." The brochure described AFA's affiliation with Platinum, and asserted that Platinum was a "broker/dealer registered with the U.S. Securities and Exchange Commission."

2. AFA's website

AFA's website stated that "Anthony Fields & Associates is Registered with the Securities And Exchange Commission as Investment Advisors." Its "About Us" page asserted that AFA was "organized to take advantage of the need to fulfill a gap in the Government securities market" and a supposed "$2.5 billion contract." That page also stated that "[o]ur group of investment professionals are on hand when you need them!" On the left-hand side of every page was the text "Anthony Fields & Associates has acquired a $50 billion contract."[5] Below that was the text "Anthony Fields has established a securities brokerage firm 'Platinum Securities Brokers' in a bold effort to reduce brokerage fees!" AFA's website also touted its "arrangement with the 45th primary dealer"—which Fields testified was intended to be a reference to Platinum—through which AFA's clients supposedly could purchase U.S. Treasury securities.[6]

3. Platinum's website

Platinum's website described itself as a "top institutional brokerage firm" that was "registered with the Securities and Exchange Commission." It stated that Platinum had "a dedicated team of Government securities researchers waiting for your call 24 hours a day." According to the website, Platinum had "a portfolio of over 25,000 U.S. Government securities."

D. Proceedings below

We issued an Order Instituting Proceedings on January 4, 2012.[7] The law judge held a two-day hearing on May 21 and 22, 2012. Fields testified in the Division's case and in his own case. The Division also presented the testimony of John Stark, whom the law judge accepted as

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5 The purported $50 billion contract was introduced into evidence at the hearing and specified AFA as the seller and "East West Trading, LLC" as the purchaser of $50 billion of U.S. Treasury Strips (with "possible rolls and extension[s]") to be sold in initial "Minimum Test Tranche[s]" of $1 million and then followed by additional tranches ranging from $500 million to $2.504 billion. The price was indicated as 22% of the face value of the instruments plus a one percent commission, and the contract specified that the purchaser's funds were to be wired to AFA's bank account. Fields did not do any due diligence on East West Trading or its representative, a man named Vincent Bach. Fields testified that he believed that Bach was a banker in Washington, D.C. and that Bach's grandfather owned a diamond mine in South Vietnam. AFA did not have any securities to sell East West and never received any funds from East West.

6 Primary dealers trade government debt directly with the Federal Reserve Bank and purchase the majority of the U.S. Treasury securities sold at auction. *See* Federal Reserve Bank of New York, *Administration of Relationships with Primary Dealers*, *available at* http://www.newyorkfed.org/markets/pridealers_policies.html (last visited Feb. 19, 2015). Currently there are 21 primary dealers; Platinum is not (and never has been) a primary dealer. *See* Federal Reserve Bank of New York, *Primary Dealers List*, *available at* http://www.newyorkfed.org/markets/pridealers_current.html (last visited Feb. 19, 2015).

7 *Anthony Fields, CPA d/b/a Anthony Fields & Associates and d/b/a Platinum Securities Brokers*, Exchange Release No. 66091, 2012 WL 19759 (Jan. 4, 2012).

an expert on prime bank frauds.[8] There were no other witnesses. The Division introduced a number of documents into evidence, including Fields's social media postings, printouts of Fields's websites, and copies of the purported contracts that Fields arranged. For his part, Fields introduced a purported bank guarantee issued by Credit Suisse and a purported Bloomberg screenshot of a mid-term note issued by Deutsche Bank. On December 5, 2012, the law judge issued an initial decision finding violations and imposing sanctions on Fields. This appeal followed.

III.

A. Antifraud violations

We find that Fields willfully committed violations of the antifraud provisions of the Securities Act and the Investment Advisers Act.

1. Securities Act Sections 17(a)(1) and 17(a)(3)

Securities Act Section 17 makes it unlawful for any person to engage in certain conduct in the "offer or sale of any securities" by the use of any means or instrumentality of interstate commerce. Specifically, Section 17(a)(1) prohibits "employ[ing] any device, scheme, or artifice to defraud" and Section 17(a)(3) prohibits "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[9] For the reasons that follow, we find the Fields willfully violated both these subsections.

a. *Fictitious prime bank instruments are "securities."*

The bank guarantees and mid-term notes that Fields offered are, notwithstanding their fictitious character, securities subject to the antifraud provisions of the securities laws.[10] The "fraud provisions are not defeated by the fact that a security purportedly traded is nonexistent or

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[8] Stark is a lawyer with Stroz Friedberg, an international risk management and consulting firm. Prior to joining Stroz Friedberg, Stark was the chief of the Office of Internet Enforcement at the Commission from 1998 to 2009. In that capacity, he oversaw hundreds of investigations into fraudulent prime bank schemes and created the Prime Bank Fraud Information Center, an initiative designed to educate investors about such schemes.

[9] 15 U.S.C. § 77q(a). Reliance is "not an element of an administrative proceeding alleging violation" of the antifraud provisions. *E.g.*, *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985).

[10] *See, e.g.*, *Brian A. Schmidt*, Exchange Act Release No. 45330, 2002 WL 89028, at *6 (Jan. 24, 2002); *Martin R. Kaiden*, Exchange Act Release No. 41629, 1999 WL 507860, at *1, *3 (July 20, 1999) (finding that fictitious prime bank guarantees and standby letters of credit were securities).

fictitious"[11] and "apply even though the securities at issue [are] a sham."[12] This must be so, lest it be the case that "the worse the securities fraud, the less applicable the securities laws."[13]

Thus, for "purposes of determining whether the instruments offered are securities," we look to Fields's "representations with respect to their characteristics," regardless of whether the instruments in fact exist.[14] Viewed in that light, it is plain that the instruments offered by Fields are indeed securities. Section 2(a)(1) of the Securities Act defines the term "security" to include a "note" or other "evidence of indebtedness."[15] The bank guarantees and mid-term notes were represented by Fields to be evidence of a debt: They promised payment of a definite sum of money with interest at a specified time in the future, and there is no suggestion that they fall within any exception to the presumption that notes are securities.[16]

b. *Fields offered prime bank instruments through a means or instrumentality of interstate commerce.*

It is settled that the use of the Internet—such as making postings on a website—is *per se* sufficient to satisfy the interstate jurisdictional element of the securities laws.[17] Fields nonetheless argues that he never claimed to be the actual seller of the prime bank instruments, that he merely passed information from potential buyers to potential sellers (and vice versa), and

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11 *First Nat'l Bank of Las Vegas, N.M. v. Russell's Estate*, 657 F.2d 668, 673 n.16 (5th Cir. 1981); *see also United States v. Schlei*, 122 F.3d 944, 972-73 (11th Cir. 1997).

12 *SEC v. Graulich*, Civ. No. 2:09-cv-04355 (WJM), 2013 WL 3146862, at *5 (D.N.J. June 19, 2013); *see also SEC v. Milan Trading Grp., Inc.*, 962 F. Supp. 2d 182, 200 (D.D.C. 2013) ("The fact that the 'securities' offered . . . did not actually exist does not . . . remove the fraud from coverage of U.S. securities laws.").

13 *E.g.*, *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (Posner, J.) (applying antifraud provisions to fraudulent "program . . . to invest in 'Prime Bank Instruments,' a nonexistent high-yield security").

14 *Kaiden*, 1999 WL 507860, at *3; *accord Schmidt*, 2002 WL 89028, at *6 ("representations made by a promoter can be sufficient to invoke the antifraud provisions ").

15 15 U.S.C. § 77b(a)(1).

16 *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *Kaiden*, 1999 WL 507860, at *3-4.

17 *E.g.*, *SEC v. GMC Holding Corp.*, No. 6:08-cv-275, 2009 WL 506872, at *4 (M.D. Fla. Feb. 27, 2009) (holding that use of the "[I]nternet . . . in connection with the offer or sale of securities . . . satisfie[s] the jurisdictional element of a violation of . . . section 17(a)"); *SEC v. Phoenix Telecom, LLC*, 239 F. Supp. 2d 1292, 1298 (N.D. Ga. 2000) (holding that use of an Internet web site "satisfies the jurisdictional means requirement"); *see also United States v. Lewis*, 554 F.3d 208, 214-16 (1st Cir. 2009) (holding that use of the Internet, "standing alone," constitutes "interstate commerce"); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (holding that "the Internet is an instrumentality and channel of interstate commerce").

that no money ever changed hands as a result of his postings. None of this affects our conclusion that Fields "offered" the prime bank instruments through his LinkedIn and TradeKey postings.

Section 2(a)(3) of the Securities Act defines "offer" to include "every attempt or offer to dispose of, or *solicitation of an offer to buy*, a security or interest in a security, for value."[18] This statutory language, which has been given an "expansive interpretation" by the courts and by the Commission,[19] extends "beyond the common law contract concept of an offer."[20] Of particular relevance here, the term is broad enough "to encompass the entire selling process, including the seller/agent transaction,"[21] and even a person who is not the "actual owner" may nonetheless "offer" securities by locating potential buyers for the owner, so long as he or she is "motivated at least in part by a desire to serve his own financial interests or those of the securities owner."[22]

Here, it is plain on the face of Fields's postings that he sought to locate potential buyers of bank guarantees and mid-term notes. Fields invited "[i]nterested parties" to email him to receive "particulars" about the contemplated transaction. Indeed, Fields admits that his purpose in making the postings was to "provide the seller with buyers of the financial instruments." Furthermore, Fields expected to receive substantial financial compensation—typically, a third of a percent of the face value of the purported instruments, which would amount to billions of dollars—for his role in facilitating these transactions. To be sure, the prime bank instruments in question did not actually exist. But that means only that the offered transactions could not successfully have been consummated—not that there was never an offer in the first place.

c. *Fields employed a scheme to defraud and engaged in transactions and practices that would operate as a fraud.*

The Commission and the federal courts have uniformly held that participation in prime bank frauds violates the Securities Act.[23] We adhere to that conclusion here and find that Fields

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18 15 U.S.C. § 77b(a)(3) (emphasis added).

19 *Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *14 n.51 (Dec. 19, 2009); *see also SEC v. Tambone*, 550 F.3d 106, 122 (1st Cir. 2006) ("[T]he SEC need not base its claim of liability on any completed transaction at all."), *reinstated in relevant part on rehearing*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc).

20 *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998).

21 *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

22 *Pinter v. Dahl*, 486 U.S. 622, 643, 647 (1988); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1525-26 (11th Cir. 1991); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989).

23 *Schmidt*, 2002 WL 89028, at *7-8; *Kaiden*, 1999 WL 507860, at *5-6; *see also SEC v. Gottlieb*, 88 F. App'x 476, 477 (2d Cir. 2004); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 194-98; *Graulich*, 2013 WL 3146862, at *5; *SEC v. Wilde*, Case No. SACV 11–0315 DOC(AJWx), 2012 WL 6621747, at *4-5 (C.D. Cal. Dec. 17, 2012); *SEC v. Milan Capital Grp., Inc.*, Case No.

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employed a "device, scheme or artifice to defraud" and engaged in a "transaction, practice, or course of business which . . . would operate as a fraud" and, in so doing, willfully violated Securities Act Sections 17(a)(1) and 17(a)(3).

We begin with Fields's offers to transact in fictitious prime bank instruments.[24] His LinkedIn and TradeKey postings contained what we have called the "most fundamental" misrepresentation of all: "[T]hat these instruments exist[ed]," when in fact they were entirely fictitious.[25] Such "misrepresentations were obviously material," for there can be "'no question a reasonable investor would consider important the fact that the security at issue did not exist.'"[26]

On appeal, Fields disputes neither that he made the statements at issue nor that the existence of the offered prime bank instruments is material. Instead, he challenges the law judge's finding of falsity and argues that he provided "clear and convincing evidence that Bank Guarantees did exist as well as Mid Term Notes." Based on an independent review of the record,

(. . . continued)

00 Civ. 108(DLC), 2000 WL 1682761, at *4, *8 (S.D.N.Y. Nov. 9, 2000); *SEC v. Norton*, Case No. 95 Civ. 4451(SHS), 1997 WL 611556, at *3 (S.D.N.Y. Oct. 3, 1997).

24 We impute Fields's conduct to AFA and Platinum—sole proprietorships that Fields founded, owned, and controlled—and vice versa. Fields admitted that he was responsible for everything that was said and done in their name. *See, e.g.*, *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972); *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *13 n.80 (Dec. 10, 2009). Moreover, Fields's LinkedIn profile referenced and linked to the AFA and Platinum websites and Fields's TradeKey profile likewise provided Fields's affiliation with AFA and noted AFA's registration with the Commission.

25 *Kaiden*, 1999 WL 507860, at *5; *see also United States v. Dazey*, 403 F.3d 1147, 1157 (10th Cir. 2005) ("The prime bank financial instruments that [the defendant] purported to invest in do not exist. The secretive, exclusive market in which such instruments are traded . . . is also purely imaginary."); *Lauer*, 52 F.3d at 670 ("Prime Bank Instruments do not exist.").

26 *SEC v. Gallard*, Case No. 95 Civ. 3099(HB), 1997 WL 767570, at *3 (S.D.N.Y. Dec. 10, 1997); *see also SEC v. Asset Recovery & Mgmt. Trust, S.A.*, Case No. 2:02-CV-1372-WKW, 2008 WL 4831738, at *7 (M.D. Ala. Nov. 3, 2008) ("The misrepresentations were material because a reasonable investor would want to know that the investments in question did not exist . . . . 'An elementary form of such misrepresentation is misrepresenting an interest as a security when it is nothing of the kind.'") (quoting *Lauer*, 52 F.3d at 670-71); *Kaiden*, 1999 WL 507860, at *5 n.25 ("We believe a reasonable investor would consider the existence of the instruments . . . material.").

we find that the Division has met its burden of establishing by a preponderance of the evidence that the securities offered by Fields did not exist.[27]

As a preliminary matter, we acknowledge that *legitimate* bank guarantees (and similar instruments, such as letters of credit) do exist and often find use in, for example, international sales transactions. The basic function of a bank guarantee or letter of credit is to make it possible for a seller to ship goods to a buyer whose creditworthiness is unknown with the confidence that payment for the goods will be made.[28] In exchange for a fee, the bank, which has conducted due diligence on the buyer, guarantees payment to the seller once the conditions set forth in the guarantee or letter of credit (*e.g.*, delivery of the goods) are satisfied. In effect, the letter of credit "substitut[es] the credit of the bank for that of one of the contracting parties," and allows the seller to look to the bank directly for payment.[29]

But nothing like the prime bank instruments *offered by Fields* actually exists.[30] To begin with, Fields admitted that he did not have any bank guarantees—let alone billions of dollars' worth of them—when he made the postings in question. Likewise, Fields admitted that he did

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27 Fields's briefing exhibits confusion about the burden of proof; at times, he insists that *he* has proven the existence of prime bank instruments "beyond a reasonable doubt," while on other occasions, he argues that the *Division* has failed to prove by "clear and convincing evidence" that they do not exist. He is wrong regarding the burden of proof. The "Division is required to demonstrate a violation of the securities law by [a] preponderance of the evidence," which includes showing that the offered prime bank "instruments do not exist by a preponderance of the evidence." *Kaiden*, 1999 WL 507860, at *5 (citing *Steadman v. SEC*, 450 U.S. 91, 102 (1981)). The Division need not "conclusively prove" their nonexistence. *Id.* Fields additionally accuses the Division of changing its position about the existence of prime bank instruments. We have reviewed the record and find this argument to be without merit. From the Order Instituting Proceedings onwards, the Division has consistently argued that the bank guarantees and mid-term notes offered by Fields were fictitious—not that there is no such thing as a "bank guarantee." *E.g.*, *Anthony Fields*, 2012 WL 19759, at *1, 5-6.

28 *See, e.g.*, James J. White & Robert S. Summers, *Uniform Commercial Code* § 26-1 (5th ed. 2008); *see also Tudor Dev. Grp., Inc. v. U.S. Fid. & Guar. Co.*, 968 F.2d 357, 360 (3d Cir. 1992) ("In short, a letter of credit is an engagement by an issuer, usually a bank, made at the request of a customer for a fee, to honor a beneficiary's drafts or other demands for payment upon satisfaction of the conditions set forth in the letter of credit."); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1988).

29 *Am. Ins. Ass'n*, 865 F.2d at 282.

30 Fields's postings referred to "bank guarantees" and "mid-term notes," and did not use the precise phrase "prime bank instruments." As noted above, the purported instruments traded in prime bank schemes go by different names, but whether called prime bank guarantees, bank guarantees, letters of credit, mid-term notes, bank debentures, or some variation thereof, they all purport to represent bank obligations that are wholly fictitious.

not have any mid-term notes and had never brokered a transaction involving them. Further, there is no secondary market for such instruments, so they cannot be bought and sold in the manner that Fields represented. Fields's LinkedIn postings advertised that he was "direct to [the] seller" of the bank guarantees, and that any buyer who could "PROVIDE MT103.32"[31] could "GET THE PAPER." Yet legitimate bank guarantees and letters of credit are the product of private, negotiated transactions between a buyer and its bank; thus, it is not possible to transfer them on a secondary market. Fields himself acknowledged that any potential purchaser would be subject to due diligence by the bank and would need to obtain the bank's authorization. In short, Fields's admissions at the hearing are inconsistent with the representations made in his postings.

The testimony of the Division's expert,[32] who explained that Fields's LinkedIn and TradeKey postings displayed all the indicia of fraudulent prime bank schemes, also independently supports our finding that the securities he offered are fictitious.[33] These indicia include: (1) the use of jargon typically associated with prime bank frauds, such as "tranches" of securities, "SWIFT 760" bank transfers, "Top 10 world banks," and "fresh cut" and "slightly seasoned" instruments; (2) the implausibly large size of the described transactions, which in Fields's case ran into the hundreds of millions or billions of dollars; (3) the existence of mysterious foreign counterparties whom Fields never met; (4) the insistence on secrecy; and (5) the promise of extraordinary large and risk-free profits. The Division's expert concluded that the securities offered by Fields are "wholly fictional" and a "complete and utter fraud." We unreservedly agree. To state the obvious, the described transactions are patently irrational from an economic perspective—there is no reason that an established bank would agree to repay a

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31 Fields testified that this was meant to convey that the buyer would commit to transferring money conditional upon transfer of the securities.

32 Over Fields's objection, the law judge accepted the Division's expert on the subject of prime bank schemes. "Law judges have broad discretion in deciding whether to admit evidence, including expert testimony," and having reviewed the testimony in question, "we conclude that the law judge did not abuse her broad discretion in admitting" it. *Steven Altman, Esq.*, Exchange Act Release No. 63306, 2010 WL 5092725, at *18 (Nov. 10, 2010). As the law judge explained, Fields's challenge to the Division's expert was premised essentially on his disagreement with the expert's conclusions, which is not a proper basis for an expert's exclusion. Thus, in resolving the issues here, we have "given such weight to the expert testimony as we consider is indicated." *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *13 n.63 (Dec. 11, 2009) (quotation marks omitted).

33 *See Dazey*, 403 F.3d at 1171 (affirming admission of testimony by expert who "carefully explained the source of his extensive knowledge of prime bank frauds and explained what attributes these schemes . . . often share"); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 194 (relying on expert testimony that the "investments described in the materials . . . are not legitimate but resemble and are classic instances of Prime Bank . . . Schemes"); *Graulich*, 2013 WL 3146862, at *4 (relying on "thorough expert report" to grant summary judgment in favor of the Commission in prime bank case).

dollar (plus interest) for something for which it received only 30 or 40 cents on the dollar—and could not possibly exist.[34]

Finally, our finding that the bank guarantees and mid-term notes offered by Fields do not exist is confirmed by the "various regulatory alerts issued by the Commission and federal financial institution supervisory agencies . . . warning of Prime Bank schemes" and other "judicial determinations . . . finding that such instruments were fraudulent and fictitious."[35] The Commission and other federal agencies, including the Federal Bureau of Investigation, the U.S. Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, have issued alerts warning of prime bank schemes.[36] Fields's postings contain many of the "warning signs" and "red flags" that these alerts have identified, including promises of "unrealistic returns at no risk,"[37] the trading of supposed

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34 *Cf. Richard D. Hicks*, Exchange Act Release No. 70165, 2013 WL 4076842, at *3 (Aug. 13, 2013) (settled proceeding) ("claim of a guaranteed 12% return was too good to be true").

35 *Kaiden*, 1999 WL 507860, at *5 (relying on the same types of evidence in finding that the respondent offered nonexistent prime bank instruments); *see supra* notes 23, 25 (collecting cases).

36 *See* Securities and Exchange Commission, *How Prime Bank Fraud Works, available at* http://www.sec.gov/divisions/enforce/primebank/howtheywork.shtml (last visited Feb. 19, 2015); Federal Bureau of Investigation, *Common Fraud Schemes, available at* http://www.fbi.gov/scamssafety/fraud (last visited Feb. 19, 2015); U.S. Dep't of the Treasury, *Prime Bank Investment Fraud, available at* http://www.treasury.gov/about/organizational-structure/ig/Pages/Scams/Prime-Bank-Investment-Fraud.aspx (last visited Feb. 19, 2015); TreasuryDirect, *Prime Bank Instrument Fraud, available at* http://www.treasurydirect.gov/instit/statreg/fraud/fraud_primebank.htm (last visited Feb. 19, 2015); Board of Governors of the Federal Reserve System, *Fictitious Instrument Fraud, available at* http://www.federalreserve.gov/oig/oig_hotline_fictitious.htm (last visited Feb. 19, 2015); Board of Governors of the Federal Reserve System, *Supervisory and Regulatory Letter 02-13: "Prime Bank" and Other Investment Fraud Schemes* (May 20, 2002), *available at* http://www.federalreserve.gov/Boarddocs/srletters/2002/sr0213.htm (last visited Feb. 19, 2015); Office of the Comptroller of the Currency, *Types of Consumer Fraud, available at* http://www.occ.gov/topics/consumer-protection/fraud-resources/types-consumerfraud.html (last visited Feb. 19, 2015); Interagency Advisory, *Warning Concerning "Prime Bank" Notes, Guarantees, and Letters of Credit and Similar Financial Instruments* (Oct. 21, 1993), *available at* http://www.occ.gov/static/news-issuances/ots/ceo-memos/ots-ceo-memo-17.pdf (last visited Feb. 19, 2015).

37 *See* Securities and Exchange Commission, *How Prime Bank Fraud Works, supra* note 36.

financial instruments "in manners that are not realistic,"[38] and the use of confusing terms and opaque jargon.[39]

In arguing otherwise, Fields relies upon a purported "Letter of Guarantee" from Credit Suisse. The law judge considered this document to be a clumsy fake, and we agree. Testimony at the hearing established that the text of the purported "Letter of Guarantee" was based on a template from the website of an entity called "KYC Consultants," which has no connection to Credit Suisse. Moreover, as the Division's expert testified, the KYC Consultants website itself had all the hallmarks of involvement in a prime bank scheme, including references to the supposed availability of "fresh cut" mid-term notes. Additionally, the letter is littered with typographical errors and internal inconsistencies that would not be present in a genuine bank guarantee. For example, it is dated "Nov. 4 201" (in the heading) and "04nd day of October 201" (in the body) and states that it "shall by [sic] duly honoured" by the bank.

Fields also relies upon a purported Bloomberg screenshot of a mid-term note issued by Deutsche Bank. This, too, has a highly untrustworthy provenance. As the Division's expert explained, the same International Securities Identification Number[40] depicted in the screenshot, XS0422717727, is found on many "lists" of purported prime bank instruments distributed on the Internet, which contain many of the hallmarks (*e.g.*, characteristic jargon and implausibly large transaction sizes) of prime bank schemes.[41] And in any event, the note depicted in the purported screenshot paid only 4.78% interest—not the implausibly high returns promised by the instruments that Fields's LinkedIn and TradeKey postings offered. All in all, Fields's documentary evidence fails to convince us that the bank guarantees and mid-term notes that he offered were real. Indeed, its suspect nature reinforces our finding that they do not exist.

The Division argued to the law judge that Fields's fraudulent misrepresentations about the existence of the offered prime bank instruments by themselves suffice to establish liability under Securities Act Sections 17(a)(1) and 17(a)(3). In particular, the Division urged that it was not required to show that Fields engaged in deceptive or fraudulent conduct apart from making the

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38 *See* Board of Governors of the Federal Reserve System, *Supervisory and Regulatory Letter 02-13: "Prime Bank" and Other Investment Fraud Schemes*, *supra* note 36.

39 *See* U.S. Dep't of the Treasury, *Prime Bank Investment Fraud*, *supra* note 36.

40 An International Securities Identification Number, or ISIN, is a code that uniquely identifies a security. "ISIN and CUSIP are interrelated designations, since CUSIP numbers can be converted into ISIN numbers by adding the United States or Canada's country code to the beginning of each particular CUSIP code and digital designation of the instrument at the end of such CUSIP." *Murakush Caliphate of Amexem Inc. v. New Jersey*, 790 F. Supp. 2d 241, 256 n.14 (D.N.J. 2011).

41 For example, one such list advertises "369 . . . available offers of BG, MTN, SBLC [standby letters of credit], CD [certificates of deposit], and bonds," and describes "seasoned" mid-term notes supposedly available for 57 cents on the dollar.

misrepresentations. Fields did not challenge the Division's argument regarding the applicable legal standard before the law judge; the initial decision—which found that Fields committed antifraud violations "by his material misrepresentations and omissions *and* by his involvement in a scheme to defraud"[42]—does not make clear whether the law judge endorsed in all respects the Division's interpretation of Section 17(a); and Fields does not raise the issue on appeal. For all these reasons, there ordinarily would be no need to go further; we could simply stop here and affirm the initial decision's bottom-line finding of liability.[43] Given the importance of providing clear interpretative guidance regarding the securities laws, however, and the fact that we recently and at length announced our considered views as to the proper construction of Section 17(a) in *John P. Flannery*,[44] we will explain in detail why we have concluded that Fields's conduct triggers liability under both Section 17(a)(1) and 17(a)(3).[45]

We have long recognized that the subsections of Section 17(a) are "mutually supporting rather than mutually exclusive."[46] As the Supreme Court has explained, "each subparagraph of § 17(a) 'proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections.'"[47] In *Flannery*, we held that Section 17(a)(1)'s prohibition against "employ[ing] any device, scheme, or artifice to defraud" reaches any defendant who (with scienter) makes, drafts, or devises a material misstatement or uses a misstatement made by others to defraud investors.[48] We specifically rejected as inapplicable to our analysis of claims arising under Section 17(a)(1) any requirement—found in some of the case law considering claims arising under Rule 10b-5(a) and (c)—that the misconduct be inherently manipulative or deceptive or that the misconduct involve more than a simple misstatement.[49] Because (as we find elsewhere) Fields acted with scienter,

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42 The law judge found, and Fields does not dispute, that a program to trade non-existent prime bank instruments would "clearly [be] a scheme to defraud within the meaning of Securities Act Section 17(a)." As discussed above, Fields's only defense was that the offered prime bank instruments were, in fact, real.

43 *See* Rule of Practice 410(b), 17 C.F.R. § 201.410(b) ("Any exception to an initial decision not stated in the petition for review . . . may, at the discretion of the Commission, be deemed to have been waived by the petitioner.").

44 *John P. Flannery*, Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014).

45 *See generally Kamen v. Kemper Fin. Servs.,, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *United States v. Berry*, 618 F.3d 13, 17 (D.C. Cir. 2010).

46 *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC 907, 1961 WL 60638, at *4 (Nov. 8, 1961).

47 *Aaron*, 446 U.S. at 697 (quoting *Naftalin*, 441 U.S. at 774).

48 *Flannery*, 2014 WL 7145625, at *17-18.

Fields's material misrepresentations as to the availability and characteristics of the nonexistent prime bank instruments in his LinkedIn and TradeKey posts offering those securities are alone enough to support our finding that Fields violated Section 17(a)(1).

Although Section 17(a)(2) also allows liability to be premised upon a material misstatement or omission—and does not require scienter—it adds the proviso that money or property be obtained "by means of" the misstatement or omission.[50] Accordingly, as we explained in *Flannery*, liability under Section 17(a)(2) is proper only when the respondent has used or employed a material misstatement or omission to directly or indirectly obtain money or property.[51] In this case, Fields was not charged with a violation of Section 17(a)(2), presumably because no money or property ever changed hands as a result of his misstatements.

Finally, Section 17(a)(3) makes it unlawful to "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[52] Scienter is not necessary to find a violation of Section 17(a)(3); nor is it necessary that the respondent obtain money or property.[53] Yet as we held in *Flannery*, an isolated misstatement unaccompanied by other conduct does not give rise to liability under this provision.[54] This follows from the ordinary meaning of the operative words in the phrase "transaction, practice, or course of business." We would be hard pressed to say that a single misstatement, without more and never acted upon, constitutes a "transaction."[55] Likewise, the ordinary meaning of "practice"

(. . . continued)

49 *Id.* at *16-17 & n.90.

50 15 U.S.C. § 77q(a)(2); *see also Aaron*, 446 U.S. at 696 ("[T]he language of § 17(a)(2) . . . is devoid of any suggestion whatsoever of a scienter requirement.").

51 *Flannery*, 2014 WL 7145625, at *11; *see also SEC v. Tambone*, 597 F.3d 436, 444 (1st Cir. 2010) (en banc). In *Flannery*, we explained that the test for liability under Section 17(a)(2) is broader than that which applies under Rule 10b-5(b). In particular, like the First Circuit in *Tambone*, we interpreted the "by means of" requirement to mean that an individual may be primarily liable under Section 17(a)(2) if he uses a misstatement to obtain money or property, even if he or she has not personally "'made a false statement in connection with the offer or sale of a security.'" *Flannery*, 2014 WL 7145625, at *11 (quoting *Tambone*, 550 F.3d at 127-28).

52 15 U.S.C. § 77q(a)(3).

53 *See Aaron*, 446 U.S. at 697 ("[T]he language of § 17(a)(3) . . . quite plainly focuses upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible."); *Kaiden*, 1999 WL 507860, at *6 n.35 (lack of pecuniary loss immaterial to violation of Section 17(a)(3), which prohibits conduct in the "*offer* or sale" of securities that operates or "*would* operate as a fraud or deceit") (emphasis added).

54 *Flannery*, 2014 WL 7145625, at *18.

55 *Id.* at *18 & n.97 (citing Webster's New International Dictionary 2688 (def. 2a) (2d ed. 1934)). To be sure, a single misstatement or omission made in connection with (or otherwise

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and "course of business" denotes routine, customary, or repeated conduct, and therefore would exclude liability based upon a single, isolated misstatement.[56] Having said that, we also noted in *Flannery* that "one who repeatedly makes or drafts . . . misstatements over a period of time may well have engaged in a fraudulent 'practice' or 'course of business.'"[57]

We need not in this case delimit the outer contours of liability under Section 17(a)(3) because it is clear that Fields's recurrent and systematic misconduct—which went far beyond one-off misstatements—falls squarely within the heartland of that provision's proscription against engaging in "any transaction, practice, or course of business which . . . would operate as a fraud" on potential purchasers.

To begin with, at least four times over a two-year period, Fields posted offers on social media websites to transact in fictitious prime bank instruments. He received twenty to forty responses, corresponded with a number of potential investors, and took other concrete steps to arrange and further these inherently deceptive transactions. For example, his conduct in matching up potential buyers with potential sellers was essential to locating new victims for the fraud and keeping it going.[58] Once someone responded to his postings, Fields took additional steps to advance the fraud. Among other things, he obtained sensitive personal information—including passport numbers and social security numbers—from potential investors and then

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(. . . continued)
used to induce) a contract, exchange, or other kind of business dealing could well constitute engaging in a "transaction." *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001) ("As it is generally understood, the word 'transactions' conveys a reciprocity, a mutual exchange . . . ."); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998) ("The ordinary meaning of 'transaction' necessarily implies some type of business dealing between parties. In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements . . .") (citations omitted).

56 *Flannery*, 2014 WL 7145625, at *18 & n.99 (citing Webster's New International Dictionary 610, 1937); *see also United States v. Hones*, 57 F.3d 1020, 1024 (11th Cir. 1995) ("Practice is defined as the 'performance or operation of something,' 'performance or application habitually engaged in,' or 'repeated or customary action.'"); Black's Law Dictionary 404 (9th ed. 2009) (defining "course of business" as the "normal routine in managing a trade or business").

57 *Flannery*, 2014 WL 7145625, at *18.

58 *Schmidt*, 2002 WL 89028, at *8 (finding liability under Section 17(a) where the respondent had, among other things, "introduced" the key players to one another and "participated in telephone calls and transmitted documents" between them); *see also SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013) (finding liability under Section 17(a) appropriate when the defendant not only communicated "late trades," but also "[found] brokers and a clearing system that would allow late trades"); *VanCook v. SEC*, 653 F.3d 130, 139 (2d Cir. 2011), *aff'g*, *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *10 (Nov. 20, 2009).

conveyed it to the sellers of the fictitious securities. And Fields meant to play an integral and ongoing role in the fictitious transactions, as evidenced by the purported contracts that he prepared. One such "Pay Order" specifies that a $200 million bank guarantee would be posted into AFA's account and that Fields would receive $2.5 million "for services rendered in brokerage for participating" in the transaction. In sum, it is not a close question that Fields engaged in a transaction, practice, and course of business that would operate as a fraud on investors in violation of Section 17(a)(3).

4. *Fields acted with scienter.*

We must find scienter—a mental state embracing an intent to deceive, manipulate, or defraud—to conclude that there was a violation of Section 17(a)(1) of the Securities Act.[59] "Scienter includes recklessness, defined as conduct that is 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'"[60] Thus, the "scienter element can be satisfied by a strong showing of reckless disregard for the truth," as well as actual knowledge of falsity.[61] It may be proven "by inference from circumstantial evidence," which "can be more than sufficient" to establish the requisite state of mind.[62] Scienter is not required to establish a violation of Section 17(a)(3) of the Securities Act.[63]

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59 *Aaron*, 446 U.S. at 697. Fields asserts that the Division failed to satisfy the pleading standards established in the Private Securities Litigation Reform Act ("PSLRA"), which requires private litigants to state with particularity facts giving rise to a "strong inference" that the defendant acted with scienter in order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This argument misses the mark in two separate respects. First, the pleading standards articulated in the PSLRA apply only to *private* plaintiffs (and are wholly distinct from the pleading standards governing the Division under our Rule of Practice 200(b)). 15 U.S.C. § 78u-4(a)(1) ("The provisions of this subsection shall apply in each private action arising under this chapter."). Second, the PSLRA did not change the substantive law regarding what constitutes scienter under the federal securities laws. *See, e.g.*, *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064 (9th Cir. 2000); *In re Reserve Fund Sec. & Derivative Litig.*, 732 F. Supp. 2d 310, 318-19 (S.D.N.Y. 2010).

60 *Brown*, 2012 WL 625874, at *9 n.8; *see also Steadman*, 967 F.2d at 641-42.

61 *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2000); *see also Lyttle*, 538 F.3d at 603 (explaining that scienter is present when "the defendants either knew that the representations they made to investors were false or were reckless in disregarding a substantial risk that they were false").

62 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *see also Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010), *aff'g Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 WL 4936788 (Nov. 14, 2008) (explaining that "[s]cienter can be established by

(continued on next page)

We find that Fields acted with scienter when he offered bank guarantees and mid-term notes that did not actually exist. In light of his business experience and professional training, Fields must have "understood that he had to verify the existence and legitimacy" of the instruments that he offered.[64] In Fields's briefing to us, for example, Fields touts his 30 years of experience as an accountant (and through 2003, his licensure as a CPA in Illinois), his operation of an accounting business under the AFA name since 1989, and his efforts to prepare for the FINRA Series 7 and Series 63 examinations.[65]

Even taken at face value, Fields's testimony confirms that he recklessly promoted nonexistent securities. We have found that a promoter's failure "to contact any bank or other institution to verify" the existence of the offered prime bank instruments is evidence of recklessness.[66] Here, too, Fields admitted that he never verified the existence of the offered prime bank instruments with the banks that his LinkedIn postings identified as their supposed issuers. For example, he testified that his only contact with HSBC was an alleged conversation with a woman named Alina Pitman, supposedly a "director of HSBC" living somewhere in Chicago, who stated that she had access to bank guarantees and mid-term notes. He had never met Ms. Pitman and he did not recall who introduced her to him. Fields never discussed with Ms. Pitman the instruments offered in his postings. Fields also admitted that he never brought up the topic of prime bank instruments with anyone at any other bank.

Further, Fields never met any of the individuals who supposedly had access to billions of dollars in bank guarantees and mid-term notes. He testified that he believed that the seller in one of his postings to the "Trade Platforms" discussion group on LinkedIn was a man named "Don Morgan," who supposedly was located in Switzerland and a grandson of J.P. Morgan, the famed financier. Fields purportedly was placed in touch with Don Morgan through "a very close associate" who was "compliance director for a trading platform," whose name Fields could not recall. Fields admitted that had never met, spoken with, or corresponded directly with "Don Morgan." Instead he had corresponded with Morgan's representative—"Lars Gunnerson, or

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(. . . continued)
direct or circumstantial evidence" and that "the objective unreasonableness of a defendant's conduct may give rise to an inference of scienter").

63 *Aaron*, 446 U.S. at 697 & 701-02; *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *Steadman*, 967 F.2d at 643 & n.5.

64 *Kaiden*, 1999 WL 507860, at *6.

65 The Series 7 examination is the general securities representative examination and the Series 63 examination covers the principles of state securities regulation. *See* Financial Industry Regulatory Authority, Inc., *FINRA Registration and Examination Requirements*, *available at* http://www.finra.org/industry/compliance/registration/qualificationsexams/qualifications/p011051 (last visited Feb. 19, 2015); *see also Exch. Servs., Inc. v. SEC*, 797 F.2d 188, 189 & n.2 (4th Cir. 1986).

66 *Kaiden*, 1999 WL 507860, at *5.

something to that effect"—whose whereabouts Fields again could not recall. According to Fields, he received a "letter of intent" from "Don Morgan," but he offered no such letter into evidence at the hearing. Fields did not remember the name of any of the other purported sellers of bank guarantees and mid-term notes. These investigative efforts—especially given Fields's suspect memory—were manifestly insufficient to support Fields's representations about the offered instruments.[67]

We acknowledge Fields's assertion that he really did believe that the offered instruments were real. But that does not alter our finding that Fields, at the very least, consciously disregarded the very great risk—which would have been clear to any reasonable person and which must have been clear to Fields—that the securities he offered were fictitious. Promised returns far too good to be true (such as acquiring a ten-year note paying 7.5% issued by a well-known bank for 30% of its face value) are a classic indication of fraud. Yet Fields failed to perform a meaningful inquiry into the existence of those securities despite these obvious warning signs and red flags.[68] As "[m]any courts have held, . . . because Prime Bank schemes claim to offer a combination of high returns with no risk, the deal is inconceivable on its face and imposes a heightened duty on the promoter to investigate."[69] And "an egregious refusal to see the obvious, or to investigate the doubtful, may . . . give rise to an inference of . . . recklessness."[70] Here, Fields's asserted belief in the securities' existence did not "warrant his making exaggerated and unfounded representations and predictions to others."[71] In short, considering (but finding

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67 *E.g., id.* at *6 (finding scienter given the respondent's inability to identify the unnamed individuals that he supposedly spoke to); *Gallard*, 1997 WL 767570, at *3-4 (finding scienter given the defendant's "total inability to provide any evidentiary support for the existence of the purported instrument or his contacts at various banks").

68 *See, e.g.*, *Gebhart*, 2008 WL 4936788, at *9 (finding scienter given paucity of investigation in the face of "obvious warning signs that some investigation was necessary"); *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *9 n.61 (Jan. 6, 2006) (scienter may be found when a "securities representative failed to exercise skepticism in face of red flags").

69 *SEC v. Reynolds*, Case No. 1:06-CV-1801-RWS, 2010 WL 3943729, at *4 (N.D. Ga. Oct. 5, 2010) (quotation marks omitted; collecting citations) ("Even if [the defendant] could argue that he genuinely believed the claims he made to the investing public, scienter can be inferred because [he] did not conduct adequate diligence."); *see also SEC v. Infinity Grp. Co.*, 212 F.3d 180, 193-94 (3d Cir. 2000); *Wilde*, 2012 WL 6621747, at *5; *Asset Recovery & Mgmt. Trust, S.A.*, 2008 WL 4831738, at *8; *SEC. v. Deyon*, 977 F. Supp. 510, 517 (D. Me. 1997).

70 *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 196 (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (3d Cir. 1996)); *see also Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (observing that securities professional have an "an independent duty to use diligence where there are any unusual factors") (quotation marks omitted).

71 *James E. Cavallo*, Exchange Act Release No. 26639, 1989 WL 991979, at *3 (Mar. 17, 1989), *pet. denied*, 993 F.2d 913 (D.C. Cir. 1993) (table).

insufficient) Fields's "protestations that [he] genuinely believed"[72] that the securities existed in light of the overwhelming circumstantial evidence bearing on his actual state of mind, we find that he acted with at least extreme recklessness, and thus with the requisite scienter.[73]

We reject as unpersuasive Fields's arguments to the contrary. Fields first argues that there is "no recklessness or intent to defraud if the respondent purchased the securities for his own benefit." To support this proposition, he cites Exhibit D to his petition for review, which purports to be a "letter of request," dated February 12, 2012, supposedly sent by Fields on behalf of "Royal International Airlines Ghana Limited" to acquire at least €10 billion (and up to €100 billion) in "Fresh Cut" bank guarantees issued by "A++ RATED" banks for 38% of the face value of the instruments. Although Fields had the opportunity to do so, this document was not adduced at the hearing and therefore is not properly before us.[74]

In any event, even if we were to consider the document, we would find that Fields's reliance upon it is unavailing. To be sure, investment of one's own money in a phony enterprise may in the appropriate circumstances be one factor potentially weighing against a finding of

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72 *See, e.g.*, *Gebhart*, 595 F.3d at 1043 (holding that the Commission "correctly applied the appropriate scienter standard" by "consider[ing] the [respondents'] arguments that they acted in good faith" and then determining, "[b]ased on the evidence as a whole," that these "assertions of good faith were 'not plausible' and lacked 'credibility'").

73 *Asset Recovery & Mgmt. Trust, S.A.*, 2008 WL 4831738, at *8; *see also SEC. v. Lyttle*, 538 F.3d 601, 603-04 (7th Cir. 2008) (affirming summary judgment against defendants in prime bank fraud and holding that no "reasonable jury could doubt that they had acted with scienter"); *Graulich*, 2013 WL 3146862, at *6 (agreeing that the "fraudulent character of the [prime bank] scheme . . . is so patent" that any person involved in perpetrating them "is either deliberately making a fraudulent statement or is acting recklessly"); *Wilde*, 2012 WL 6621747, at *5 ("Because 'prime bank' instruments do not exist, courts have repeatedly held that the promoters of such schemes acted, at a minimum, recklessly.").

74 *See* Rule of Practice 460(c), 17 C.F.R. § 201.460(c). Fields has not sought leave to adduce the Letter of Request as additional evidence pursuant to our Rule of Practice 452. *See id.* § 201.452 (allowing submission of additional evidence if the party seeking to introduce such evidence "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously"). Fields attached three other exhibits to his petition for review. Exhibit A is an empty tab. Exhibit B is the purported Bloomberg screenshot already discussed. Exhibit C, which appears to be a fragment of a news release by the International Chamber of Commerce and a fragment of a term sheet outlining Credit Suisse's "standard conditions" for the issuance of legitimate bank guarantees, was not offered at the hearing. These documents do not appear material, and Fields has not explained his failure to introduce them earlier. We decline, therefore, to include them in the record or to discuss them further.

scienter,[75] but in this case, there is no evidence that Fields *actually* put any of his own money at stake in this purported Ghanaian airline venture. Furthermore, even assuming that Fields did personally invest in bank guarantees, the evidence detailed above leaves us confident that Fields must have known when he made his misrepresentations that his actions presented an unacceptable danger of misleading potential investors.[76] That Fields stood to gain financially from his fraudulent conduct—in the form of hundreds of millions, if not billions, of dollars in commissions—further reinforces our finding that he acted with a high degree of scienter.[77] It would be entirely rational for someone to invest a relatively small amount of his or her own assets in a fraudulent investment with the hope of lulling into complacency potential investors from whom he or she expected to earn much more money. As Fields put it, he expected to make "big bucks" out of his "cut" of the commissions that the buyers' and sellers' representatives and consultants were supposed to share among themselves once a deal was consummated. Finally, the "letter of request" contains significant indicia of untrustworthiness and, if anything, confirms Fields's recklessness. The letter is strewn with typos, ungrammatical and haphazardly capitalized, and describes a transaction that is economically nonsensical and incredible.

Fields's second argument fares no better. He insists at some length that his conduct cannot be considered reckless because he intended to serve only "high net worth and institutional investors" and to target his postings to "accredited investors," not retail investors.[78] According to Fields, accredited investors have access to "privileged information," and therefore have the ability to do their own "due diligence to determine the viaboloty [sic] of the posts made." We are skeptical that Fields meant to target his postings so narrowly; for example, one of the LinkedIn discussion groups in question had over 1,000 members, and there is no indication that

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75 *See Hoffman v. Estabrook & Co.*, 587 F.2d 509, 517 (1st Cir. 1978).

76 *Gebhart*, 2008 WL 4936788, at *10 (rejecting respondents' argument that they lacked scienter because it was "implausible to suggest that the [the respondents] knew or suspected that [the company] would be unable to repay these loans while, at the same time, loaning it money" given the abundance of other circumstantial evidence of scienter).

77 *Riordan*, 2009 WL 4731397, at *9 n.49 (finding that a "pecuniary motive for engaging in the . . . scheme" is "further circumstantial evidence of . . . scienter"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (stating that "motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference").

78 The term "accredited investor" has a number of different definitions, and Fields does not identify which he has in mind. For illustrative purposes, Rule 501 of Regulation D, generally speaking, defines that term to include institutional investors as well as natural persons whose individual net worth exceeds $1 million or whose individual income exceeds $200,000. *See* 17 C.F.R. § 230.501(a). Offers of securities made solely to accredited investors may, under certain circumstances, be exempt from registration, but that does not constitute an exemption from other provisions of the securities laws, including the antifraud provisions. *See generally* 17 C.F.R. § 230.500; *Kevin D. Kunz*, Exchange Act Release No. 45290, 2002 WL 54819, at *4 n.14, *7-8 (Jan. 16, 2002); *see also infra* note 114.

membership in that group was limited to accredited investors. At any rate, we find no merit to Fields's contention that individuals are free to offer fictitious securities to accredited investors because such investors are more likely to be able to ferret out the fraud on their own. As we have explained, "a sophisticated person is entitled to the protection of the antifraud provisions of the securities laws" as well.[79]

For all of the foregoing reasons, we conclude that the preponderance of the evidence establishes that Fields acted with scienter and, furthermore, willfully violated Sections 17(a)(1) and (a)(3) of the Securities Act.[80]

2. Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-1(a)(5)

We find that Fields also violated the antifraud provisions of the Advisers Act. In particular, Section 206(1) of that Act makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client; Section 206(2) makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any client or prospective client; and Section 206(4) makes it unlawful for an investment adviser to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.[81] Rule 206(4)-1(a)(5) provides that it is fraudulent within the meaning of Section 206(4) for any investment adviser to distribute any advertisement "which contains any untrue statement of a material fact, or which is otherwise false or misleading."[82] Together, these sections prohibit investment advisers from misstating material facts or omitting facts necessary to make a prior statement non-misleading in promotional literature and other communications to clients or prospective clients.[83] Scienter is required for violations of Section 206(1), but not for violations of Sections 206(2) or 206(4).[84]

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79 *Schmidt*, 2002 WL 89028, at *6 & n.40, 9 (collecting cases); *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 611726, at *4 (Sept. 15, 1998) ("accredited investors . . . are also vulnerable to fraud").

80 Willfulness for purposes of the securities laws means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quotation marks omitted); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976). In this case, Fields's willfulness is established by, *inter alia*, his admissions that he purposely made, and had sole responsibility for, his social media postings and the statements contained therein.

81 15 U.S.C § 80b-6(1); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *8 (Jan. 16, 2008).

82 17 C.F.R. § 275.206(4)-1(a)(5).

83 *E.g.*, *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *8-9; *Valicenti Advisory Servs., Inc.*, Advisers Act Release No. 1774, 1998 WL 798699, at *1, *5 (Nov. 18, 1998); *Standard Inv. Mgmt., Inc.*, Advisers Act Release No. 228, 43 SEC 864, 1968 WL 86065, at *1 n.1 (Aug. 30,

(continued on next page)

a. Fields is an investment adviser.

The Advisers Act defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities," subject to several exceptions inapplicable here.[85] This aptly describes AFA, which, according to the Form ADV filed by Fields, was organized to provide "[f]inancial planning" and "[p]ortfolio management" services in exchange for compensation based on a percentage of assets under management. Fields's activities as AFA's president, chief compliance officer, and control person bring him within the "broad" definition of "investment adviser" under the Advisers Act.[86] As discussed above, Fields admitted that he controlled AFA and was solely responsible for everything that AFA did and said. Thus, he is an "investment adviser" within the meaning of the Advisers Act, and it is appropriate to hold him personally and primarily liable for violations of that Act.[87]

b. Fields made numerous material misrepresentations to potential investment adviser clients.

Via AFA's Form ADV and AFA's and Platinum's websites, Fields disseminated false and material information to prospective clients.[88] We catalogue here some of the more flagrant misrepresentations:

(. . . continued)

1968). Notably, because investment advisers and their associated persons are fiduciaries, they are charged with the affirmative duty of "utmost good faith, and full and fair disclosure of all material facts" and the obligation "to employ reasonable care to avoid misleading" their clients through half-truths or incompletely volunteered information. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194 (1963); *e.g.*, *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 & n.44 (Sept. 26, 2007).

84 *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *8 & n.30.

85 15 U.S.C. § 80b-2(a)(11).

86 *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *9 & n.37.

87 *Id.*; *John J. Kenny*, Exchange Act Release No. 47847, 2003 WL 21078085, at *17 & n.54 (May 14, 2003); *SEC v. Berger*, 244 F. Supp. 2d 180, 193 (S.D.N.Y. 2001) ("Because [the defendant] effectively controlled [the investment advisory firm] and its decisionmaking, [the defendant] is also properly labeled an investment adviser within the meaning of the Advisers Act.").

88 AFA's website advertised its relationship to Platinum, which it described as an "affiliated company" established to "reduce brokerage fees." AFA's website also promoted its "relationship with the 45th primary dealer" of U.S. Treasury Securities, an intended reference to Platinum.

- Fields represented that AFA was registered as an investment adviser with the Commission. In reality, AFA was ineligible to register as an investment adviser because it lacked sufficient assets under management.[89]

- Fields represented that AFA had assets under management of $400 million. In reality, as Fields admitted during the hearing, AFA did not actually have any assets under management; Fields merely "anticipated" later getting them. Fields nonetheless argues that the Form ADV's statements were true because he had entered into contracts that supposedly gave him a "reasonable expectation" that he would receive such assets to manage. We do not agree. The Form ADV provides clear instructions about how an investment adviser must calculate "assets under management." Consistently with the statute, it defines "assets under management" in the present tense as including only "portfolios for which you [*i.e.*, the adviser] *provide* continuous and regular supervisory or management services *as of the date of filing*."[90] Assets that an adviser expects to manage in the future do not count.[91]

- Fields represented that AFA had acquired a $50 billion contract. In reality, the purported contract was nonsensical on its face.[92] That contract provided for AFA to sell East West Trading $50 billion of U.S. Treasury Strips at a mere 22% of the face value of the instruments plus a one percent commission. Yet Fields did not have any Treasury Strips and lacked the funding to acquire them.[93] Although (as Fields argues) it is literally correct that AFA "did have a $50 Billion contract" with East West Trading, it was fraudulent and misleading for Fields to fail to

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89 *See infra* pages 28-29.

90 *See* Form ADV: Instructions for Part 1A, Item 5.F (emphasis added); *see also* 15 U.S.C. § 80b-3a(a)(3).

91 Additionally, it was patently unreasonable to suppose that any of Fields's contracts, which made no economic sense, would result in the acquisition of assets under management and, like the law judge, we find that Fields's explanation was simply not credible.

92 *See supra* note 5.

93 Fields testified that he was planning to obtain $200 million via a purported "Joint Venture Agreement" with Lakeshore Ventures Group, Inc. dated March 27, 2010. But that document—which is also absurd on its face—actually calls for *Fields*, not Lakeshore, to "procure the funds . . . required for the [joint venture] . . . in tranches of not less than $200 million." Fields acknowledged that "that's what that [*i.e.*, the agreement] says, but that is not the way" he supposedly envisioned the venture as being structured. We do not view this purported "joint venture agreement" with Lakeshore as a sufficient basis for Fields to represent that AFA had acquired a $50 billion contract.

disclose the additional—and highly material—facts showing that the purported contract could not possibly have been carried out.[94]

- Fields represented that AFA's client base included high net worth individuals and hedge funds. In reality, AFA had no investment advisory clients.

- Fields represented that Platinum was a "primary dealer" in government securities and that Platinum had "a portfolio of over 25,000 U.S. Government securities." In reality, Platinum was not a primary dealer and did not have any securities in its inventory.[95]

- Fields represented that AFA and Platinum had an "expert" and "experienced" investment team. In reality, AFA and Platinum did not have any employees who provided investment-related services other than Fields himself.

These false statements were material because they "conveyed a false impression of [AFA's and Platinum's] size and investor asset base and of the professional qualifications" of those affiliated with the firms.[96] They made AFA "appear to be larger" than it actually was, and a reasonable investor would have wanted to know the truth because investors routinely consider an adviser's "attractiveness to other investors" when making investment decisions.[97]

c. *Fields acted with scienter.*

We find that Fields's misrepresentations about AFA and Platinum were knowing and intentionally calculated to deceive others. As their sole proprietor, Fields inescapably had first-hand, personal knowledge about the size and extent of their operations and the falsity of his representations concerning them. Further, as stated previously, Fields had a "motive for overstating [AFA's] assets," which provides additional circumstantial evidence of his scienter.[98]

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94 *See Capital Gains Research Bureau, Inc.*, 375 U.S. at 200 (explaining that fraud by an investment adviser fiduciary embraces the "[f]ailure to disclose material facts").

95 We reject Fields's explanation that Platinum was affiliated with other companies—*e.g.*, Pershing, Fidelity, and Merrill Lynch—and *those* entities, some of which were primary dealers, had over 25,000 securities in *their* inventories. A reasonable investor would surely find it important to making an investment decision whether Platinum *itself* possessed the inventory or whether it merely had access to *others'* inventory.

96 *The Barr Fin. Grp., Inc.*, Advisers Act Release Number 2179, 2003 WL 22258489, at *5 (Oct. 2, 2003).

97 *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *9.

98 *Id.*

B. Sections 203A and 207 of the Advisers Act

We also find that Fields violated Section 203A of the Advisers Act, which, at the time Fields registered AFA, prohibited an adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business from registering with the Commission, unless it had assets under management in excess of $25 million or advises a registered investment company.[99] Fields admits in his briefing that AFA lacked the "required qualifications to meet the standards of registration." AFA's principal office and place of business was in Illinois, which had a regulatory regime for investment advisers. Because AFA had no assets under management, it was ineligible to register with the Commission.

Yet Fields contends that the Commission is actually to blame for his violation of Section 203A because AFA's eligibility "was supposed to be determined by the Commission" and AFA should have "been properly screened" before it was allowed to register. Of course, it was *Fields himself* who fraudulently misrepresented AFA's qualifications to register and thus induced the Commission to accept AFA's registration. We are unmoved by this baseless argument.[100]

For much the same reasons, we find that Fields violated Section 207 of the Advisers Act, which makes it unlawful for any person to willfully make any untrue statement of a material fact or to willfully omit any required fact in any registration application or report filed with the Commission.[101] AFA's Form ADV stated that AFA had assets under management of $400 million and four clients. In reality, AFA had no assets under management and no clients—

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99 15 U.S.C. § 80b-3a(a)(1). The Dodd-Frank Act raised the threshold for Commission registration to $100 million for most investment advisers by creating a new category of "mid-sized advisers." *Id.* § 80b-3a(a)(2). Section 203A "exempts an adviser from this prohibition if, at the time of registration, the adviser . . . has a reasonable expectation that it would be eligible for Commission registration within 120 days after the date its registration becomes effective." *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *11 (Dec. 21, 2007). However, this exemption must be explicitly invoked on Schedule D of Form ADV and, moreover, the adviser must withdraw the registration if it remains ineligible to register after 120 days. 17 C.F.R. § 275.203A-2(c)(2). Fields did not invoke this exemption, did not withdraw AFA's registration in light of AFA's continuing ineligibility to register, and AFA would not, in any event, have qualified for the exemption because, as we observe *supra* notes 91-94 and accompanying text, Fields could not have had a reasonable expectation that AFA would acquire any assets under management as a result of these facially absurd contracts.

100 *See, e.g.*, *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 WL 1376365, at *5 n.22 (May 9, 2007) (explaining that the Commission has repeatedly held that industry participants cannot shift responsibility for compliance to regulators).

101 15 U.S.C. § 80b-7. Scienter is not required to support a Section 207 violation. *E.g.*, *Disraeli*, 2007 WL 4481515, at *13.

misstatements that were material in that they bore on whether AFA satisfied the requirements for Commission registration. These misstatements were also willful: Fields had sole responsibility for AFA's registration form and knew that its contents were false when he submitted it.

C. Rule 206(4)-7 of the Advisers Act

Rule 206(4)-7(a) of the Advisers Act requires, among other things, that an investment adviser adopt and implement written policies and procedures reasonably designed to prevent violations by the investment adviser or its supervised persons of the Advisers Act and the rules adopted thereunder.[102] Fields admitted that AFA did not have any written procedures when he first registered AFA with the Commission in March 2010. It was only in October 2010 that Fields purchased a template for a compliance manual from a vendor called National Regulatory Services. Based on the undisputed fact that Fields did not have any compliance manual prior to that date, we find that Fields violated Rule 206(4)-7(a).

Moreover, we are doubtful that Fields's eventual adoption of the off-the-shelf compliance manual from National Regulatory Services cured the violation. In adopting Rule 206(4)-7, we stressed that "[e]ach adviser should adopt policies and procedures that take into consideration the nature of *that firm's operations*" and that advisers should "identify conflicts and other compliance factors creating risk exposure . . . in light of the firm's *particular operations*, and then design policies and procedures that address *those* risks."[103] It is evident that Fields did not tailor the manual to the particular risks of AFA's operations. Fields testified that he spent about an hour answering yes-or-no questions and filling in the template. He admitted that he did not edit the resultant document in any fashion and that he never read the manual in its entirety. Indeed, during the investigative interview, Fields was surprised by the presence of a provision—which required advertisements to be reviewed by someone "other than the individual who prepared [the] material"—that he conceded he did not even mean to include in the manual.

We find that Fields's violation of Rule 206(4)-7(a) was willful. Although Fields claimed that he "didn't know [he] needed a compliance code," there is no doubt that he intended to operate AFA as an investment advisor and that Fields did so without a compliance code. Thus, Fields "intentionally commit[ted] the act which constitutes the violation," which is sufficient to establish willfulness.[104]

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102 17 C.F.R. § 275.206(4)-7(a).

103 *Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Release No. 2204, 68 Fed. Reg. 74714, 74716 (Dec. 24, 2003) (emphasis added); *see also Battery Wealth Mgmt., Inc.*, Advisers Act Release No. 2800, 2008 WL 4587550, at *4 (Oct. 15, 2008) (instituting and settling administrative proceeding where adviser had adopted "generic compliance manual[]" that was not tailored to the "particular risks" of that adviser's business).

104 *Wonsover*, 205 F.3d at 414; *see also supra* note 80.

D. Section 15(a) of the Exchange Act

Section 15(a)(1) of the Exchange Act prohibits a broker or dealer from making use of any means or instrumentality of interstate commerce to effect, induce, or attempt to induce any transactions in any security (other than an exempted security)[105] unless the person is registered with the Commission or is associated with a registered firm.[106] This provision "ensure[s] that customers . . . receive either the regulatory protections that result from a salesman being registered himself or the protections that stem from the salesman being supervised by a registered firm."[107] Scienter is not required to prove a violation of Section 15(a)(1).[108]

Platinum was not registered with the Commission after September 2010. Fields withdrew Platinum's registration effective in September 2010 when he was informed by FINRA that Platinum did not meet the net capital requirements to be a broker-dealer. Fields claimed that he resubmitted Platinum's registration later that month, but because there is no record of such a submission in the Commission's records and Fields presented no other corroborating evidence, we do not credit Fields's account. It is undisputed, in any event, that Fields was never licensed as a registered representative of Platinum.

We also find that Fields engaged in activities after September 2010 that required him to register as a broker. Section 3(a)(4) of the Exchange Act defines a "broker" as any person "engaged in the business of effecting transactions in securities for the account of others."[109] The phrase "engaged in the business" means a "level of participation in purchasing and selling securities involv[ing] more than a few isolated transactions"; there is "no requirement . . . that

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105 Section 3 of the Exchange Act defines "exempted security" to include government securities. 15 U.S.C. § 78c(12)(A)(i). A broker-dealer whose business consists "*primarily* of transactions in exempted securities" still must register with the Commission if it conducts *any* business in "non-exempt securities." *See Burley & Co.*, 28 SEC 126, Exchange Act Release No. 4109, 1948 WL 69443, at *2 (June 22, 1948) (emphasis added). We base our finding that Fields violated Section 15(a)(1)'s broker-dealer registration requirement exclusively upon Fields's holding himself out as a broker and his attempts to induce transactions in non-exempted securities (and not on his attempts to induce transactions in government securities). We note that a distinct registration regime applies to government securities brokers, which is not at issue in this proceeding.. *See* 15 U.S.C. § 78o-5.

106 15 U.S.C. § 78o(a)(1).

107 *Charles A. Roth*, Exchange Act Release No. 31085, 1992 WL 216693, at *4 (Aug. 25, 1992).

108 *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

109 15 U.S.C. § 78c(a)(4).

such activity be a person's principal business or the principal source of income."[110] Activities that are indicative of being a broker include holding oneself out as a broker-dealer, recruiting or soliciting potential investors, handling client funds and securities, negotiating with issuers, and receiving transaction-based compensation.[111]

Fields, AFA, and Platinum explicitly held themselves out as brokers and providing brokerage services, and that is by itself sufficient to trigger Section 15(a)(1)'s registration requirement.[112] AFA's website (which was active through at least May 2011) told readers that Fields had "established a securities brokerage firm 'Platinum Securities Brokers.'" Platinum's website (which also remained publicly accessible until at least that date) described Platinum as a "top institutional brokerage firm" that provided "prime brokering" services, including "securities lending, . . . leveraged trade executions, and cash management." According to Platinum's website, Platinum's customers could buy, among other things, "bonds" and "mutual funds" by, among other things, "calling one of [Platinum's] representatives." The website stated that Platinum was "registered with the Securities and Exchange Commission."

Although the foregoing itself required Fields and Platinum to register as a broker, Fields also repeatedly attempted to induce transactions in securities for other individuals by soliciting potential investors and arranging transactions on their behalf.[113] For example, Fields's October 13, 2010 TradeKey posting stated that Fields had a "client interested in buying $50 billion [in] bank guarantees." In one series of emails, Fields described himself as the "Mandate/Representative" of "Westminster International Corp." seeking to purchase €500 billion in medium-term notes, a transaction for which Fields was to receive a one percent commission.

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110 *Gordon Wesley Sodorff*, Exchange Act Release No. 31134, 1992 WL 224082, at *4 (Sept. 2, 1992); *see also SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998).

111 *See, e.g.*, *SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Art Intellect, Inc.*, Case No. 2:11-CV-357, 2013 WL 840048, at *20 (D. Utah Mar. 6, 2013); *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 12-13; *Strengthening the Commission's Requirements Regarding Auditor Independence*, Exchange Act Release No. 47265, 68 Fed. Reg. 6006, 6014 & n.82 (Feb. 5, 2003).

112 *E.g.*, *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 13 ("In its representations to investors, [the broker] held itself out as being engaged in the business . . . ."); *Strengthening the Commission's Requirements Regarding Auditor Independence*, 68 Fed. Reg. at 6014 n.82 ("A person may be 'engaged in the business,' among other ways, . . . by holding itself out as a broker-dealer.").

113 *E.g.*, *George*, 426 F.3d at 797 (individual who "regularly involved in communications with and recruitment of investors for the purchase of securities" found to be a broker); *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 13 (individual who "actively solicit[ed] participation" in transactions was found to be a broker); *SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997) (individual who "solicited investors" and "distributed sales circulars in the hope that potential investors" would invest in prime bank scheme found to be a broker); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) (individual who "solicited clients actively" found to be a broker).

In another series of emails, Fields reported to "Steve Dills," an individual who had expressed interest in purchasing mid-term notes, that he had "spoke to the sellers rep" and that he looked forward to a "very sound business relationship." At the hearing, Fields readily agreed that he was "basically" trying to "broker a purchase and sale" of the securities in question and that he expected to receive a commission if the sale went through.[114]

We therefore find that the evidence is overwhelming that Fields acted as an unregistered broker in violation of Section 15(a)(1) of the Exchange Act.

IV.

In scattershot fashion, Fields argues for the first time in his reply brief that the conduct of the proceedings by the law judge denied him due process. These contentions are waived;[115] they also are devoid of merit.

Denial of a continuance to obtain counsel: Fields argues that the law judge's denial of his request for a continuance to obtain counsel deprived him of due process. We have carefully reviewed the record and find no basis for relief. We issued the Order Instituting Proceedings in

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114 Fields nevertheless argues that the contemplated transactions involved "private placements," not public offerings. Generally speaking, a private placement refers to the sale of a security that is exempt from the Securities Act's registration requirements. *See Kunz*, 2002 WL 54819, at *7; *e.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 899-900 (5th Cir. 1977). We find Fields's argument flawed in two independent respects. In the first place, exemptions from these requirements "are construed narrowly," and Fields has failed to carry his "burden of demonstrating [his] entitlement to an exemption." *Kunz*, 2002 WL 54819, at *7. For example, Fields has not demonstrated that his offers were limited to only accredited investors or that they satisfied the conditions for exemption under Regulation D or Section 4(2) of the Securities Act. *See supra* note 78; 17 C.F.R. § 230.501 (defining accredited investor); *id.* §§ 230.502 (general conditions for all exemptions under Regulation D), 230.504-.506 (specific exemptions); *SEC v. Murphy*, 626 F.2d 633, 645 (9th Cir. 1980) (four-factor test for exemption under Section 4(2)). Moreover, even if an exemption were applicable, that at most would mean that the *sales of the securities* themselves need not be registered—not that a person (such as Fields) attempting to engage in those securities transactions was exempt from registration as a broker. *See, e.g.*, 17 C.F.R. § 230.500 ("Regulation D relates to transactions exempted from the registration requirements of [S]ection 5 of the Securities Act . . . Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws.").

115 Under our Rules of Practice, "[a]ny exception to an initial decision not stated in the petition for review . . . . may, at the discretion of the Commission, be deemed to have been waived." Rule of Practice 410(b), 17 C.F.R. § 201.410(b). Moreover, arguments for reversal not made in the opening brief are waived because "[r]eply briefs shall be confined to matters in opposition briefs of other parties." Rule of Practice 450(b), *id.* § 201.450(b).

this matter on January 4, 2012. On January 6, the law judge issued a scheduling order, attached to which was a document informing Fields that he was "entitled to be represented by counsel of [his] choice" and "encourage[d] . . . to retain legal counsel." The document also reminded Fields that "[a]ll parties, including pro se litigants, are expected to be familiar with and abide by the applicable procedural Rules." The hearing was ultimately set for May 21, 2012. That morning, immediately before the hearing was to commence, Fields for the first time sought a continuance so that he could "to try to hire an attorney." By Fields's own account, he did not take any steps to obtain counsel until 30 days before the hearing. The law judge denied Fields's request for a continuance on the ground that it came too late.

"We have stated that our inquiry on review of a denial of a postponement or continuance is whether the denial constituted an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay."[116] Fields's eleventh-hour bid for a continuance to obtain counsel plainly did not constitute a "justifiable request for delay," especially in view of his conceded inaction on that front in the period leading up to the hearing. Fields had almost four months to find a lawyer from when he received the OIP on January 31, 2012.[117] "[W]hile a respondent has the right to be represented by counsel, the law does not require endless postponements of judicial proceedings while respondents attempt to secure legal representation."[118] Under the circumstances, we find no error in the law judge's decision to deny Fields's motion for a continuance.[119]

Delay in issuance of initial decision: Fields asserts without elaboration that the "7 month delay in the Administrative Law Judge's decision" from the completion of the hearing was unlawful. We disagree. The initial decision was issued on December 5, 2012, within 300 days of February 21, 2012, the date that Fields effectively waived service of the OIP by filing an answer.[120] We have rejected similar arguments for dismissal even in the face of far longer

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116 *Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *35 (Jan. 31, 2008) (quotation marks omitted).

117 In fact, Fields has been aware of the issues raised in this proceeding since May 25, 2011, when the Division first requested documents from him. Moreover, at a June 17, 2011 investigative interview, Fields was specifically advised that he had the right to be represented by counsel.

118 *Dearlove*, 2008 WL 281105, at *35 n.155 (quotation marks omitted).

119 *See also David Post*, Exchange Act Release No. 37613, 1996 WL 498554, at *3 (Aug. 28, 1996) (finding that the hearing board acted "within its discretion in refusing to continue the hearing indefinitely to give [the pro se respondent] the opportunity to retain counsel" when he had "four weeks between notice of the hearing and the hearing date"); *Underhill Sec. Corp.*, Exchange Act Release No. 7668, 42 SEC 689, 1965 WL 87065, at *8 (1965) (affirming denial of requested continuance when need was occasioned by the respondents' "own dilatory conduct").

120 The OIP specified that the initial decision was to be filed within 300 days from the date of service of the OIP. *Cf.* Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2) (noting that such

(continued on next page)

delays.[121] Fields has "not even hinted at the existence" of any sort of "lackadaisical conduct on the part of the Commission or of any improper reason for the delay" that might conceivably present grounds for abating the proceedings.[122] Nor has Fields "suggested, let alone demonstrated, as [he] would be required to do, any prejudice to [him] or to [his] ability to defend [himself] caused by the allegedly undue delay."[123]

Hearsay and denial of the right to cross-examination: Fields also argues that the Division introduced inadmissible evidence in the form of hearsay by a "witness that [he] was not able to cross examine." Fields's brief does not identify the challenged statements (or the individual who supposedly made them) and it does not appear that Fields made a contemporaneous objection to any testimony on hearsay grounds at the hearing.[124] Our review of the record also shows that the law judge gave Fields great latitude in cross-examination of the Division's expert, the only witness (other than Fields himself) who testified at the hearing. In any event, "hearsay is admissible in administrative proceedings, and we evaluate such evidence based on its probative value, its reliability, and the fairness of its use."[125] Fields does not argue that the (unidentified) testimony lacks reliability or probative force. Finally, and in any event, our de novo review cures any evidentiary error that the law judge may have made.[126]

Malicious prosecution: Fields asserts without elaboration that he was the victim of "malicious prosecution." To establish a claim for selective prosecution, the respondent must

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(. . . continued)

"deadlines confer no substantive rights "). The service copy of the OIP was mailed to Fields via U.S. Express Mail on January 4, 2012 to the address that Fields provided in his registration forms filed with the Commission. The U.S. Postal Service unsuccessfully attempted delivery, and the mailing was unclaimed. The Division then hired a process server to attempt to serve Fields at his registered address and at a nearby address to which Fields's neighbors directed the process server; these attempts, too, were unsuccessful. It appears that Fields eventually obtained the OIP from the Commission's website upon his return from an out-of-country trip at the end of January 2012 and filed an answer that did not challenge the sufficiency of service.

121 *Feeley & Wilcox Asset Mgmt. Corp.*, Exchange Act Release No. 48607, 2003 WL 22316308, at *2 (Oct. 9, 2003) (two-year delay).

122 *Id.* (quotation marks omitted).

123 *Id.*

124 *Cf.* Rule of Practice 321(a), 17 C.F.R. § 201.321(a) ("Objections to the admission . . . of evidence must be made on the record . . . ."). The law judge *sua sponte* identified one of the Division's proffered exhibits as containing hearsay, and the Division agreed that it would not move that exhibit into evidence.

125 *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *11 (Sept. 13, 2010).

126 *Dearlove*, 2008 WL 281105, at *10.

demonstrate not only that he was "unfairly singled out," but also that his "prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right."[127] Fields has not alleged any facts, nor can we find any in the record before us, that suggest he was singled out or that his prosecution was motivated by such considerations.

In short, we find no merit to Fields's contentions that he was deprived of due process.

V.

We now turn to the issue of sanctions. "[I]n determining an appropriate sanction in the public interest, we consider the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations."[128] Fields principally argues that sanctions are unwarranted because there "was no securities fraud," the prime bank instruments he offered were real, and the proceedings against him were "all a lie orchestrated by the Division." For the reasons set forth above, we have found that Fields willfully committed violations of the securities laws, and we conclude that these violations warrant the imposition of stringent sanctions.

A. Cease-and-Desist Order

Section 8A(a) of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act authorize us to impose a cease-and-desist order upon a person who "is violating, has violated, or is about to violate" any provision of these statutes or any rule or regulation thereunder.[129] "In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations," and even a "single egregious violation can be sufficient to indicate some risk of future violation."[130] Indeed, "[i]n the ordinary case, and absent evidence to the contrary, a finding of past violation raises a risk of future violation sufficient to support our ordering a respondent to cease and desist."[131] Fields made numerous material misrepresentations and omissions to prospective investors, such as his

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127 *John B. Busacca III*, Exchange Act Release No. 63312, 2010 WL 5092726, at *13 (Nov. 12, 2010) (quotation marks omitted).

128 *E.g.*, *John A. Carley*, Exchange Act Release No. 57246, 2008 WL 268598, at *21 (Jan. 31, 2008).

129 15 U.S.C. §§ 77h-1(a), 78u-3, 80b-3(k).

130 *Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *15 (July 13, 2006), *pet. denied*, *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634 (D.C. Cir. 2008).

131 *Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 2003 WL 21658248, at *18 (July 15, 2003).

repeated pretensions to have access to nonexistent prime bank instruments. Moreover, as his sole argument that a cease-and-desist order is unwarranted, he continues to insist that he has "proven beyond a reasonable doubt that the financial instruments do actually exist." Given Fields's "lack of recognition of the wrongful nature of [his] conduct," we find that there is a sufficient risk that he will commit future violations, and that the public interest warrants imposing a cease-and-desist order.[132]

B. Bar Order

Section 925 of the Dodd-Frank Act enlarged the scope of bars available in administrative proceedings by authorizing us to impose collateral bars—that is, bars prohibiting individuals from associating in capacities other than those in which the respondent was associated at the time of the misconduct.[133] Thus, as amended, Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act authorize us to bar a person who has willfully violated any provision of the Securities Act, Exchange Act, Investment Advisers Act, or Investment Company Act from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if we find such a sanction to be in the public interest.[134] Section 9(b) of the Investment Company Act authorizes us to prohibit any person from serving or acting in certain capacities with respect to an investment company when similar conditions are satisfied.[135]

Although the Division sought the full breadth of collateral bars available under Dodd-Frank, the law judge did not grant its request—Fields was barred only from association with any broker, dealer, investment adviser, municipal securities dealer, transfer agent, or investment company, and not from association with a municipal advisor or nationally recognized statistical rating organization. The initial decision does not explain the basis for this decision. The Division did not appeal the initial decision and neither party has addressed the scope of the bar on appeal. Nonetheless, as our order granting Fields's petition for review makes clear, we have determined on our own initiative to review the sanctions imposed pursuant to Rule of Practice 411(d), including the scope of the bar.[136]

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132 *Johnny Clifton*, 2013 WL 3487076, at *15.

133 *Id.* at *13.

134 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6), 80b-3(e)(5), 80b-3(f); *see, e.g.*, *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *5 (Dec. 13, 2012); *John A. Carley*, 2008 WL 268598, at *21-22.

135 15 U.S.C. § 80a-9(b)(2); *see, e.g.*, *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *10 (Nov. 21, 2008).

136 *See* Order Granting Petition For Review and Scheduling Briefs, at 1 (Jan. 18, 2012); 17 C.F.R. § 201.411(d). We took a similar course in *Alfred Clay Ludlum, III*, 2013 WL 3479060, at *4 n.34, *5 n.56.

Having done so, we find that imposition of a collateral bar in all capacities is in the public interest. As we have held, "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws."[137] Fields's fraudulent conduct was egregious and recurrent. He repeatedly tried to broker transactions with potential investors involving nonexistent prime bank securities, and this by itself has warranted the imposition of a bar in prior cases.[138] He deceived potential clients about AFA's background, assets under management, operational experience, and size. There is no question, moreover, that his conduct was willful. Fields admitted that he intended to make, and was solely responsible for, all of the representations in his social media postings and on his websites. He has no regrets—"[n]one at all," Fields proclaims—for his conduct. Further, as set forth in our discussion of scienter, the wrongfulness of Fields's conduct was obvious and manifested a high degree of scienter.[139] Fields "ignored numerous red flags," and his "failure to conduct a searching inquiry . . . evinces a disregard for regulatory requirements that calls into serious question [his] ability to function as [a] securities professional[]."[140]

Moreover, it is apparent from Fields's testimony at the hearing and his briefing to us that he remains unwavering in the belief that the bank guarantees and mid-term notes he offered actually exist. He testified that the "secondary market [for such prime bank instruments] is everywhere" and that, going forward, he would continue to "buy them for [him]self." He has made clear that it is his "aspiration[]" and intent to remain in the securities industry as an investment adviser and broker if given the chance. He insists that he still has a contract to broker the sale of $50 billion in U.S. Treasury Strips and that he has the "potential to do [that] deal."[141] That even now, Fields does not appear to "grasp the wrongful nature of [his] conduct,"[142] convinces us that permitting him to remain in the securities industry in any of the capacities

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137 *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

138 *E.g.*, *Schmidt*, 2002 WL 89028, at *9 (imposing a bar in light of the respondent's "repeated misrepresentations" about "fraudulent scheme that purported to lease non-existent T-Bills"); *Kaiden*, 1999 WL 507860, at *8 (imposing a bar in light of the respondent's "refus[al] to acknowledge that . . . prime bank instruments were fictitious" and "complete lack of appreciation of his obligations under the securities law").

139 *Murray*, 2008 WL 4964110, at *10.

140 *Carley*, 2008 WL 268598, at *22.

141 Fields was adamant on this point at the hearing, insisting "I do have a 50 billion dollar contract."

142 *Murray*, 2008 WL 4964110, at *10; *Schmidt*, 2002 WL 89028, at *9 ("He has not taken responsibility for his actions and appears to lack contrition."); *see also Lawton*, 2012 WL 6208750, at *12 & n.64 ("[F]ailure[] to recognize the wrongfulness of his conduct presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future.").

covered by Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) "will present opportunities for future violations."[143] For essentially the same reasons, permitting Fields to associate with or provide services to investment companies also would present an unacceptably high risk of future violations.[144]

We do not find mitigation in Fields's sundry contentions that a bar will "destroy his ability to invest in his family's future" and the "future of his grandchildren," that a bar will impair Fields's purported investments in a Ghanaian airline, and that a bar is too severe a penalty given that he has "several friends who are investment advisers." How a respondent might in other respects suffer as a result of his or her misconduct or the sanctions that follow—*e.g.*, loss of money, unemployment, or harm to reputation—is not a mitigating factor.[145] The fact that Fields apparently never profited directly from his misrepresentations also does not justify a reduced sanction in light of his serious misconduct.[146] In short, the "hardship [Fields] asserts he has and will continue to suffer is outweighed by the necessity of ensuring that public investors are protected from him."[147]

Finally, we note that some of Fields's misconduct predated the July 21, 2010 enactment of the Dodd-Frank Act. That is immaterial to our determination of sanctions, however, because we have held that collateral bars premised upon pre-Dodd-Frank conduct are not impermissibly retroactive.[148] In any event, we would find that Fields's post-Dodd-Frank acts of misconduct—for example, making postings on LinkedIn that solicited potential buyers of bank guarantees and mid-term notes, which continued until at least "[s]ometime in 2011," and maintaining the AFA and Platinum websites, which were active until at least May 20, 2011—are by themselves sufficient to warrant a collateral bar under the circumstances of this case.

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143 *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 (Feb. 13, 2009).

144 *E.g.*, *Murray*, 2008 WL 4964110, at *10 (imposing bar under both Section 9(b) of the Investment Company Act and Section 203(f) of the Advisers Act for the same underlying misconduct).

145 *Clifton*, 2013 WL 3487076, at *16 n.116; *Ashton Noshir Gowadia*, Exchange Act Release No. 40410, 53 SEC 786, 1998 WL 564575, at *4 (Sept. 8, 1998).

146 *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 WL 358737, at *26 & n.66 (Feb. 1, 2010), *pet. denied*, 647 F.3d 1156 (D.C. Cir. 2011).

147 *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *13 (June 14, 2013) (rejecting as mitigating the respondent's claims "that he has been out of work, he cannot find employment, and his family is suffering"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *7 (Dec. 22, 2008) ("We also do not consider mitigating the economic disadvantages [the respondent] alleges he suffered because they are a result of his misconduct.").

148 *Clifton*, 2013 WL 3487076, at *13; *Lawton*, 2012 WL 6208750, at *10.

More than a decade ago, we observed that "a person who refuses to acknowledge the fictitious nature of prime bank instruments has no place in the securities industry."[149] That is all the more true today given the opportunities to reach a large audience that have been created by new avenues of communication. As the Division's expert put it, social media makes perpetrating prime bank schemes especially easy and inexpensive since the technology can automatically make connections to potential victims. Given Fields's egregious and deliberate pattern of violative conduct and his unwillingness to acknowledge the wrongfulness of this conduct or to offer credible assurances against future violations, "we find ample evidence of his ongoing unfitness and risk that he would engage in further misconduct if given future opportunities in the industry."[150] Thus, we have determined to bar Fields from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and to prohibit him from serving or acting in any of the statutorily enumerated capacities with respect to an investment company.[151] Imposing such a bar serves the public interest and will protect investors from the threat that Fields poses and, just as importantly, deter others from engaging in the same serious misconduct.[152]

C. Revocation of Registration

Section 203(e) of the Advisers Act authorizes us to revoke an investment adviser's registration if it, or any person associated with it, has willfully violated the securities laws and if revocation is in the public interest.[153] We may also revoke an investment adviser's registration if it "has willfully made or caused to be made in any application for registration or report required to be filed with the Commission . . . any statement" that was materially false or misleading and

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149 *Kaiden*, 1999 WL 507860, at *7.

150 *Lawton*, 2012 WL 6208750, at *13 (imposing full collateral bar); *see also Clifton*, 2013 WL 3487076, at *15 (imposing full collateral bar "[g]iven the scope and severity of [the respondent's] misconduct," which "evidences an unfitness to participate in the securities industry that goes beyond the professional capacity in which he was acting when he engaged in the misconduct underlying these proceedings"); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 WL 3479060, at *5-6 (July 11, 2013) ("imposing a broad industry-wide bar" given the respondent's "extended, egregious violations of the law," which "demonstrate[] that allowing him to enter the securities industry in *any capacity* would create too great a risk that future efforts to detect securities violations would be impaired, causing harm to the public") (quotation marks omitted; emphasis in original).

151 15 U.S.C. § 80a-9(b)(2).

152 *See Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) ("[G]eneral deterrence . . . may be considered as part of the overall remedial inquiry[.]") (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

153 15 U.S.C § 80b-3(e)(5).

revocation is in the public interest.[154] We find that revocation of AFA's registration as an investment adviser is appropriate and in the public interest. Fields (who is AFA's sole proprietor) committed multiple violations of the securities laws; AFA's Form ADV contains numerous material misrepresentations; and AFA, which does not have any assets under management, is statutorily prohibited from registering with the Commission by Section 203A(a) of the Advisers Act.[155] Moreover, there can be no question that these violations were willful, given that Fields undisputedly intended to submit the registration forms with full knowledge of the misstatements contained therein. Fields himself concedes that AFA's registration should be revoked because AFA does not have the "required qualifications to meet the standards of registration."

D. Civil penalties

Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 203(i) of the Advisers Act authorize us to impose civil money penalties when a respondent has violated a provision of each respective statute, and assessing such penalties is in the public interest.[156] In determining whether a penalty is in the public interest, we consider (1) whether the violation involved fraud, deceit, or manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require.[157] If we determine that the imposition of a civil penalty is in the public interest, a three-tier system establishes the maximum such penalty that may be imposed for each violation found. For each act or omission involving fraud or deceit that additionally resulted in (or created a significant risk) of substantial losses to other persons or that resulted in substantial gains to the wrongdoer, a third-tier penalty may be

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154 *Id.* § 80b-3(e)(1).

155 *Id.* § 80b-3A(a).

156 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i). Section 929P(a) of the Dodd-Frank Act conferred upon the Commission the authority to impose civil penalties in cease-and-desist proceedings. In such proceedings, no additional findings of willfulness are required; we need find only that the respondent "is violating or has violated" any provision of the applicable statute or "is or was a cause" of such violation to impose a civil penalty. We have no occasion in this case to address any retroactive effect of Section 929P because we find that Fields's misconduct postdating the enactment of the Dodd-Frank Act standing alone warrants the imposition of civil penalties and, moreover, that Fields's misconduct throughout was willful.

157 15 U.S.C. §§ 78u-2(c); 80b-3(i)(3); *see, e.g., Fundamental Portfolio Advisors, Inc.*, 2003 WL 21658248, at *17.

warranted.[158] For the time period at issue here, the maximum third-tier penalty for a natural person was $150,000 for each violation.[159]

The law judge prescribed a single, third-tier civil penalty of $150,000. The Division's position is that a "$150,000 penalty is appropriate." Fields himself agrees that the Commission should "keep the civil money sanction as it is at $150,000," although elsewhere he asserts in passing that the penalty should "not be as excessive as that which is handed down from a judge to a convicted murderer." We understand this to be an argument that the penalty is disproportionate to the gravity of Fields's misconduct, and, so construed, reject it. It is clear that "disproportionate penalties are irrelevant to the appropriateness of a sanction if the sanction is within the SEC's discretion."[160] We note, in any event, that we have imposed a third-tier civil penalty in other cases involving schemes to offer nonexistent securities.[161]

Considering all the circumstances, we find that a penalty is in the public interest and that a third-tier penalty is warranted because Fields's misconduct involved fraud and created a significant risk of losses to prospective investors. Fields's social media postings reached thousands, if not more, of potential victims.[162] A credulous individual taken in by them might

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158 15 U.S.C. §§ 77h-1(g)(2)(C), 78u-2(b)(3), 80b-3(i)(2)(C).

159 17 C.F.R. § 201.1004 sets forth the inflation-adjusted maximum civil penalty amounts for violations occurring after March 3, 2009 but before March 5, 2013.

160 *Seghers v. SEC*, 548 F.3d 129, 135 (D.C. Cir. 2008); *cf. Craig*, 2008 WL 5328784, at *6 ("[B]ecause the appropriate remedial action depends on the facts and circumstances of each particular case, the proper sanction cannot be precisely determined by comparison with action taken in other cases.") (quotation marks omitted).

161 *Schmidt*, 2002 WL 89028, at *10 & n.52 (finding that a "fraudulent and deceitful" scheme to lease fictional securities was "a classic example of the type of behavior against which [the securities laws were] intended to protect" and that a "severe penalty . . . is necessary").

162 Although the statutory text provides that a penalty may be imposed for "each act or omission," it leaves the precise unit of violation undefined. Throughout, this case has been litigated on the Division's premise that all of Fields's misconduct "may be considered as one course of action" constituting a single act for purposes of assessing a civil penalty. For present purposes, and because no party has urged a different view, we accept this position. *Cf. Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012). We accordingly have no occasion to determine whether an alternative way of tallying up the number of violative acts or omissions—for example, counting each distinct violative posting or each distinct potential investor to whom Fields made misrepresentations—might also present an appropriate basis for the determination of civil money penalties. *See generally Brown*, 2012 WL 625874, at *17 & n.59 ("[T]his was not a single act that defrauded multiple customers, but rather separate interactions, where each customer presented a unique opportunity to violate the securities laws."); *Guy P. Riordan*, 2009 WL 4731397, at *22 (imposing separate civil money penalty for each violative transaction).

have pursued an investment in nonexistent prime bank instruments; investors not infrequently have been deceived by similar prime bank schemes: The Federal Reserve, for example, reports that prime bank frauds "have defrauded investors out of nearly $10 billion."[163] The fortunate happenstance that nobody *actually* lost money in this case does not negate the significant *risk* of substantial losses that Fields's violations created.[164] The severity of Fields's misconduct underscores the need for a very significant penalty to deter Fields and others from recklessly peddling nonexistent securities.[165] We accordingly find that a penalty of $150,000 is appropriate and in the public interest.

An appropriate order will issue.[166]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

[163] *See* Board of Governors of the Federal Reserve System, *Fictitious Instrument Fraud*, *supra* note 36; *see, e.g.*, *United States v. Monach*, 429 F. App'x 179, 179 (3d Cir. 2011) (victim lost $3 million); *Lyttle*, 538 F.3d at 604 (victims lost $32 million); *United States v. Dazey*, 403 F.3d 1147, 1158 (10th Cir. 2005) (victims lost $14 million); *Milan Trading Grp., Inc.*, 962 F. Supp. 2d at 187-88 (victims lost $2.6 million); *Secure Capital Funding Corp.*, 2013 WL 3286234, at *2 (victims lost $4 million); *Graulich*, 2013 WL 3146862, at *1 (victims lost $13 million).

[164] *Clifton*, 2013 WL 3487076, at *16; *Kornman*, 2009 WL 367635, at *9 (declining to give mitigating weight to fact that "no particular investor was directly harmed by [the] conduct").

[165] We note that Fields asserts without providing any evidentiary support that he has declared bankruptcy and owes about $120,000 in outstanding tax liabilities. Fields does not claim to be financially unable to pay a civil penalty, however, and we would, at any rate, decline to exercise our discretion to waive the penalty given that his "misconduct is . . . egregious." *Trautman*, 2009 WL 6761741, at *24.

[166] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9727 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74344 / February 20, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4028 / February 20, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31461 / February 20, 2015

Admin. Proc. File No. 3-14684

In the Matter of

ANTHONY FIELDS, CPA d/b/a
ANTHONY FIELDS & ASSOCIATES and d/b/a
PLATINUM SECURITIES BROKERS

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Anthony Fields cease and desist from committing or causing any violations or future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933, Section 15(a) of the Securities Exchange Act of 1934, and Sections 203A, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940, and Rules 206(4)-1(a)(5) and 206(4)-7 thereunder; and it is further

ORDERED that Anthony Fields be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Anthony Fields is prohibited, permanently, from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and it is further

ORDERED that the investment adviser registration of Anthony Fields & Associates be revoked; and it is further

ORDERED that Anthony Fields pay a civil money penalty in the amount of $150,000.

Payment of the civil money penalty shall be made by United States postal money order, certified check, bank cashier's check, wire transfer, or bank money order; payable to the Securities and Exchange Commission. The payment and a cover letter identifying the respondent and file number of this proceeding shall be mailed or hand-delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

By the Commission.

Brent Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Municipal Advisor and
NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9729 / February 20, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74347 / February 20, 2015

INVESTMENT COMPANT ACT OF 1940
Release No. 31463 / February 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16398

In the Matter of **SANDRA DYCHE,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Sandra Dyche ("Dyche" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Administrative and Cease-And-Desist Proceedings Pursuant to

Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

SUMMARY

1. This case involves the misappropriation of investor funds by Premiere Power, LLC ("Premiere") CEO John Jankovic, Chairman Jerry Jankovic, and board member Sandra Dyche. The Jankovics formed Premiere in 2009 to pursue energy-related projects on Native American land. Soon after Premiere's inception, Dyche and the Jankovics agreed that Dyche would use approximately half the funds raised from investors for use in connection with an unrelated lawsuit against Jerry Jankovic and Dyche. As a result of this agreement, Dyche diverted \$1 million out of a total of \$1.95 million she raised for Premiere. The Premiere offering materials Dyche used to solicit investments failed to disclose that approximately half of the money raised would be diverted to unrelated third parties and would not be available to Premiere.

RESPONDENT

2. Sandra Dyche, age 62, is a resident of New York, New York. During the relevant period, Dyche was a Premiere board member and also raised funds for Premiere.

OTHER RELEVANT ENTITIES AND PERSONS

3. Premiere Power, LLC is a Delaware limited liability company with its principal place of business in Las Vegas, Nevada. Since its formation by Jerry and John Jankovic in 2009, Premiere's business plan has been to develop power plants in the central and southwestern United States. Premiere ran out of cash in 2011.

4. John Jankovic, age 39, is a resident of Irvine, California. He served as Premiere's CEO and director from the company's formation until the summer of 2011. John Jankovic has an MBA from the University of Michigan. The Commission has charged John Jankovic for his role in the misconduct described in this Order.

5. Jerry Jankovic, age 73, and father of John Jankovic, is a resident of Tulsa, Oklahoma. At all relevant times, he served as Chairman of Premiere's Board and voting majority member and since 2011 has also been its CEO. He previously reached a settlement with the

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

British Columbia Securities Commission after failing to disclose that he was using prospectus funds from an unsuccessful Canadian corporation to develop a different American corporation. The Commission has charged Jerry Jankovic for his role in the misconduct described in this Order.

FACTS

Jerry Jankovic's and Dyche's History of Misappropriating Investor Funds

6. In December 2006, two investors sued Jerry Jankovic and Dyche in connection with their investment in an energy company Jerry Jankovic and Dyche formed in 2001 (the "2001 venture"). Among other things, the investors alleged that Jerry Jankovic and Dyche fraudulently induced them to purchase shares by representing that the proceeds would be used to build a power plant and casino on Native American land (neither of which ever broke ground). The investors claimed — in a striking parallel to the current allegations involving Premiere — that Jerry Jankovic and Dyche instead diverted about half of their $1.2 million investment to Jerry Jankovic, who used the funds to settle a prior lawsuit. The prior suit had alleged that Jerry Jankovic had defrauded an investor in yet another company that was also supposedly pursuing power generation projects.

7. The court entered a default judgment against Jerry Jankovic for the allegations related to the 2001 venture in August 2007. In 2012, the jury found that Dyche had knowingly or recklessly made false representations with the intent of securing their investment. The jury awarded the investors $1.2 million in rescission and $1.2 million in punitive damages.

The Jankovics Form Premiere Power

8. While the litigation related to the 2001 venture was proceeding, the Jankovics formed Premiere in July 2009 to pursue energy-related opportunities, with its primary focus on building power plants on Native American land. At all relevant times, Jerry Jankovic was Premiere's Chairman of the Board and voting majority member. Dyche was one of Premiere's Board members.

9. Premiere successfully negotiated an agreement with the Osage Nation in Oklahoma to build a power plant on Osage territory. However, Premiere failed to obtain the bank financing required for the project, which, like the 2001 venture, never broke ground. John Jankovic attributed this failure directly to Premiere's inability to raise $2 million in interim financing, an amount he testified would have allowed Premiere to complete the steps necessary to obtain permanent financing. Premiere never earned any revenue and ran out of cash in 2011.

The Jankovics and Dyche Divert Investor Funds from Premiere

10. Among other materials in their non-public offering, Premiere used a "Preliminary Information Memorandum" and an accompanying "Term Sheet" to solicit investments. The PIM discusses two power plants Premiere planned to develop in Oklahoma. The Term Sheet includes

the following disclosure regarding the use of offering proceeds: "the capital raised . . . will directly support due diligence fees, legal and contract fees, engineering and regulatory documents, nation credit ratings and any other expenses incurred to complete the financing of the [power plants]." None of the offering documents disclose that investments in Premiere may be used for anything other than Premiere business.

11. Prior to raising any money, however, Jerry Jankovic, John Jankovic, and Dyche agreed that any investment would be "split," with 52 percent going to Premiere and 48 percent being "transferred" for use in connection with the lawsuit related to the 2001 venture. The intent of the split appears to have been for Dyche to provide the diverted funds to the investors in the 2001 venture who had sued her and Jerry Jankovic.

12. Dyche, who was neither a registered broker nor affiliated with a registered broker, actively solicited investors for Premiere, described the investment to the investors, and subsequently took possession of customer funds. Premiere paid Dyche in Premiere shares based on the size of the investment she secured.

13. In December 2009, Dyche raised $1.5 million for Premiere from an investor. Dyche told the investor that her funds would be for Premiere and did not disclose the agreement with the Jankovics to divert funds away from Premiere. After arranging for $500,000 to be wired to Premiere, Dyche kept the remaining $1 million to use in connection with the litigation related to the 2001 venture.

14. In January 2010, John Jankovic issued and Dyche provided the investor stock certificates and welcome letters that made it appear that her entire $1.5 million had been invested in Premiere. These documents were consistent with the investor's executed subscription agreement, which Dyche had the investor sign and John Jankovic received on December 13, 2009. The subscription agreement reflected a $1.5 million Premiere investment and included wiring instructions to Premiere's bank account.

15. The investor visited New York in December 2009 to meet with John Jankovic and Dyche. John Jankovic made a personal presentation to the investor and other potential Premiere investors. In these discussions, John Jankovic used a PowerPoint presentation that tracked the language in the offering materials. John Jankovic explained that investor funds raised would be for Premiere. Neither John Jankovic nor Dyche disclosed their plan to divert funds away from Premiere.

16. In addition to the $1.5 million, Dyche subsequently raised an additional $450,000 from two investors, one of whom invested $300,000 after attending the December 2009 meeting in New York.[2] The entirety of that $450,000 went to Premiere. However, no disclosures were made to any investors that Premiere's principals were diverting funds away from the company.

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[2] Premiere's offering was exempt from Section 5's registration requirements because it was not "public," and accordingly, was exempt under Securities Act Section 4(a)(2).

VIOLATIONS

17. As a result of the conduct described above, Dyche violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the offer or sale of securities and in connection with the purchase or sale of securities. Dyche also wilfully violated Exchange Act Section 15(a), which makes it unlawful for any "broker or dealer" to effect any securities transactions unless, in the case of a natural person, she is associated with a registered broker-dealer.

UNDERTAKINGS

18. Respondent has undertaken to forgo directly or indirectly soliciting or accepting funds from any person or entity in an unregistered offering of securities for a period of five years.

19. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Respondent (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoints Respondent's undersigned attorney as agent to receive service of such notices and subpoenas; (iv) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consents to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

In determining whether to accept the Offer, the Commission has considered these undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Dyche's Offer.

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Dyche cease and desist from committing or causing any violations and any future violations of Securities Act Section 17(a) and Exchange Act Sections 10(b) and 15(a) and Rule 10b-5 thereunder.

B. Respondent Dyche be, and hereby is:

1. barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

2. prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

3. barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent shall pay disgorgement of $1 million, which represents profits gained as a result of the conduct described herein, prejudgment interest of $164,000 and civil penalties of $250,000, to the Securities and Exchange Commission. Payment shall be made in equal installments of $353,500 according to the following schedule: (1) Within 14 days of the entry of this Order; (2) June 30, 2015; (3) September 30, 2015; and (4) December 31, 2015. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

1. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

2. Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

3. Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Dyche as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

E. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, prejudgment interest, and penalties referenced in paragraph D above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, she shall not argue that she is entitled to, nor shall she benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that she shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

F. Respondent shall comply with the undertaking enumerated in Paragraph 18 above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74350 / February 23, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3639 / February 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16399

In the Matter of **Halpern & Associates LLC** **and Barbara Halpern, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Halpern & Associates LLC and Barbara Halpern (collectively, "Respondents") pursuant to Sections 4C[1] and

1 Section 4C provides, in relevant part:

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[2]

II.

The Commission's public official files disclose that, at all relevant times, Lighthouse Financial Group, LLC ("Lighthouse" or "the firm") was registered with the Commission as a broker-dealer.

III.

After an investigation, the Division of Enforcement and the Office of the Chief Accountant allege that:

SUMMARY

1. These proceedings arise out of Respondents' improper professional conduct in their audit of Lighthouse's financial statements for the year ended December 31, 2009. Those financial statements were materially inaccurate in that they overstated the firm's assets, because its securities inventory as recorded in its financial statements was based on erroneous, and inflated, figures for the size of its positions in certain securities, and understated the firm's liabilities by omitting its liabilities to one of the broker-dealers through which it engaged in proprietary trading. Those errors caused the firm's reported net capital to be overstated by nearly $5 million, or over 350%. Respondents egregiously failed in several ways to adhere to Generally Accepted Auditing Standards ("GAAS") and did not detect those errors in their audit of the financial statements.

RESPONDENTS

2. **Halpern & Associates LLC** ("H&A") is an accounting and auditing firm based in Wilton, Connecticut. H&A was founded in 1982, has been registered with the PCAOB since 2004 and has twelve employees. Barbara Halpern is currently the sole owner and president of H&A. In 2014, H&A was the independent auditor to twenty-eight broker-dealers. In addition to serving as an independent auditor to broker-dealers and other entities, H&A provides tax advice and, on a consulting basis, provides broker-dealers with the services of individuals licensed to act

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2 Rule 102(e)(1)(ii) provides, in pertinent part:

> The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

as a broker-dealer's financial and operations principal. H&A acted as the independent auditor for Lighthouse from 2002 until Lighthouse withdrew its registration as a broker-dealer in August 2010.

3. **Barbara Halpern**, age 61, of Weston, Connecticut, was the engagement partner on Lighthouse's 2009 audit. She is currently the sole owner and president of H&A; during the relevant period she was the 95% owner. During the relevant period, Barbara Halpern was a certified public accountant licensed to practice in New York and Connecticut. She is currently licensed in Connecticut. She has held a Series 27 license since 1998 and a Series 54 license since 1980.

OTHER RELEVANT ENTITY

4. Lighthouse was registered with the Commission as a broker-dealer from August 2, 2000 until October 23, 2010. In December 2010, Lighthouse filed a petition for liquidation under the U.S. Bankruptcy Code. At all relevant times, Lighthouse's principal place of business was New York, New York. During the relevant period, Lighthouse acted as an introducing broker for retail and institutional customers, engaged in proprietary trading and market-making, and acted as an underwriter or placement agent for equity and bond issuances. Lighthouse had clearing arrangements with several clearing brokers, including Penson Financial Services, Inc. ("Penson"), which at all relevant times was a registered broker-dealer with its principal place of business in Dallas, Texas.

FACTUAL ALLEGATIONS

Background

5. Section 15(c)(3) of the Exchange Act [15 U.S.C. § 78o(c)(3)] and Rule 15c3-1 thereunder [17 CFR 240.15c3-1] require that broker-dealers generally effecting transactions in securities "at all times have and maintain net capital." The rule is designed to require a broker-dealer to maintain sufficient liquid assets to meet all obligations to customers and counterparties and have adequate additional resources to wind down its business in an orderly manner without the need for a formal proceeding if the firm fails financially. The net capital rule requires different minimum amounts of net capital based on the nature of a firm's business and the method a firm uses in computing its net capital.

6. To compute its net capital for purposes of Rule 15c3-1, a broker-dealer first calculates its net worth, computed in accordance with generally accepted accounting principles ("GAAP"), deducts the value of certain illiquid assets, and then adds back certain qualifying subordinated loans. The final step is to deduct certain specified percentages, or haircuts, from the market value of the securities or other inventory it holds in its proprietary accounts. Rule 15c3-1 prescribes differing haircut amounts for a variety of classes of securities and other allowable assets.

7. Section 17(e) of the Exchange Act and Rule 17a-5 thereunder require registered broker-dealers to file with the Commission annual audited reports containing, among other things, the broker-dealer's financial statements for the fiscal year, a calculation of its net capital at fiscal year-end, and a report of an independent auditor on the financial statements.

8. On February 28, 2010, Lighthouse filed its annual audited report ("Annual Audited Report"), which contained Lighthouse's financial statements for the year ended December 31, 2009 ("2009 financial statements"). The 2009 Annual Audited Report also contained H&A's report on the financial statements.

9. The 2009 financial statements overstated the firm's net capital by approximately $4.9 million, or over 350%. The overstatement was primarily attributable to the following errors: [3]

a. First, the financial statements overstated Lighthouse's assets by incorrectly including approximately $2,052,257 in long securities positions in the firm's proprietary accounts at Penson;[4] and

b. Second, the financial statements understated Lighthouse's liabilities by omitting approximately $2,314,484 owed to Penson.[5]

Errors That Led to The Overstatement of Lighthouse's Long Securities Positions and Understatement of its Liabilities to Penson

10. The overstatement of the total market value of Lighthouse's long securities positions in its accounts at Penson was the result of the firm's use of erroneous – and overstated – numbers of shares of fifteen securities held in five accounts. Lighthouse calculated the total market value of its inventory in those accounts to be $3,489,971, whereas based on the actual size of the positions as shown in Penson's records, the total market value of Lighthouse's inventory in its Penson accounts was only $1,437,714. The 2009 financial statements thus overstated the value of Lighthouse's long securities positions by approximately $2,052,257.

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3 The firm's reported net capital was also overstated as result of the application of erroneous and insufficient haircuts to Lighthouse's assets.

4 The $2,052,257 figure also takes into account a $251,317 understatement of the value of the firm's long securities position that resulted from Lighthouse's failure to include any of the inventory in one of the firm's proprietary accounts.

5 In addition to the amounts due to Penson discussed at paragraph 11 below, this figure includes a $113,002 understatement of Lighthouse's exposure on short positions in Penson accounts.

11. The 2009 financial statements also understated, by approximately $2,314,484, Lighthouse's payables to brokers as a result of the firm's failure to include negative balances in a Lighthouse account at Penson. The account, named "Lighthouse Financial Group F/X Account" ("F/X account"), was one of several Lighthouse administrative accounts at Penson that were used to hold deposits, resolve failed settlement transactions, and pay clearing balances. Positive balances in those accounts represented amounts *due from* Penson to Lighthouse while negative balances represented amounts *due to* Penson from Lighthouse.

The Audit of Lighthouse's 2009 Financial Statements

12. In its Independent Auditors' report, which was authorized for issuance by Barbara Halpern, H&A stated that it had audited Lighthouse's 2009 financial statements in accordance with GAAS and expressed its opinion that the financial statements fairly presented, in all material respects, the financial position of Lighthouse as of December 31, 2009. As the engagement partner on the audit, Barbara Halpern was responsible for supervising the audit and she signed off on all the work papers.

13. In fact, the audit was not conducted in accordance with GAAS and the financial statements contained in the 2009 Annual Audited Report did not fairly present, in all material respects, the financial position of Lighthouse as of December 31, 2009 because they reflected the errors described above.

14. The audit was not conducted in accordance with GAAS because, among other things, Respondents failed to adhere to the most fundamental GAAS requirements: the requirement to exercise due professional care in planning and performing the audit, which includes the requirements to properly staff and supervise the audit, to obtain sufficient appropriate audit evidence to support the auditor's opinion, and to exercise professional skepticism in evaluating the audit evidence obtained.

15. Respondents failed to exercise due care in planning the Lighthouse auditand performing the Lighthouse audit, as the auditing standards require. AU § 230.01. The requirement to exercise due professional care includes the requirement to staff the audit appropriately: "Auditors should be assigned to tasks and supervised commensurate with their level of knowledge, skill, and ability so that they can evaluate the audit evidence they are examining." AU § 230.06.[6] The individual who was responsible for the testing of Lighthouse's securities inventory and its balances with banks and brokers – the "senior auditor" – lacked the knowledge necessary to evaluate the audit evidence obtained concerning Lighthouse's proprietary trading. At the time of the audit, he had only been with H&A for six months, had only six months of experience doing audit work of any kind, had never audited a broker-dealer, had no understanding of Lighthouse's

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6 Citations to "AU" are citations to Statements on Auditing Standards in effect at the time of the audit. Those statements were issued by the Auditing Standards Board of the American Institute of Certified Public Accountants ("AICPA").

proprietary trading, and was not familiar with the professional literature concerning auditing broker-dealers. By assigning the senior auditor the critical responsibility of testing Lighthouse's securities inventory and its balances with banks and brokers despite his lack of knowledge in these areas, and by failing to properly supervise him, Respondents failed to exercise due care in planning and performing the audit.

16. Respondents also failed to obtain sufficient appropriate audit evidence concerning Lighthouse's inventory held at Penson and the firm's balances with Penson. The audit team sent Penson an open, *i.e.* blank, confirmation request seeking "[a]n itemized statement for each of [Lighthouse's] accounts with you showing security positions and balances as of December 31, 2009." Penson did not send anything to the audit team concerning the proprietary trading accounts. Penson did send monthly account statements for the F/X account and the other administrative accounts to the audit team. Because the monthly statements reported on a settlement date basis and Lighthouse's financial statements reported on a trade date basis, the audit team did not view them as appropriate audit evidence.

17. Having been unable to confirm the firm's inventory and balances, Respondents should have performed alternative procedures adequate to obtain sufficient appropriate audit evidence to support an unqualified opinion, AU § 330.31("When the auditor has not received replies to positive confirmation requests, he or she should apply alternative procedures to the nonresponses to obtain the evidence necessary to reduce audit risk to an acceptably low level."), but they failed to do so.

18. The alternative procedure chosen by Barbara Halpern was to rely on information provided by Lighthouse, which the audit team mistakenly – and unreasonably – viewed as information obtained from Penson. Specifically, Barbara Halpern and the senior auditor obtained from Lighthouse schedules of the firm's December 31, 2009 trade date inventory at Penson and trade date money balances with Penson. They referred to those schedules – incorrectly – as a "screen print" and a "screen shot" of on-line Penson reports.

19. Respondents failed to exercise due care and professional skepticism in considering the reliability of those client-provided records, and they failed to obtain audit evidence about their accuracy and completeness.

The Audit Procedures Regarding Lighthouse's Securities Positions

20. The purported screen shot of a Penson trade date inventory report provided by Lighthouse was not a confirmation because it was not a communication received directly from a third party. AU § 330.04 ("Confirmation is the process of obtaining and evaluating a direct communication from a third party in response to a request for information about a particular item affecting financial statement assertions.")

21. The purported screen shot of a Penson inventory report was also not in fact a report obtained from Penson's website but rather a schedule that Lighthouse personnel had created. As a

client-produced record, in order to provide sufficient appropriate audit evidence for the existence of the securities on the balance sheet, the inventory schedule needed to be – but was not – subjected to audit procedures. AU §326.08 ("Audit evidence is more reliable when it is obtained from knowledgeable independent sources outside the entity."). Respondents failed to consider the reliability of the information. AU § 326.09 ("The auditor should consider the reliability of the information to be used as audit evidence, for example, photocopies; facsimiles; or filmed, digitized, or other electronic documents, including consideration of controls over their preparation and maintenance where relevant."). Moreover, Respondents failed to obtain audit evidence about the accuracy and completeness of the client-produced record. AU § 326.10 ("When information produced by the entity is used by the auditor to perform further audit procedures, the auditor should obtain audit evidence about the accuracy and completeness of the information.").

22. Respondents failed to perform adequate procedures to determine whether Lighthouse's accounts at Penson actually held the securities listed on the inventory schedule, whether the share quantities shown on the schedule were accurate, or whether Lighthouse had additional securities positions at Penson that were not shown on the schedule. Relatedly, they failed to perform adequate procedures to test their belief that the schedule was in fact a copy of a Penson-created record. In fact, the schedule was not a copy of a Penson-created record and it overstated the size of fifteen of the firm's long securities positions in its accounts at Penson, and thus overstated Lighthouse's assets by approximately $2 million.

23. Barbara Halpern knew that the purported screen shot of a Penson inventory report had been provided by the client. She failed to exercise due care and professional skepticism in evaluating the quality of that audit evidence and thus its sufficiency and appropriateness to support the auditor's opinion.

The Audit Procedures Regarding Lighthouse's Balances with Penson

24. The 2009 financial statements included among Lighthouse's assets monies due from Penson to Lighthouse in connection with transactions in five currencies in the F/X account. The financial statements failed to include, however, amounts *due to* Penson from Lighthouse. Those unreported liabilities totaled $2,314,484.

25. The balances in the F/X account appeared on a variety of Penson reports including the December monthly account statements, copies of which Penson had sent directly to Respondents in response to a confirmation request. Having concluded that the account statements were not sufficient appropriate audit evidence because they reported on a settlement date, rather than trade date, basis, and having been unable to obtain a reconciliation of the statements and Lighthouse's trade date records, the senior auditor and Barbara Halpen disregarded the account statements in testing Lighthouse's balances with Penson.

26. To test Lighthouse's money balances with Penson, Barbara Halpern and the senior auditor relied on a document bearing the title "Penson Money Line," which they knew had been

provided by Lighthouse personnel. The senior auditor labelled the document "screen print" and Respondents treated the document as a screen shot of a report obtained from Penson's website.

27. The purported screen print of a Penson money line report provided by Lighthouse was not a confirmation because it was not a communication directly from a third party. AU § 330.04 ("Confirmation is the process of obtaining and evaluating a direct communication from a third party in response to a request for information about a particular item affecting financial statement assertions.")

28. The purported screen print of a Penson money line report was also not obtained from Penson's website, but instead was a schedule prepared by Lighthouse personnel. As a client-produced record, in order to provide sufficient appropriate audit evidence for the accuracy and completeness of Lighthouse's balances with Penson on the balance sheet, the purported screen print needed to be – but was not – subjected to audit procedures. AU §326.08 ("Audit evidence is more reliable when it is obtained from knowledgeable independent sources outside the entity."); AU § 326.09 ("The auditor should consider the reliability of the information to be used as audit evidence, for example, photocopies; facsimiles; or filmed, digitized, or other electronic documents, including consideration of controls over their preparation and maintenance where relevant."); AU § 326.10 ("When information produced by the entity is used by the auditor to perform further audit procedures, the auditor should obtain audit evidence about the accuracy and completeness of the information.").

29. Barbara Halpern was aware that there were differences between the balances shown on Lighthouse's records and the balances shown on the December monthly account statements that the audit team had received from Penson. Lighthouse's records showed only positive balances, *i.e.* amounts *due to* Lighthouse *from* Penson. For the F/X account, they showed a total positive trade date balance for the account of $2,284,644, whereas the account statements for the F/X account reported a total value for the account of *negative* $22,305. The December monthly account statements also showed that, in addition to positive balances, there were negative balances in the F/X account totaling approximately $2.3 million.[7]

30. Barbara Halpern assumed that the differences she could not account for were the result of pending trades, *i.e.* trades that had been executed but had not yet settled. She did not request a pending trade report from Penson or otherwise attempt to verify this assumption, however.

31 Nevertheless, the December account statements for the F/X account – which Respondents had obtained from Penson – reported pending trades. Specifically, the account statements showed that there was only one trade pending settlement on December 31, 2009 for the

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7 For the F/X account, there were multiple positive and multiple negative balances because balances were calculated separately for each different currency. The Penson account statements, like the schedule prepared by Lighthouse, reported the balances in both local currency and U.S. Dollars.

F/X account: a transaction in Euros at a total cost in U.S. dollars of only $42,838, which would not account for the discrepancies known to Barbara Halpern.

32. After receiving from Lighthouse the purported screen print of a Penson money line report that reflected only positive balances, Barbara Halpern failed to perform, or to have the audit team perform, adequate procedures to test her belief that the client-produced document was in fact a copy of a Penson-created record. She also failed to perform, or have the audit team perform, adequate procedures to test whether Lighthouse in fact had no negative balances with Penson or that it had positive balances in the amounts shown on the purported screen print. In fact, the purported screen print she relied upon was not a copy of a Penson-created record and on December 31, 2009, Lighthouse had *negative* balances in the F/X account totaling approximately $2,314,484 in addition to the positive balances that appeared on the purported screen shot that had been supplied by the client.

33. Barbara Halpern knew that the purported screen print of a Penson money line report had been provided by the client. She nevertheless relied upon the document without testing the completeness and accuracy of the information and without understanding what criteria had been used to generate the document. By relying upon a client-produced record without obtaining audit evidence about its accuracy and completeness, Barbara Halpern failed to exercise due care and professional skepticism in considering the reliability of that information and its sufficiency and appropriateness to support the auditor's opinion.

LEGAL ANALYSIS

Respondents Engaged in Improper Professional Conduct and Caused Lighthouse's Violations of Section 17 of the Exchange Act and Rule17a-5(a) thereunder

34. As a result of the conduct described above, Respondents engaged in improper professional conduct. Regarding accountants, Rule 102(e)(1)(iv)(B) and Section 4C(b) provide that the following two types of negligent conduct may constitute "improper professional conduct":

(1) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted, or

(2) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

"Applicable professional standards" for auditors primarily refers to GAAP, GAAS, the AICPA Code of Professional Conduct, and Commission regulations. *See Amendment to Rule 102(e) of the Commission's Rules of Practice,* Securities Act Release No. 7593 (Oct. 19, 1998) ("*Rule 102(e) Release*"). With respect to audits of broker-dealer financial statements, the GAAS in effect during the relevant period is embodied in various Statements on Auditing Standards ("SAS"), as well as the Codification of Statements on Auditing Standards, both issued by the Auditing Standards Board of the AICPA.

35. Barbara Halpern failed to adhere to the most fundamental auditing standards: the standards that require an auditor to exercise due professional care in planning and performing an audit, AU § 230.01, by properly staffing and supervising the audit, AU § 230.06, by obtaining sufficient appropriate audit evidence, AU § 326.01, and by maintaining an attitude of professional skepticism, which includes "a questioning mind and a critical assessment of audit evidence[,]" AU §§ 230.07-08. An auditor must "obtain sufficient appropriate audit evidence by performing audit procedures to afford a reasonable basis for an opinion regarding the financial statements under audit." AU § 326.01. "The auditor should use professional judgment and should exercise professional skepticism in evaluating the quantity and quality of audit evidence, and thus its sufficiency and appropriateness, to support the audit opinion." AU § 326.13.

36. Barbara Halpern also failed to adhere to auditing standards concerning confirmation, AU § 330, the reliability of audit evidence, including audit evidence in the form of electronic documents, AU § 326.09, and audit evidence provided by the client, AU §326.08, and the need to obtain audit evidence about the completeness and accuracy of client-produced information used to perform audit procedures. AU § 326.10.

37. As a result of the conduct alleged above, Barbara Halpern failed to adhere to GAAS in planning and performing the audit of Lighthouse's 2009 financial statements and preparing the audit report on those statements. Moreover, those failures occurred in the most critical areas of the audit – the testing of Lighthouse's holdings in its proprietary accounts and its liabilities to one of the broker-dealers through which it engaged in proprietary trading.

38. Accordingly, Barbara Halpern engaged in at least a single instance of highly unreasonable or, at a minimum, repeated instances of unreasonable conduct within the meaning of Rule 102(e)(1)(iv)(B).

39. Barbara Halpern's improper professional conduct may be attributed to H&A.

40. Section 17 of the Exchange Act requires registered broker-dealers to make and disseminate certain financial and operational reports. Rule 17a-5(a) requires that certain broker-dealers file an annual audited report that contains the broker-dealer's year-end financial statements and a report on those statements by an independent auditor. Implicit in the requirement that a registered broker-dealer file financial reports is the requirement that the information contained in those reports be accurate. *See Nikko Securities Co. International, Inc.,* Exchange Act Release No. 32331 (May 19, 1993).

41. As described above, Lighthouse failed to file an accurate annual audited report for the year ended December 31, 2009. The firm therefore violated Section 17 and Rule 17a-5(a) thereunder.

42. As a result of the conduct alleged above, Respondents were each a cause of Lighthouse's violations of Section 17 of the Exchange Act and Rule17a-5(a) thereunder.

IV.

In view of the allegations made by the Division of Enforcement and the Office of the Chief Accountant, the Commission deems it necessary and appropriate that public administrative and cease-and-desist proceedings be instituted to determine:

Whether the allegations set forth in Section III hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

What, if any, remedial action is necessary and appropriate against Respondents pursuant to Rule 102(e) of the Commission's Rules of Practice; and

Whether, pursuant to Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations and any future violations of Section 17 of the Exchange Act and Rule 17a-5 thereunder and whether Respondents should be ordered to pay disgorgement pursuant to Section 21C(e) of the Exchange Act.

V.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section IV hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, they may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondents as provided for in the Commission's Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9730 / February 23, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74353 / February 23, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4030 / February 23, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31467 / February 23, 2015

Admin. Proc. File No. 3-15842

In the Matter of TOTAL WEALTH MANAGEMENT, INC., JACOB KEITH COOPER, NATHAN MCNAMEE, and DOUGLAS DAVID SHOEMAKER	ORDER GRANTING EXTENSION

Chief Administrative Law Judge Brenda P. Murray has moved, pursuant to Commission Rule of Practice 360(a)(3),[1] for an extension of six months to issue the initial decision in these proceedings. As discussed below, we grant her motion.

On April 15, 2014, we issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Total Wealth Management, Inc. ("Total Wealth"), a registered investment adviser; Jacob Keith Cooper, the co-founder, sole owner, and CEO of Total Wealth; Nathan McNamee, the current president and chief compliance officer of Total Wealth; and Douglas David Shoemaker, the co-founder and former chief compliance officer of Total Wealth.[2] The OIP alleges that Total Wealth, Cooper, McNamee, and Shoemaker violated federal securities anti-fraud provisions by, among other things, directing client money to investment

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[1] 17 C.F.R. § 201.360(a)(3).

[2] *Total Wealth Mgmt., Inc.*, Securities Exchange Act Release No. 71948, 2014 WL 1438614 (Apr. 15, 2014).

funds that paid revenue-sharing fees and by collecting, and concealing their receipt of, those fees.[3]

The initial decision in these proceedings is currently due by February 17, 2015. In requesting an extension, Chief Judge Murray asserts that she has not yet held a hearing because she had stayed the proceedings for a prolonged period to allow for settlement negotiations and because of other settlement-related procedures.[4] She requests an extension "to allow for further settlement negotiations and for a hearing if settlement proves impossible."

We adopted Rule of Practice 360(a) to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings by setting deadlines for issuance of an initial decision.[5] That rule provides, however, for deadline extensions under certain circumstances if supported by a motion from the Chief Administrative Law Judge and if it appears, as here, that "additional time is necessary or appropriate in the public interest."[6]

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[3] The OIP specifically alleges that: (i) Total Wealth, Cooper, McNamee, and Shoemaker willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 207 of the Investment Advisers Act of 1940; (ii) Total Wealth and Cooper willfully violated Advisers Act Sections 206(1), 206(2), and 206(4), and Rule 206(4)-8 thereunder; and (iii) Total Wealth willfully violated Advisers Act Section 206(4) and Rule 206(4)-2 thereunder. The OIP also alleges that: (i) McNamee and Shoemaker willfully aided and abetted and caused Total Wealth and Cooper's violations of Exchange Act Section 10(b) and Rule 10b-5(b) and Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8; (ii) Cooper willfully aided and abetted and caused Total Wealth's violations of Exchange Act Section 10(b) and Rule 10b-5(b); and (iii) Cooper and McNamee willfully aided and abetted and caused Total Wealth's violations of Advisers Act Section 206(4) and Rule 206(4)-2.

[4] Chief Judge Murray explains that on August 7, 2014, she stayed proceedings "based on the representation that the parties had reached an agreement in principle to settle the allegations in the OIP." She asserts that, on October 23, 2014, the Division of Enforcement notified her "that it had withdrawn the Offer of Settlement from Commission consideration based on new information it had received," and that she granted the Division "additional time to review documents regarding the source of Respondents' settlement funds." Chief Judge Murray asserts that she also set a prehearing conference for January 6, 2015, during which the Division stated that it was still unable to recommend settlement. Chief Judge Murray then ordered the parties to confer and report by January 16, 2015, whether settlement "was possible within the given schedule," and the Division reported back that it was "still unable to recommend settlement."

[5] *See Adopting Release*, Exchange Act Release No. 48018, 2003 WL 21354791, at *2 (June 11, 2003) ("[T]he Commission has determined that timely completion of proceedings can be achieved more successfully through the adoption of mandatory deadlines and procedures designed to meet these deadlines.").

[6] 17 C.F.R. § 201.360(a)(3).

Accordingly, IT IS ORDERED that the deadline for filing the initial decision in these proceedings is extended to August 17, 2015.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74354 / February 23, 2015

Admin. Proc. File No. 3-15824

In the Matter of the Application of

STEVEN ROBERT TOMLINSON

For Review of Disciplinary Action Taken By FINRA

ORDER DENYING REQUEST FOR RECONSIDERATION

Steven Robert Tomlinson, a registered representative with Wells Fargo Advisors, LLC, filed a letter, dated January 8, 2015, concerning our December 11, 2014 opinion and order (the "December 11 Order") sustaining FINRA disciplinary action against him.[1] We have construed Tomlinson's letter as a request for reconsideration of the December 11 Order and, for the reasons set forth below, reject the request on two independent grounds: it is untimely and lacks merit.

I. Background

In the December 11 Order, we sustained FINRA's findings that Tomlinson violated just and equitable principles of trade by downloading, without authorization, confidential nonpublic information concerning more than 2,000 customers from his former broker-dealer firm's computer system and sharing that information with Wells Fargo. We also sustained FINRA's sanction of a ninety-day suspension. We stated that Tomlinson's misconduct "implicates quintessential ethical considerations and reflects negatively on his ability to comply with fundamental regulatory requirements."[2] We further stated that the sanction "reflects the importance of a security professional's obligation to safeguard confidential customer information, and is a measured response to Tomlinson's careless breach of that obligation."[3]

[1] *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131 (Dec. 11, 2014).

[2] *Id.* at *6.

[3] *Id.* at *11.

On January 8, 2015, Tomlinson responded by letter to the December 11 Order, complaining that we failed to use our "power" to request information that would have been "beneficial to the decision making process." Specifically, Tomlinson asserted that we failed to request that FINRA provide the written recommendations of two subcommittee members of FINRA's National Adjudicatory Council ("NAC"); that the Corning Credit Union (the "Credit Union") and the National Credit Union Administration ("NCUA") produce information regarding data breaches for the period of January 2008 through September 2013; and that Raymond James Financial Services, Inc. produce a copy of his son's Uniform Transfers to Minors Act account client agreement and the privacy statement in force in November 2008.

II. Analysis

A. Tomlinson's request for reconsideration is untimely.

We have construed Tomlinson's letter as a request for reconsideration and reject his request on two independent grounds: it is untimely and lacks merit. Rule of Practice 470 provides, in relevant part, that a motion for reconsideration "shall be filed within 10 days after service of the order complained of."[4] Tomlinson was served with a copy of the December 11 Order on December 15, 2014 and received it on December 22, 2014, but his letter was not filed until January 9, 2015, which was beyond the ten-day period provided in Rule 470. As a result, Tomlinson's request for reconsideration of the December 11 Order was untimely.

B. Tomlinson's request for reconsideration lacks merit.

Even if Tomlinson's request for reconsideration had been timely filed, it would be unavailing.[5] FINRA was not required to provide Tomlinson with written recommendations of NAC subcommittee members because, as we stated in the December 11 Order, "[a] respondent is not entitled to obtain internal [FINRA] staff memoranda."[6] Moreover, Tomlinson's assertions that we failed to send "requests for information" to FINRA, the Credit Union, the NCUA, and Raymond James were raised for the first time in his request for reconsideration, and therefore were forfeited.[7] In any event, there is no basis to believe that the information Tomlinson seeks would

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4 17 C.F.R. § 201.470.

5 We note that reconsideration is intended to be an "exceptional" remedy. *See Johnny Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *1 (Oct. 9, 2013) (denying motions for reconsideration and a stay).

6 *Tomlinson*, 2014 WL 6985131, at *8.

7 *See KPMG Peat Marwick LLP*, Exchange Act Release No. 44050, 2001 WL 223378, at *1 n.7 (Mar. 8, 2001) (denying request for reconsideration, in part, on grounds that a party is foreclosed from resurrecting an argument that it failed to raise in its appeal to the Commission). Furthermore, Tomlinson does not point to, nor are we aware of, any rule that allows us to make

(continued...)

have changed the outcome given, as we found earlier, that Tomlinson "understood the types of customer information that were protected as 'personally identifiable information,' but that . . . he 'carelessly' granted Wells Fargo 'unfettered' access to that information."[8] As we found, Tomlinson's action was a clear breach of his duty to safeguard clients' information and was done to further "his own financial purpose and benefit."[9] We further found that "[t]he facts and circumstances of this case fully support a ninety-day suspension."[10]

Accordingly, it is ORDERED that the request for reconsideration of the December 11, 2014 opinion and order filed by Steven Robert Tomlinson is hereby denied.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

(...continued)
such a "request for information." *See BFG Sec., Inc.*, Exchange Act Release No. 44627, 2001 WL 865449, at *5 n.24 (July 31, 2001) (denying, as outside the Commission's authority in the proceeding or contrary to the public interest and public policy, applicants' requests, among other things, to order NASD to turn over all internal and other documents pertaining to applicants).

8 *Tomlinson*, 2014 WL 6985131, at *6.

9 *Id.* at *11.

10 *Id.*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74356 / February 24, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3640 / February 24, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16400

In the Matter of **THE GOODYEAR TIRE & RUBBER COMPANY,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against The Goodyear Tire & Rubber Company ("Goodyear" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Exchange Act, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. This case involves violations of the books, records, and internal control provisions of the Foreign Corrupt Practices Act ("FCPA") by Goodyear. Goodyear, headquartered in Akron, Ohio, is one of the world's largest tire companies. From 2007 through 2011, Goodyear subsidiaries in Kenya (Treadsetters Tyres Ltd., or "Treadsetters") and Angola (Trentyre Angola Lda., or "Trentyre") routinely paid bribes to employees of government-owned entities and private companies to obtain tire sales. These same subsidiaries also paid bribes to police, tax, and other local authorities. In all, between 2007 and 2011, Goodyear subsidiaries in Kenya and Angola made over $3.2 million in illicit payments.

2. All of these bribery payments were falsely recorded as legitimate business expenses in the books and records of these subsidiaries which were consolidated into Goodyear's books and records. Goodyear did not prevent or detect these improper payments because it failed to implement adequate FCPA compliance controls at its subsidiaries in sub-Saharan Africa.

Respondent

3. **Goodyear**, an Ohio corporation headquartered in Akron, Ohio, is one of the world's largest tire manufacturers. Goodyear has manufacturing facilities in 22 countries and sells tires in most countries around the world. Goodyear's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on The NASDAQ Stock Market.

Other Relevant Entities

4. **Magister Ltd.** ("Magister") is a wholly-owned subsidiary of Goodyear incorporated in Mauritius, and headquartered in South Africa. Magister holds the shares and oversees the operations of the Goodyear subsidiaries in sub-Saharan Africa. During the relevant time period this included Treadsetters in Kenya and Trentyre in Angola.

5. **Treadsetters** is a retail tire distributor incorporated and located in Kenya. During the relevant time period, Treadsetters was an indirect subsidiary of Goodyear, and had annual revenues of approximately $20 million. Goodyear divested its ownership interest in Treadsetters in 2013.

6. **Trentyre** is a retail tire distributor incorporated and located in Angola. Trentyre is a wholly owned subsidiary of Goodyear. During the relevant time period, Trentyre had annual revenues between $6 million and $20 million.

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Improper Payments in Kenya

7. Treadsetters is a retail tire distributor in Kenya. In 2002, Goodyear acquired a minority ownership interest in Treadsetters. By 2006, Goodyear had acquired a majority ownership interest in the company, though the day-to-day operations of Treadsetters continued to be run by Treadsetters' founders and the local general manager. During the relevant time period, Treadsetters had annual revenues of approximately $20 million.

8. From 2007 through 2011, Treadsetters' management regularly authorized and paid bribes to employees of government-owned or affiliated entities, and private companies, to obtain business. The practice was routine and appears to have been in place prior to Goodyear's acquisition of Treadsetters. The bribes generally were paid in cash and falsely recorded on Treadsetters' books as expenses for promotional products.

9. Treadsetters' general manager and finance director were at the center of the scheme. They approved payments for phony promotional products, and then directed the finance assistant to write-out the checks to cash. Treadsetters' staff then cashed the checks and used the money to make improper payments to employees of customers, which included both government-owned entities and private companies.

10. Between 2007 and 2011, Treadsetters paid over $1.5 million in bribes in connection with the sale of tires. This included improper payments to employees of government-owned or affiliated entities including the Kenya Ports Authority, the Armed Forces Canteen Organization, the Nzoia Sugar Company, the Kenyan Air Force, the Ministry of Roads, the Ministry of State for Defense, the East African Portland Cement Co., and Telkom Kenya Ltd. During that same time period, Treadsetters also made approximately $14,457 in improper payments to local government officials in Kenya, including city council employees, police, and building inspectors.

11. Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate FCPA compliance training and controls after the acquisition.

Improper Payments in Angola

12. Trentyre was incorporated in 2007, and is a wholly-owned subsidiary of Goodyear. Trentyre is primarily engaged in selling new tires for mining equipment. During the relevant time period, Trentyre had annual revenues between $6 million and $20 million.

13. From 2007 through 2011, Trentyre paid over $1.6 million in bribes to employees of government-owned or affiliated entities, and private companies, to obtain tire sales. Trentyre paid approximately $1.4 million of these bribes to employees of government-owned or affiliated entities in Angola, including the Catoca Diamond Mine, UNICARGAS, Engevia Construction and Public Works, the Electric Company of Luanda, National Service of Alfadega, and Sonangol. A majority of these improper payments were paid to employees of Trentyre's largest customer at the time, the Catoca Diamond Mine, which is owned by a consortium of mining interests, including Endiama E.P., Angola's national mining company, and ALROSA, a Russian mining

company. During the same time period, Trentyre also made approximately $64,713 in improper payments to local government officials in Angola, including police and tax authorities.

14. The bribery scheme was put in place by Trentyre's former general manager. To hide the scheme and generate funds for the improper payments, Trentyre falsely marked-up the costs of its tires by adding to its invoice price phony freight and customs clearing costs. On a monthly basis, as tires were sold, the phony freight and clearing costs were reclassified to a balance sheet account. Trentyre made improper payments to employees of customers both in cash and through wire transfers. As bribes were paid, the amounts were debited from the balance sheet account, and falsely recorded as payments to vendors for freight and clearing costs.

15. Goodyear did not prevent or detect these improper payments because it failed to implement adequate FCPA compliance training and controls at this subsidiary.

Legal Standards and Violations

16. Under Section 21C(a) of the Exchange Act, the Commission may impose a cease-and-desist order upon any person who is violating, has violated, or is about to violate any provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation.

17. Under Section 13(b)(2)(A) of the Exchange Act issuers are required to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of the issuer. [15 U.S.C. §78m(b)(2)(A)].

18. Under Section 13(b)(2)(B) of the Exchange Act issuers are required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. [15 U.S.C. §78m(b)(2)(B)].

19. As described above, Goodyear subsidiaries in Kenya and Angola made improper payments to employees of government-owned entities and private companies to obtain business. These improper payments were falsely recorded as legitimate business expenses in the books and records of these subsidiaries which were consolidated into Goodyear's books and records. Accordingly, Goodyear violated Section 13(b)(2)(A) of the Exchange Act. As described above, Goodyear also violated Section 13(b)(2)(B) of the Exchange Act by failing to devise and maintain sufficient accounting controls to prevent and detect these improper payments.

Goodyear's Cooperation and Remedial Efforts

20. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff. After receiving information about the bribes, Goodyear promptly halted the improper payments and reported the matter to Commission staff. Goodyear also provided significant cooperation with the Commission's investigation. This included voluntarily producing documents and reports and other information from the company's internal investigation, and promptly responding to Commission staff's requests for information and documents. These efforts assisted the Commission in efficiently collecting evidence including information that may not have been otherwise available to the staff.

21. Goodyear also has undertaken remedial efforts. In Kenya, Goodyear divested its ownership interest in Treadsetters, and ceased all business dealings with the company. In Angola, after Goodyear halted the improper payments its subsidiary lost its largest customer. Goodyear is now in the process of divesting this subsidiary.

22. Goodyear also undertook disciplinary action against certain employees, including executives of its Europe, Middle East and Africa region who had oversight responsibility, for failing to ensure adequate FCPA compliance training and controls were in place at the company's subsidiaries in sub-Saharan Africa.

23. Goodyear also implemented improvements to its compliance program, both specific to its operations in sub-Saharan Africa, and globally. In Africa, the improvements include expanded on-line and in-person anti-corruption training for subsidiary management, sales, and finance personnel; regular audits, by internal audit, specifically focused on corruption risks; quarterly self-assessment questionnaires required of each subsidiary regarding business with government-affiliated customers; quarterly management certifications from every subsidiary that cover among other things controls over financial reporting; and annual testing of internal controls at each subsidiary. To increase oversight, Goodyear also put in place a new regional management structure, and added new compliance, accounting, and audit positions. Goodyear is also making technology improvements, where possible, to electronically link subsidiaries in sub-Saharan Africa to its global network. At the parent company, Goodyear created a new senior position of Vice President of Compliance and Ethics, which further elevated the compliance function within the company. Goodyear has also expanded on-line and in-person anti-corruption and ethics training at its other subsidiaries, and implemented a new Integrity Hotline Web Portal, which enhanced users' ability to file anonymous online reports to its hotline system. With that system, Goodyear is also implementing a new case management system for legal, compliance and internal audit to document and track complaints, investigations and remediation. Goodyear also has updated its policies governing third-party agents and vendors, and is in the process of implementing a new third-party due diligence software tool.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Respondent Goodyear's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Goodyear cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

B. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $14,122,525 and prejudgment interest of $2,105,540 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payments must be made in one of the following ways:

1) Respondent may transmit payment electronically to the Commission, which shall provide detailed ACH transfer/Fedwire instructions upon request;

2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Goodyear as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Brian O. Quinn, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

C. Respondent shall report to the Commission staff periodically, at no less than twelve-month intervals during a three-year term, the status of its remediation and implementation of compliance measures. Should respondent discover credible evidence, not already reported to the Commission staff, that questionable or corrupt payments or questionable or corrupt transfers of property or interests may have been offered, promised, paid, or authorized by Respondent entity or person, or any entity or person while working directly for Respondent, or that related false books and records have been maintained, Respondent shall promptly report such conduct to the

Commission staff. During this three-year period, Respondent shall: (1) conduct an initial review and submit an initial report, and (2) conduct and prepare at least two (2) follow-up reviews and reports, as described below:

1) Respondent shall submit to the Commission staff a written report within one (1) year of the entry of this Order setting forth a complete description of its FCPA and anti-corruption related remediation efforts to date, its proposals reasonably designed to improve the policies and procedures of Respondent for ensuring compliance with the FCPA and other applicable anti-corruption laws, and the parameters of the subsequent reviews (the "Initial Report"). The Initial Report shall be transmitted to Brian O. Quinn, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549. Respondent may extend the time period for issuance of the Initial Report with prior written approval of the Commission staff.

2) Respondent shall undertake at least two (2) follow-up reviews, incorporating any comments provided by the Commission staff on the previous report, to further monitor and assess whether the policies and procedures of Respondent are reasonably designed to detect and prevent violations of the FCPA and other applicable anti-corruption laws (the "Follow-up Reports").

3) The first Follow-up Report shall be completed by no later than one (1) year after the Initial Report. The second Follow-up Report shall be completed by no later than one (1) year after the completion of the first Follow-up Report. Respondent may extend the time period for issuance of the Follow-up Reports with prior written approval of the Commission staff.

4) The periodic reviews and reports submitted by Respondent will likely include proprietary, financial, confidential, and competitive business information. Public disclosure of the reports could discourage cooperation, impede pending or potential government investigations or undermine the objectives of the reporting requirement. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except (1) pursuant to court order, (2) as agreed by the parties in writing, (3) to the extent that the Commission staff determines in its sole discretion that disclosure would be in furtherance of the Commission's discharge of its duties and responsibilities, or (4) is otherwise required by law.

D. Respondent acknowledges that the Commission is not imposing a civil penalty based upon its cooperation in a Commission investigation and related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to any statute of limitations defense.

By the Commission

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74366 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16401

In the Matter of **Energiz Renewable, Inc., Iron Eagle Group, Inc., and MedClean Technologies, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Energiz Renewable, Inc. ("ERIP") (CIK No. 859313) is a dissolved Florida corporation located in Keyport, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ERIP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2011, which reported a net loss of $936,682 for the prior nine months. As of February 23, 2015, the common stock of ERIP was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Iron Eagle Group, Inc. ("IEAG") (CIK No. 1043825) is a void Delaware corporation located in New York, New York with a class of securities registered with the

[1]The short form of each issuer's name is also its stock symbol.

Commission pursuant to Exchange Act Section 12(g). IEAG is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $1,126,202 for the prior six months. As of February 23, 2015, the common stock of IEAG was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. MedClean Technologies, Inc. ("MCLN") (CIK No. 40528) is a delinquent Delaware corporation located in Bethlehem, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MCLN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $720,524 for the prior nine months. As of February 23, 2015, the common stock of MCLN was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74369 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16402

In the Matter of **China Yili Petroleum Company,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT [1]

1. China Yili Petroleum Company ("CYIP") (CIK No. 1339854) is a permanently revoked Nevada corporation located in Tongliao, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CYIP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $118,799 for the prior six months. As of February 23, 2015, the common stock of CYIP was quoted on OTC Link operated by OTC Markets Group, Inc. (formerly "Pink Sheets"), had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports and failed to bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74372 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16403

In the Matter of **Defense Industries International, Inc., EvCarCo, Inc., and Island Breeze International, Inc.** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Defense Industries International, Inc. ("DFNS") (CIK No. 1069563) is a defaulted Nevada corporation located in Petach Tikva, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DFNS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2011, which reported a net loss of $3,462,076 for the prior nine months. As of February 23, 2015, the common stock of DFNS was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. EvCarCo, Inc. ("EVCA") (CIK No. 1459003) is a revoked Nevada corporation located in Fort Worth, Texas with a class of securities registered with the Commission pursuant

[1]The short form of each issuer's name is also its stock symbol.

to Exchange Act Section 12(g). EVCA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $1,639,545 for the prior nine months. As of February 23, 2015, the common stock of EVCA was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Island Breeze International, Inc. ("IBII") (CIK No. 1419886) is a void Delaware corporation located in Bellmawr, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IBII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2012, which reported a net loss of $1,191,769 for the prior nine months. As of February 23, 2015, the common stock of IBII was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74374 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16404

In the Matter of **Dittybase Technologies, Inc.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondent named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT[1]

1. Dittybase Technologies, Inc. ("DTTY") (CIK No. 1311170) is an Alberta corporation located in Victoria, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DTTY is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2008, which reported a net loss and comprehensive loss of $449,461 Canadian for the prior year. As of February 23, 2015, the common shares of DTTY were quoted on OTC Link operated by OTC Markets Group, Inc. (formerly "Pink Sheets"), had three market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports and failed to bring its filings current in response to the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rule 13a-1 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that the Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If the Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon the Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating
Commissioner Piwowar
Dissented as to the
Municipal Advisor and
NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4032 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16405

In the Matter of **CAROLYN C. HOWARD,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Carolyn C. Howard ("Respondent" or "Howard").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over her and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Advisers Act, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Howard was a co-founder of Howard Interests, a New Hampshire unincorporated financial services firm, acting as an unregistered investment adviser. From 2002 to early 2009, Howard, together with Charles Howard, III, operated Howard Interests as an investment adviser to clients for compensation.

2. On August 20, 2014, Howard, in the case State of New Hampshire v. Carolyn C. Howard (No. 213-2014-CR-197), pled guilty to one count of being an unlicensed investment adviser in violation of New Hampshire Revised Statutes Annotated 421-B:6 (a misdemeanor), before the Superior Court of the State of New Hampshire. In a plea agreement, Howard agreed to a sentence of 12 months with that entire sentence deferred for a period of one year.

3. On August 20, 2014, the State of New Hampshire Bureau of Securities Regulation entered a consent order against Howard. The order alleged, among other things, that Howard assisted in the founding and management of an unlicensed investment adviser under the name Howard Interests. Howard, according to the state's order, also acted as an investment adviser representative in that she dealt with Howard Interests' clients and received payments from clients that, while payable to Howard Interests, were deposited to bank accounts solely in her name. The state's order contained a finding that Howard, in operating Howard Interests, "knew or in the exercise of reasonable care would know" that Howard Interests was operating as an unlicensed investment adviser. The New Hampshire order permanently barred Howard from any securities licensure in any capacity in the State of New Hampshire.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Howard's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act, that Respondent Howard be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating
Commissioner Piwowar
Dissented as to the
Municipal Advisor
and NRSRO bars.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74375 / February 25, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4033 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16406

In the Matter of **CHARLES H. HOWARD, III** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Charles H. Howard, III ("Respondent" or "Howard").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Howard was a founder of Howard Interests, a New Hampshire unincorporated financial services firm acting as an unregistered investment adviser and unregistered broker-dealer. From 2002 to early 2009, Howard, doing business as Howard Interests, provided investment advice to clients for compensation and traded stock on behalf of different brokerage firms' customers for transaction-based compensation. Howard, 69 years old, is a resident of Jaffrey, New Hampshire.

2. On August 20, 2014, Howard, in the case State of New Hampshire v. Charles H. Howard, III (No. 213-2014-CR-196) pled guilty to one count of conspiracy in violation of New Hampshire Revised Statutes Annotated 629:3 and one count of securities manipulation in violation of New Hampshire Revised Statutes Annotated 421-B:5 before the Superior Court of the State of New Hampshire. In a plea agreement, Howard agreed to a sentence of 7-20 years in prison and agreed to pay restitution in the amount of $600,000.

3. The criminal information to which Howard pled guilty alleged that Howard committed the crime of conspiracy to commit investment adviser fraud and, having received compensation for advising others of the value of securities and their purchase or sale, he employed devices, schemes and artifices to defraud and engaged in acts and practices which operated as a fraud and deceit on others.

4. In connection with that plea, Respondent admitted that:

   a) He failed to disclose to clients and prospective clients that he had prior criminal convictions for securities fraud, that he was subject to a federal court injunction from violating the federal securities laws, and that he had been barred from association with a broker-dealer or investment adviser;

   b) He effected transactions in securities by means of manipulative and deceptive practices including effecting a series of transactions in different brokerage firms' customers' accounts to create actual or apparent active trading to manipulate the price of a security; and

   c) He induced clients to purchase a security in unsuitably large amounts while concealing from those clients that he was attempting to manipulate the price of that security; and

5. On August 20, 2014, the State of New Hampshire Bureau of Securities Regulation entered a consent order against Howard. The order alleged, among other things, that Howard operated an unlicensed investment adviser and unlicensed broker-dealer under the name Howard Interests. The state's order contained a finding that Howard, in operating Howard Interests, engaged in fraudulent activity in connection with the purchase or sale of securities in that he failed to disclose to investors, among other things, that he was not licensed to provide the investment services he was providing, and that he had been barred in the past by the U.S. Securities and Exchange Commission. The New Hampshire order permanently barred Howard from any securities licensure in any capacity in the State of New Hampshire.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Howard's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Howard be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Howard be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
Municipal Advisor and
NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74376 / February 25, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4035 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16162

In the Matter of WILLIAM L. WALTERS, Respondent.	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") previously instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against William L. Walters ("Respondent").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.3. and III.4. below, and consents to the entry of this Order Making Findings and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Walters, age 49, formerly resided in Honolulu, Hawaii, from 2000 to 2003, and then in Lone Tree, Colorado, through August 2006. He was the owner and operator of Samurai

Capital, Inc. ("Samurai") and Mana Trading Co., Inc. ("Mana Trading"), two alter ego entities. From 1993 through 1997, prior to the relevant time period, Walters was a registered representative associated with two successive broker-dealers.

2. From at least 2001 through 2006, Walters offered and sold securities to investors in connection with a purported "day trading" program. During the relevant period, Walters was not registered with the Commission in any capacity. Walters acted as an unregistered broker in these offers and sales in violation of Section 15(a) of the Exchange Act by: (1) soliciting investors to purchase securities; (2) negotiating the terms of sales to investors; and (3) receiving and handling investor funds. In connection with these offers and sales, Walters also received compensation tied to particular investments because he used the investor funds received for his personal expenses. During the same period, Walters acted as an investment adviser to the pooled day trading funds because he, for compensation, engaged in the business of advising the funds as to their purchase and sale of securities.

3. On April 15, 2011, Walters pleaded guilty to multiple counts of securities fraud and theft before the Colorado District Court. People v. Walters, Colo. Dist. Ct. Case No. 07-CR-408. On April 29, 2011, a judgment of conviction in the criminal case was entered against Walters. He was sentenced to a prison term of 40 years and ordered to make restitution in the amount of $9.5 million.

4. The counts of the criminal information to which Walters pleaded guilty alleged, among other things, that between 2001 and at least 2006, Walters defrauded investors by soliciting money for his purported "day trading" program through Samurai and Mana Trading. The indictment further alleged that the Samurai and Mana trading investments offered and sold by Walter, evidenced in part by promissory notes, involved the purchase and sale of securities. The indictment alleged that most of the investor tor funds were used by Walters for personal purposes and to make ostensible "interest payments" and payouts to other investors. The indictment further alleged that Walters made false and misleading statements to investors about the rates of return of his program, and failed to disclose to investors his trading losses and his use of investor funds to pay other investors.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Walter's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Walters be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

Pursuant to Section 15(b)(6) of the Exchange Act Respondent Walters be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4034 / February 25, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16165

In the Matter of **David Scott Cacchione,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David Scott Cacchione ("Respondent").[1]

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.5. and III.7. below, and consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Investment Advisers Act ("Order"), as set forth below.

[1] On September 25, 2014, the Commission instituted public administrative proceedings pursuant to Section 203(f) of the Advisers Act against Respondent David Scott Cacchione.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Cacchione, 49 years old, is a resident of Menlo Park, California. He is a Managing Member, Chief Compliance Officer, and owner of at least fifty percent interest in Montara Capital Management LLC ("Montara"). From 1989 to 2008, Cacchione was a registered representative associated with various registered broker-dealers and lastly with Merriman Curhan Ford & Co. ("Merriman").

2. Montara is a Delaware limited liability company with its principal place of business in Menlo Park, California.

3. On June 25, 2014, Montara filed an application on Form ADV with the Commission for registration as an investment adviser but withdrew its application on July 21, 2014.

4. Based on Cacchione's positions and ownership interest in Montara, and his efforts to remain associated with Montara, Cacchione is, or seeking to be, a "person associated with" an investment adviser as that term is defined in Section 202(a)(17) of the Advisers Act.

5. On March 24, 2009, the Commission filed a complaint alleging violations of the federal securities laws against Cacchione in the civil action entitled Securities and Exchange Commission v. David Scott Cacchione, Civil Action Number 3:09-CV-1259-CRB, in the United States District Court for the Northern District of California. On April 1, 2009, a final judgment was entered by consent against Cacchione, permanently enjoining him from future violations of 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Subsequently, on April 22, 2009, the Commission also issued an order barring Cacchione from association with any broker-dealer under Section 15(b) of the Exchange Act. In the Matter of David Scott Cacchione, Exch. Act Release No. 59812, Admin. Proc. File No. 3-13455 (Apr. 22, 2009). In its order, the Commission included findings based upon the complaint's allegations.

6. The complaint alleged, among other things, that from 2007 to 2008, Cacchione supplied account statements of unknowing Merriman customers to William Del Biaggio knowing that Del Biaggio would fraudulently pledge the securities in the accounts as collateral to obtain more than $45 million in personal loans. The Commission's complaint also alleged that Cacchione engaged in a pattern of unauthorized trading in the customers' accounts.

7. On March 31, 2009, Cacchione pleaded guilty to one count of aiding and abetting securities fraud in violation of Title 18 United States Code, Sections 1348 and 2 before the United States District Court for the Northern District of California, in United States v. David Scott Cacchione, Crim. Information No. 3:09-CR-296. On October 13, 2009, a judgment in the criminal case was entered against Cacchione. He was sentenced

to a prison term of five years followed by three years of supervised release and ordered to make restitution in the amount of $47,542,887, jointly and severally with his co-defendant William Del Biaggio. Cacchione was released from custody on June 9, 2014. The joint and several restitution requirement of his sentence has not been fully satisfied.

8. The criminal information to which Cacchione pleaded guilty alleged, among other things, that Cacchione, while he was associated with a broker-dealer, aided and abetted a scheme to defraud lenders in connection with the fraudulent pledge of securities underlying the final judgment described in Paragraph 5 above and the related Commission complaint. Cacchione admitted in his plea agreement that while he was a registered representative with Merriman, (1) he signed falsified account control agreements that falsely gave the appearance that Del Biaggio owned and controlled Merriman clients' accounts when he did not; and (2) he provided account statements belonging to Merriman clients, knowing that Del Biaggio intended to and did falsify the account statements Cacchione provided.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Cacchione's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Cacchione be, and hereby is barred from association with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating
Commissioner Piwowar
Dissented as to the
Municipal Advisor
and NRSRO Bars

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74379 / February 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16407

In the Matter of DIANE GLATFELTER, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Diane Glatfelter ("Glatfelter" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent admits the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Sections III.2., below, and consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Glatfelter, age 48, is a resident of Billerica, Massachusetts. In the civil action entitled Securities and Exchange Commission v. K2 Unlimited, Inc., et al., Civil Action Number 1:11-cv-11629, in the United States District Court for the District of Massachusetts, the Commission alleged that Glatfelter offered clients of K2 Unlimited, Inc. and 211 Ventures, LLC securities without being registered as a broker or dealer in accordance with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)].

2. On February 13, 2015, a final judgment was entered by consent against Glatfelter, permanently enjoining her from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 15(a) of the Exchange Act, and imposing an officer and director bar, in the civil action entitled Securities and Exchange Commission v. K2 Unlimited, Inc., et al., Civil Action Number 1:11-cv-11629, in the United States District Court for the District of Massachusetts.

3. The Commission's complaint alleged that Glatfelter, through K2 Unlimited, Inc. and through 211 Ventures, LLC, purported to offer venture capital financing to clients by the use of fictitious instruments called bank guarantees, and also offered clients direct investments in fraudulent and non-existent trading programs, promising high returns and guarantees against loss. The Commission alleged that Glatfelter, with others, defrauded investors of at least $2,225,000 by offering these fictitious investments.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Glatfelter's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Glatfelter be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Stein
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74385 / February 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16408

In the Matter of THOMAS EDWARD KENT, Respondent.	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Thomas Edward Kent ("Respondent" or "Kent") pursuant to Rules 102(e)(2) and 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(2) provides, in relevant part, that:

> Any attorney who has been suspended or disbarred by a court of the United States or of any State. . . shall be forthwith suspended from appearing or practicing before the Commission. . . .

Rule 102(e)(3)(i) provides, in relevant part, that:

> The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any attorney . . . who has been by name . . . permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.1 and 4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Kent, age 56, was at all relevant times an attorney licensed to practice in the State of California. Kent was disbarred by the State of California effective August 30, 2014. At all relevant times, Kent was employed at the Law Offices of Lee & Kent in Los Angeles, California. He acted as legal counsel for Nexland, Inc., dba Nexland Investment Group ("Nexland") from at least some time in 2010 to August 2011. He also served as the executive vice president and general counsel of Nexsun Ethanol, LLC ("Nexsun"), and served on its Board of Directors from about 2008 to 2009. Kent resides in Granada Hills, California.

2. Nexland is a California Corporation which was at all relevant times headquartered in Los Angeles, California. Nexland is the managing member of three California limited liability companies which purported to offer investments eligible under the United States Government's EB-5 visa program, which is administered by the United States Citizenship and Immigration Service ("USCIS"), and provides immigrant investors conditional permanent residency status for a two-year period, followed by permanent residency if the required program conditions, including creation of full-time jobs, are met. Nexland was incorporated by Kent at the direction of Justin Moongyu Lee ("J. Lee"), its CEO and president, and a principal of Lee & Kent, and Kent acted as Nexland's legal counsel from 2010 to August 2011.

3. Nexsun is a Kansas limited liability company which was at all relevant times headquartered in Los Angeles, California. Nexsun was created to purportedly operate an ethanol plant in Kansas, which plant was the purported EB-5 eligible investment. At all relevant times, Kent was executive vice president and general counsel of Nexsun. Kent was also on the board of directors of Nexsun in or about 2008 through 2009.

4. On October 15, 2014, a judgment was entered against Kent, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled

Securities and Exchange Commission v. Justin Moongyu Lee, et al., Civil Action Number 2:14 - CV-06865 RGK, in the United States District Court for the Central District of California.

5. The Commission's complaint alleged, among other things, that Kent participated in the fraudulent EB-5 scheme as follows.

a. Under the EB-5 program, an immigrant who invests capital in a "commercial enterprise" in the United States may petition USCIS and receive conditional permanent residency status for a two-year period. The immigrant must invest at least $500,000 in a "Targeted Employment Area" ("TEA") and thereby create at least ten full-time jobs for United States workers. If the immigrant satisfies these and other conditions within the two-year period, the immigrant may then petition the USCIS for permanent residency. To facilitate investment and job creation within a TEA, the EB-5 program allows entities to apply to USCIS to become approved "regional centers." To become a regional center, the entity must demonstrate, with supporting economic and statistical studies, how it will promote economic growth, including job creation.

b. First, Kent and J. Lee applied to USCIS in 2006 on behalf of Kansas Biofuel Regional Center , LLC ("Kansas Biofuel"), an entity for which they had prepared the business plan, for designation as a "regional center." Kent was the vice president of Kansas Biofuel. Among other representations, Kent and J. Lee claimed to USCIS that there would be "substantial economic benefit" to the area stemming from construction and operation of new ethanol plants by Nexsun, including "thousands" of new jobs.

c. Second, after USCIS approved the designation of Kansas Biofuel as a regional center, Kent and J. Lee created various companies through which to raise monies from immigrant investors. Kent reviewed all of the offering materials, and was thus aware of their content. The Defendants, including Kent, then proceeded to raise millions of dollars from immigrant investors by representing to them that their monies would be used to construct an ethanol plant in Kansas, and that this investment qualified the investors to obtain residency, and ultimately citizenship, in the United States.

d. In fact, however, as Kent knew, the ethanol plant was never built. No jobs were created, and J. Lee and his wife, Rebecca Taewon Lee, misappropriated and misused most of the $11.5 million raised in the offerings. These misuses of investor monies were neither permissible under the EB-5 program nor disclosed to investors.

e. To conceal the fraudulent use of funds and failure to construct the promised ethanol plant and create the jobs contemplated by the EB-5 program, Kent and the Lees submitted various false documents to USCIS. In particular, Kent wrote and signed cover letters for Form I-829 packages submitted to USCIS in 2010 and 2011 petitioning for removal of the conditions on specific investors' residency in the United States, which packages claimed that the job creation requirements of the EB-5 program had been met. Kent reviewed the packages before they were submitted to the USCIS. Those packages included Forms I-9 purporting to identify individual employees to be hired by Nexsun, even though no Nexsun plant had been built, and Nexsun employee lists. The lists were misleading because, among other things, they listed Kent's wife as a full-time Nexsun employee without disclosing that she lived in California, rather than in the Kansas TEA, and because they described her position as "Accountant," when at most she performed clerical functions for Nexsun. Additionally, in response to USCIS Requests for Additional Evidence in support of specific I-829 petitions ("RFEs"), Kent falsely represented that either twenty-one or twenty-six "full time direct jobs" were created by Nexsun as of the date of the investor's I-829 petition, that "construction of Nexsun's refinery is substantially underway and moving towards successful completion," and that the investor petitioner "currently expects that construction will be complete and commercial operations will commence by the first quarter of 2012," when he knew construction had in fact ceased in mid-2008.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondent Kent's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

Kent is suspended from appearing or practicing before the Commission as an attorney.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson
By Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74386 / February 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16409

In the Matter of **Inova Technology, Inc.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Inova Technology, Inc. ("Inova" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Inova Technology, Inc. (CIK No. 0001088211) is a defaulted Nevada corporation with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Inova has no assets, offices, officers, directors or employees. Inova is delinquent in its periodic filings with the Commission, having not filed its Forms 10-Q for the periods ended October 31, 2013, January 31, 2014, July 31, 2014, and October 31, 2014, or its Form 10-K for the fiscal year ended April 30, 2014. During the relevant period, the common stock of Inova (symbol "INVA") was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group Inc. On September 25, 2014, pursuant to Section 12(k) of the Exchange Act, the Commission suspended trading of Inova's securities for ten business days. Since the trading suspension ended, the company's securities have been traded on the over-the-counter markets in the "Grey Market".

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, Respondent Inova is delinquent in its periodic filings with the Commission, having repeatedly failed to meet its obligations to file timely periodic reports.

3. Section 13(a) of the Exchange Act, and the rules promulgated thereunder, require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

4. As a result of the foregoing, Respondent Inova failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that a public administrative proceeding be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford Respondent Inova an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke, the registration of each class of securities of Inova registered pursuant to Section 12 of the Exchange Act, and any successor under Rules 12b-2 or 12g-3 of the Exchange Act, and any new corporate names of Respondent Inova.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the respondent, and any successor under Rules 12b-2 or 12g-3 of the Exchange Act, and any new corporate names of Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74387; File No. SR-OCC-2014-813)

February 26, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Filing, as Modified by Amendment No. 1, Concerning a Proposed Capital Plan for Raising Additional Capital That Would Support The Options Clearing Corporation's Function as a Systemically Important Financial Market Utility

On December 29, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice File No. SR-OCC-2014-813 pursuant to Section 806(e)(1)(A) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Payment, Clearing and Settlement Supervision Act")[1] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Act").[2] On January 14, 2015, OCC filed Amendment No. 1 to the advance notice.[3] The advance

1 12 U.S.C. 5465(e)(1)(A). The Financial Stability Oversight Council designated OCC a systemically important financial market utility on July 18, 2012. *See* Financial Stability Oversight Council 2012 Annual Report, Appendix A, http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf. Therefore, OCC is required to comply with the Payment, Clearing and Settlement Supervision Act and file advance notices with the Commission.

2 17 CFR 240.19b-4(n)(1)(i). As the Commission noted in the notice of filing of the advance notice, as modified by Amendment No. 1, OCC stated that the purpose of this proposal is, in part, to facilitate compliance with proposed Commission rules and address Principle 15 of the Principles for Financial Market Infrastructures ("PMFIs"). The proposed Commission rules are pending. *See* Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 29508 (May 22, 2014) (S7-03-14). Therefore, the Commission has evaluated this advance notice under the Payment, Clearing and Settlement Supervision Act and the rules currently in force thereunder. *See* Securities Exchange Act Release No. 74202 (February 4, 2015), 80 FR 7056 (February 9, 2015) (SR-OCC-2014-813) at note 3.

3 According to OCC, OCC filed Amendment No. 1 to: (i) update OCC's plan for raising additional capital ("Capital Plan") in connection with negotiations between OCC and the options exchanges that own equity in OCC ("Stockholder Exchanges" or "stockholders") and that would contribute additional capital under

notice was published for comment in the Federal Register on February 9, 2015.[4] The Commission received eight comment letters on OCC's proposal.[5] This publication serves as a notice of no objection to proposal discussed in the advance notice.

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the Capital Plan, (ii) correct typographical errors, and (iii) update the Term Sheet included as an exhibit, which summarizes material features of the Capital Plan.

4 Securities Exchange Act Release No. 74202 (February 4, 2015), 80 FR 7056 (February 9, 2015) (SR-OCC-2014-813). In conjunction with this advance notice, OCC filed a corresponding proposed rule change seeking approval of changes to its By-Laws, Certificate of Incorporation and relevant agreements, including its Stockholders Agreement, necessary to implement the Capital Plan. This proposed rule change was published in the Federal Register on January 30, 2015. Securities Exchange Act Release No. 74136 (January 26, 2015), 80 FR 5171 (January 30, 2015) (SR-OCC-2015-02).

5 *See* Letter from Eric Swanson, General Counsel & Secretary, BATS Global Markets, Inc., (February 19, 2015) ("BATS Letter"); Letter from Tony McCormick, Chief Executive Officer, BOX Options Exchange, (February 19, 2015) ("BOX Letter"); Letter from Howard L. Kramer on behalf of Belvedere Trading, CTC Trading Group, IMC Financial Markets, Integral Derivatives, Susquehanna Investment Group, and Wolverine Trading, (February 20, 2015) ("MM Letter"); Letter from Ellen Greene, Managing Director, Financial Services Operations, SIFMA, (February 20, 2015) ("SIFMA Letter"); Letter from James E. Brown, General Counsel, OCC, (February 23, 2015) (responding to BATS Letter and BOX Letter) ("OCC Letter I"); Letter from James E. Brown, General Counsel, OCC, (February 23, 2015) (responding to MM Letter) ("OCC Letter II"); Letter from Barbara J. Comly, Executive Vice President, General Counsel & Corporate Secretary, Miami International Securities Exchange, LLC (February 24, 2015) ("MIAX Letter"); Letter from James E. Brown, General Counsel, OCC, (February 24, 2015) (responding to SIFMA Letter) ("OCC Letter III"). Since the proposal was filed as both an advance notice and proposed rule change, the Commission considered all comments received on the proposal, regardless of whether the comments were submitted to the proposed rule change or advance notice. In its assessment of the advance notice, the Commission assessed whether the issues raised by the commenters relate to the level or nature of risks presented to OCC by the Capital Plan. *See* comments on the advance notice (File No. SR-OCC-2014-813), http://www.sec.gov/comments/sr-occ-2014-813/occ2014813.shtml and comments on the proposed rule change (File No. SR-OCC-2015-02), http://www.sec.gov/comments/sr-occ-2015-02/occ201502.shtml.

I. Description of the Advance Notice

Pursuant to this advance notice, OCC is implementing a Capital Plan under which the Stockholder Exchanges will make an additional capital contribution and commit to replenishment capital ("Replenishment Capital") in circumstances discussed below, and will receive, among other things, the right to receive dividends from OCC. In addition to the additional capital contribution and Replenishment Capital, the main features of the Capital Plan include: (i) a policy establishing OCC's clearing fees at a level that would be sufficient to cover OCC's estimated operating expenses plus a "business risk buffer" as described below ("Fee Policy"), (ii) a policy establishing the amount of the annual refund to clearing members of OCC's fees ("Refund Policy"), and (iii) a policy for calculating the amount of dividends to be paid to the options exchanges owning equity in OCC ("Dividend Policy"). OCC stated that it intends to implement the Capital Plan on or about February 27, 2015, subject to all necessary regulatory approvals.[6]

OCC states in its proposal that it is implementing this Capital Plan, in part, to increase significantly OCC's capital in connection with its increased responsibilities as a systemically important financial market utility. OCC's proposal includes an infusion of substantial additional equity capital by the Stockholder Exchanges to be made prior to February 27, 2015, subject to regulatory approval, that when added to retained earnings accumulated by OCC in 2014 will significantly increase OCC's capital levels as compared to historical levels. Additionally, the proposed change includes the Replenishment Capital commitment, which will provide OCC with access to additional

6 OCC filed a proposed rule change seeking approval of changes to its By-Laws, Certificate of Incorporation and relevant agreements, including its Stockholders Agreement, necessary to implement the Capital Plan. *See supra* note 4.

equity contributed by the Stockholder Exchanges should OCC's equity fall close to or below the amount that OCC determines to be appropriate to support its business and manage business risk.

A. Background

OCC is a clearing agency registered with the Commission and is also a derivatives clearing organization ("DCO") regulated in its capacity as such by the Commodity Futures Trading Commission ("CFTC"). OCC is a Delaware business corporation and is owned equally by the Stockholder Exchanges, five national securities exchanges for which OCC provides clearing services.[7] In addition, OCC provides clearing services for seven other national securities exchanges that trade options ("Non-Stockholder Exchanges"). In its capacity as a DCO, OCC provides clearing services to four futures exchanges. OCC also has been designated systemically important by the Financial Stability Oversight Council pursuant to the Payment, Clearing and Settlement Supervision Act, and the Commission is OCC's "Supervisory Agency" under Section 803(8) of the Payment, Clearing and Settlement Supervision Act.[8]

According to OCC, it has devoted substantial efforts during the past year to: 1) develop a 5-year forward looking model of expenses; 2) quantify maximum recovery and wind-down costs under OCC's recovery and wind-down plan; 3) assess and quantify OCC's operational and business risks; 4) model projected capital accumulation taking into account varying assumptions concerning business conditions, fee levels, buffer margin levels and refunds; and 5) develop an effective mechanism that provides OCC

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7 The Stockholder Exchanges are: Chicago Board Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ OMX PHLX LLC; NYSE MKT LLC; and NYSE Arca, Inc.

8 12 U.S.C. 5462(8).

access to replenishment capital in the event of losses. Incorporating the results of those efforts, the Capital Plan is intended to provide OCC with the means to increase its stockholder equity.

B. OCC's Projected Capital Requirement

According to OCC, using the methods described in detail below, OCC will annually determine a target capital requirement consisting of (i) a baseline capital requirement equal to the greatest of (x) six months operating expenses for the following year, (y) the maximum cost of the recovery scenario from OCC's recovery and wind-down plan, and (z) the cost to OCC of winding down operations as set forth in the recovery and wind-down plan ("Baseline Capital Requirement"), plus (ii) a target capital buffer linked to plausible loss scenarios from operational risk, business risk and pension risk ("Target Capital Buffer") (collectively, "Target Capital Requirement"). OCC determined that the appropriate Target Capital Requirement is $247 million, reflecting a Baseline Capital Requirement of $117 million, which is equal to six months of projected operating expenses, plus a Target Capital Buffer of $130 million. This Target Capital Buffer would provide a significant capital cushion to offset potential business losses.

According to OCC, it had total shareholders' equity of approximately $25 million as of December 31, 2013,[9] meaning that OCC proposes to add additional capital of $222 million to meet its 2015 Target Capital Requirement. OCC determined that a viable plan for Replenishment Capital should provide for a replenishment capital amount which

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9 *See* OCC 2013 Annual Report, Financial Statements, Statements of Financial Condition, available on OCC's website, http://optionsclearing.com/components/docs/about/annual-reports/occ_2013_annual_report.pdf.

would give OCC access to additional capital as needed up to a maximum of the Baseline Capital Requirement ("Replenishment Capital Amount").[10] Therefore, OCC's Capital Plan will include the following in order to provide OCC in 2015 with ready access to approximately $364 million in equity capital:

Baseline Capital Requirement	$117,000,000
Target Capital Buffer	$130,000,000
Target Capital Requirement	$247,000,000
Replenishment Capital Amount	$117,000,000
Total OCC Capital Resources	$364,000,000

C. Procedures Followed in Order to Determine Capital Requirement

According to OCC, various measures were used in determining the appropriate level of capital. An outside consultant conducted a "bottom-up" analysis of OCC's risks and quantified the appropriate amount of capital to be held against each risk. The analysis was comprehensive across risk types, including credit, market, pension, operation, and business risk. Based on internal operational risk scenarios and loss modeling at or above the 99% confidence level, OCC's operational risk was quantified at $226 million and pension risk at $21 million, resulting in the total Target Capital Requirement of $247 million. Business risk was addressed by taking into consideration that OCC has the ability to fully offset potential revenue volatility and manage business risk to zero by adjusting the levels at which fees and refunds are set and by adopting a Business Risk Buffer of 25% when setting fees. Other risks, such as counterparty risk and on-balance sheet credit and market risk, were considered to be immaterial for

10 The obligation to provide Replenishment Capital will be capped at $200 million, which OCC projects will account for increases in its capital requirements for the foreseeable future.

purposes of requiring additional capital based on means available to OCC to address those risks that did not require use of OCC's capital. As discussed in more detail below in the context of OCC's Fee Policy, the Business Risk Buffer of 25% is achieved by setting OCC's fees at a level intended to achieve target annual revenue that will result in a 25% buffer for the year after paying all operating expenses.

Additionally, OCC determined that its maximum recovery costs would be $100 million and projected wind-down costs would be $73 million. OCC projected its expenses for 2015 will be $234 million, so that six months projected expenses are $234 million/2 = $117 million. The greater of recovery or wind-down costs and six months of operating expenses is therefore $117 million, and OCC's Baseline Capital Requirement (minimum regulatory requirement) is therefore $117 million. According to OCC, it then computed the appropriate amount of a Target Capital Buffer from operational risk, business risk, and pension risk, resulting in a determination that the current Target Capital Buffer should be $130 million. Thus, the Target Capital Requirement is $117 million + $130 million = $247 million.

D. Overview of, and Basis for, OCC's Proposal to Acquire Additional Equity Capital

According to OCC, in order to meet its Target Capital Requirement, and after consideration of alternatives, OCC's Board of Directors approved a proposal from OCC's Stockholder Exchanges pursuant to which OCC would meet its Target Capital Requirement of $247 million in early 2015 as follows:

Shareholders' Equity as of 1/1/2014	$ 25,000,000
Shareholders Equity Accumulated Through Retained Earnings[11]	$ 72,000,000
Additional Contribution from Stockholder Exchanges	$150,000,000
Target Capital Requirement	$247,000,000
Replenishment Capital Amount	$117,000,000
Total OCC Capital Resources	$364,000,000

The additional contribution of the Stockholder Exchanges will be made in respect of their Class B Common Stock on a *pro rata* basis. The Stockholder Exchanges will also commit to provide additional equity capital up to the Replenishment Capital Amount, which is currently $117 million, in the event Replenishment Capital is needed. While the Replenishment Capital Amount will increase as the Baseline Capital Requirement increases, under OCC's proposal, it would be capped at a total of $200 million, which could be outstanding at any point in time. OCC estimates that the Baseline Capital Requirement will not exceed this amount before 2022. When the limit is being approached, OCC will revise the Capital Plan as needed to address future needs. In consideration for their capital contributions and replenishment commitments, the Stockholder Exchanges will receive dividends as described in the Dividend Policy discussed below for so long as they remain stockholders, and maintain their contributed capital and commitment to replenish capital up to the Replenishment Capital Amount, subject to the $200 million cap.

11 According to OCC, "the $72 million is after giving effect to the approximately $40 million refund" expected to be made for 2014. Securities Exchange Act Release No. 74202 (February 4, 2015), 80 FR 7056, 7058 at note 15 (February 9, 2015) (SR-OCC-2014-813).

E. Fee, Refund, and Dividend Policies

Upon reaching the Target Capital Requirement, the Capital Plan requires OCC to set its fees at a level that utilizes a Business Risk Buffer of 25%. The purpose of this Business Risk Buffer is to ensure that OCC accumulates sufficient capital to cover unexpected fluctuations in operating expenses, business capital needs, and regulatory capital requirements. Furthermore, the Capital Plan requires OCC to maintain Fee, Refund, and Dividend Policies, described in more detail below, which are designed to ensure that OCC's shareholders' equity remains well above the Baseline Capital Requirement.

The required Business Risk Buffer of 25% is below OCC's 10-year historical pre-refund average buffer of 31%. The target will remain 25% so long as OCC's shareholders' equity remains above the Target Capital Requirement amount. The reduction in buffer margin from OCC's 10-year average of 31% to 25% reflects OCC's commitment to operating as an industry utility and ensuring that market participants benefit as much as possible from OCC's operational efficiencies in the future. This reduction will permit OCC to charge lower fees to market participants rather than maximize refunds to clearing members and dividend distributions to Stockholder Exchanges. OCC will review its fee schedule on a quarterly basis to manage revenue as closely to this target as possible.[12] For example, if the Business Risk Buffer is materially above 25% after the first quarter of a particular year, OCC may decrease fees for the

12 If OCC's fee schedule needs to be changed in order to achieve the 25% Business Risk Buffer, OCC would file a proposed rule change seeking approval of the revised fee schedule.

remainder of the year, and conversely if the Business Risk Buffer is materially below 25% at this time, OCC may increase fees for the remainder of the year.

The Capital Plan will allow OCC to refund approximately $40 million from 2014 fees to clearing members in 2015 and to reduce fees in an amount to be determined by OCC's Board of Directors, effective in the second quarter of 2015. OCC will announce new fee levels early in 2015 and will make such fees effective following notification to clearing members, making any necessary filings, and receiving any necessary approvals from the Commission. OCC will endeavor to provide clearing members with no less than 60-day notice in advance of the effectiveness of changes to fee levels, particularly those that result in increases to fee levels. No dividends will be declared until December 2015 and no dividends will be paid until 2016.

Changes to the Fee, Refund or Dividend Policies will require the affirmative vote of two-thirds of the directors then in office and approval of the shareholders of all of OCC's outstanding Class B Common Stock. The formulas for determining the amount of refunds and dividends under the Refund and Dividend Policies, respectively, which are described in more detail below, are based on, among other things, the current tax treatment of refunds as a deductible expense. The Refund and Dividend Policies will provide that in the event that refunds payable under the Refund Policy are not tax deductible, the policies would be amended to restore the relative economic benefits between the recipients of the refunds and the Stockholder Exchanges.

1. Fee Policy

Under the Fee Policy, in setting fees each year, OCC will calculate an annual revenue target based on a forward twelve months expense forecast divided by the difference between one and the Business Risk Buffer of 25% (*i.e.*, OCC will divide the expense forecast by .75). Establishing a Business Risk Buffer at 25% will allow OCC to manage the risk that fees may generate less revenue than expected due to lower-than-expected trading volume or other factors, or that expenses may be higher than projected. The Fee Policy also will include provisions from existing Article IX, Section 9, of OCC's By-Laws to effectively state that the fee schedule also may include additional amounts necessary to (i) maintain such reserves as are deemed reasonably necessary by OCC's Board of Directors to provide facilities for the conduct of OCC's business and to conduct development and capital planning activities in connection with OCC's services to the options exchanges, clearing members and the general public, and (ii) accumulate such additional surplus as the Board of Directors may deem advisable to permit OCC to meet its obligations to clearing members and the general public. However, OCC states that these provisions will be used only in extraordinary circumstances and to the extent that the Board of Directors has determined that the required amount of such additional reserves or additional surplus will exceed the full amount that will be accumulated through the Business Risk Buffer (prior to payment of refunds or dividends) so OCC's fees will ordinarily be based on its projected operating expenses and the Business Risk Buffer of 25%.

Under the advance notice proposal, OCC will use the following formula to calculate its annual revenue target as follows:

Annual Revenue Target = Forward 12 Months Expense Forecast/(1-.25).

Because OCC's clearing fee schedules typically reflect different rates for different categories of transactions, fee projections will include projections as to relative volume in each such category. The clearing fee schedule will therefore be set to achieve a blended or average rate per contract sufficient, when multiplied by total projected contract volume, to achieve the Annual Revenue Target. Under extraordinary circumstances, OCC will add any amount determined to be necessary for additional reserves or surplus and divide the resulting number by the projected contract volume to determine the applicable average fee per cleared contract needed to achieve the additional amounts required. Consistent with past practice, OCC will notify its clearing members of the fees OCC determines it will apply for any particular period by describing the change in an information memorandum distributed to all clearing members. Consistent with past practice, OCC also will notify regulators of the fees it determines would apply for any particular period by filing an amendment to its schedule of fees as a proposed rule change for immediate effectiveness under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(2) thereunder.

2. *Refund Policy*

Under the Refund Policy, except at a time when Replenishment Capital is outstanding as described below, OCC will declare a refund to clearing members in December of each year, beginning in 2015, in an amount equal to 50% of the excess, if any, of (i) the pre-tax income for the year prior to the refund over (ii) the sum of (x) the amount of pre-tax income after the refund necessary to produce after-tax income sufficient to maintain shareholders' equity at the Target Capital Requirement for the following year plus (y) the amount of pre-tax income after the refund necessary to fund any additional reserves or additional surplus not already included in the Target Capital Requirement. Such refund will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and applicable federal laws and regulations. OCC will not be able to pay a refund on a particular date unless dividends were paid on the same date. If Replenishment Capital has been contributed and remains outstanding, OCC will not pay refunds until such time as the Target Capital Requirement is restored through the accumulation of retained earnings. Refunds in accordance with the Refund Policy will resume once the Target Capital Requirement is restored and all Replenishment Capital is repaid in full, provided that the restoration of the Target Capital Requirement and the repayment of Replenishment Capital occurred within 24 months of the issuance date of the Replenishment Capital. If within 24 months of the issuance date of any Replenishment Capital, such Replenishment Capital has not been repaid in full or shareholders' equity has not been restored to the Target Capital Requirement, OCC will no longer pay refunds to clearing members, even if the Target Capital Requirement is restored and all Replenishment Capital is repaid at a later date.

3. Dividend Policy

The Dividend Policy provides that, except at a time when Replenishment Capital is outstanding, OCC will declare a dividend on its Class B Common Stock in December of each year in an aggregate amount equal to the excess, if any, of (i) after-tax income for the year, after application of the Refund Policy (unless the Refund Policy has been eliminated, in which case the refunds shall be deemed to be $0) over (ii) the sum of (A) the amount required to be retained in order to maintain total shareholders' equity at the Target Capital Requirement for the following year, plus (B) the amount of any additional reserves or additional surplus not already included in the Target Capital Requirement. Such dividend will be paid in the year following the declaration after the issuance of OCC's audited financial statements, provided that (i) the payment does not result in total shareholders' equity falling below the Target Capital Requirement, and (ii) such payment is otherwise permitted by applicable Delaware law and applicable federal laws and regulations. If Replenishment Capital has been contributed and remains outstanding, OCC would not pay dividends until such time as the Target Capital Requirement is restored.

F. OCC's Status as an Industry Utility

According to OCC, OCC has always been operated on an "industry utility" model. The Stockholder Exchanges have contributed only minimal capital to OCC.[13] OCC's By-Laws currently require that OCC set its clearing fees at a level that is designed to cover operating expenses and to maintain such reserves and accumulate such additional capital as are deemed reasonably necessary for OCC to meet its obligations to its clearing members and the public. Clearing fees that are collected in excess of these amounts are refunded annually on a *pro rata* basis to the clearing members that paid them. Under this model, OCC has never paid dividends to the Stockholder Exchanges, but has paid significant refunds to clearing members each year. OCC is aware that some portion of those refunds may not be passed through by the clearing members to their end user customers. Accordingly, OCC believes that by adopting an approach that pays

[13] According to OCC, its common stock and paid in capital total $2,659,999. *See* OCC 2013 Annual Report, Financial Statements, Statements of Financial Condition, available on OCC's website, http://optionsclearing.com/components/docs/about/annual-reports/occ_2013_annual_report.pdf.

dividends to the Stockholder Exchanges, which have invested a significant amount of additional capital ($150 million), but that reduces the historical pre-refund average buffer of 31% by adopting a Business Risk Buffer of 25%, the approach outlined in its Capital Plan maintains, and perhaps better aligns with, an industry utility model.

According to OCC, given the very large increase in capital that OCC has determined to be appropriate and to meet the increased responsibilities imposed upon it as a systemically important financial market utility, OCC has decided that the best alternative available to it is to obtain a substantial further capital contribution from the Stockholder Exchanges. OCC believes that this cannot be accomplished without modification of the past practice of not providing dividends to stockholders. Accordingly, OCC is establishing a new Fee Policy, Refund Policy, and Dividend Policy. Because of the Business Risk Buffer being set at 25%, the combination of the Fee, Refund and Dividend Policies will effectively cap the dividends to be paid to the Stockholder Exchanges at a level that OCC's Board of Directors (with the advice of outside financial experts) has determined results in a reasonable rate of return on contributed capital, particularly in comparison to the implied cost of capital to the clearing members and their customers of an alternative approach considered by the Board of Directors that would require the accumulation of retained earnings through higher fees and no refunds for several years. OCC will continue to refund a percentage of excess clearing fees to clearing members, thereby benefiting both clearing members and their customers.

OCC believes that the Capital Plan therefore effectively preserves OCC's industry utility model of providing its services in an efficient manner, while also enhancing the benefits to the end user customers by charging lower initial fees due to the decrease in the buffer margin from OCC's 10-year average of 31% to 25%. OCC states that it believes clearing members and customers will benefit from the proposed Capital Plan because the plan will allow OCC to continue to provide clearing services at low cost, including through a significant refund of 2014 fees, a reduction of fees beginning in 2015 and projected continuing refunds and lower fees for the foreseeable future.

According to OCC, it believes that Stockholder Exchanges will benefit from the dividend they receive and, perhaps more importantly, they will be assured that OCC is in a position to provide clearing services for their markets on an on-going basis within the same basic structure that has served these markets well since their inception and without the need to radically change the structure to address potential demands of outside equity investors. Non-Stockholder Exchanges also will benefit by continuing to receive OCC's clearing services for their products on the same basis as they presently do.[14]

OCC also believes that the Capital Plan will better align the interests of Stockholder Exchanges and clearing members with respect to expenses, because changes to the level of operating expenses directly affect the Target Capital Requirement. In short, OCC believes that the present proposal represents a fair and reasonable balancing of the interests of the Stockholder Exchanges, the other exchanges for which OCC provides clearing services, clearing members, customers, and the general public while providing an immediate infusion of capital and a structure within which OCC can meet its obligations to the public as a systemically important financial market utility.

14 According to OCC, Non-Stockholder Exchanges contribute capital by purchasing a promissory note in the principal amount of $1,000,000. *See* Section 2 of Article VIIB of OCC's By-Laws. The required Capital Contribution of Non-Stockholder exchanges will not change under the Capital Plan.

G. Replenishment Capital Plan

OCC is establishing a Replenishment Capital Plan whereby OCC's Stockholder Exchanges are obligated to provide on a *pro rata* basis a committed amount of Replenishment Capital should OCC's total shareholders' equity fall below the hard trigger, as described below.[15] The aggregate committed amount for all five Stockholder Exchanges in the form of Replenishment Capital that could be outstanding at any time will be capped at the excess of (i) the lesser of (A) the Baseline Capital Requirement, which is currently $117 million, at the time of the relevant funding, or (B) $200 million, over (ii) amounts of outstanding Replenishment Capital ("Cap Formula"). The $200 million figure in the Cap Formula takes into account projected growth in the Baseline Capital Requirement for the foreseeable future. The commitment to provide Replenishment Capital will not be limited by time, but rather only by the Cap Formula. Replenishment Capital will be called in whole or in part after the occurrence of a "hard trigger" event described below. If the Baseline Capital Requirement approaches or exceeds $200 million, OCC's Board of Directors may consider, as part of its annual review of the Replenishment Capital Plan, alternative arrangements to obtain replenishment capital in excess of the $200 million committed under the Replenishment Capital Plan. In addition, the Refund Policy and the Dividend Policy will provide that, in the absence of obtaining any such alternative arrangements, the amount of the difference will be subtracted from amounts that would otherwise be available for the payment of refunds and dividends.

15 The Replenishment Capital Plan is a component of the Capital Plan.

Replenishment Capital contributed to OCC under the Replenishment Capital Plan will take the form of a new class of common stock ("Class C Common Stock") of OCC to be issued to the Stockholder Exchanges solely in exchange for Replenishment Capital contributions.

The Replenishment Capital Plan is a component of OCC's overall Capital Plan. In implementing the Replenishment Capital Plan, OCC's management would monitor OCC's levels of shareholders' equity to identify certain triggers, or reduced capital levels, that might require action. OCC has identified two key triggers – a soft trigger and a hard trigger – and proposes that OCC will take certain steps upon the occurrence of either. The "soft trigger" for re-evaluating OCC's capital will occur if OCC's shareholders' equity falls below the sum of (i) the Baseline Capital Requirement and (ii) 75% of the Target Capital Buffer. The soft trigger will be a warning sign that OCC's capital had fallen to a level that requires attention and responsive action to prevent it from falling to unacceptable levels. Upon a breach of the soft trigger, OCC's senior management and OCC's Board of Directors will review alternatives to increasing capital, and take appropriate action as necessary, including increasing fees or decreasing expenses, to restore shareholders' equity to the Target Capital Requirement.

The "hard trigger" for making a mandatory Replenishment Capital call will occur if shareholders' equity falls below 125% of the Baseline Capital Requirement ("Hard Trigger Threshold"). OCC considers that a breach of the Hard Trigger Threshold is a sign that significant corrective action, with a more immediate impact than increasing fees or decreasing expenses, should be taken to increase OCC's capital, either as part of a recovery plan or a wind-down plan for OCC's business. OCC's shareholders' equity will have to fall more than $100,000,000 below the fully funded capital amount described above in order to breach the Hard Trigger Threshold. As a result, OCC views the breach of the Hard Trigger Threshold as unlikely and occurring only as a result of a significant, unexpected event. In the event of such a breach, OCC's Board of Directors must determine whether to attempt a recovery, a wind-down of OCC's operations, or a sale or similar transaction, subject in each case to any necessary stockholder consent.[16] If the Board of Directors decides to wind-down OCC's operations, OCC will access the Replenishment Capital in an amount sufficient to fund the wind-down, as determined by the Board and subject to the Cap Formula. If the Board of Directors decides to attempt a recovery of OCC's capital and business, OCC will access the Replenishment Capital in an amount sufficient to return shareholders' equity to an amount equal to $20 million above the Hard Trigger Threshold, subject to the Cap Formula.

While Replenishment Capital is outstanding, no refunds or dividends will be paid and, if any Replenishment Capital remains outstanding for more than 24 months or the Target Capital Requirement is not restored during that period, changes to how OCC calculates refunds and dividends may be necessary (as described in more detail in OCC's Refund Policy and Dividend Policy). In addition, while Replenishment Capital is outstanding, OCC will first utilize the entire amount of available funds to repurchase, on a *pro rata* basis from each Stockholder Exchange, to the extent permitted by applicable Delaware and federal law and regulations, outstanding shares of Class C Common Stock as soon as practicable after completion of the financial statements following the end of

16 The requirement for stockholder consent would arise under OCC's Restated Certificate of Incorporation, which would provide that any decision to attempt a recovery would require separate approval by the stockholders, while a decision to wind-down would require separate approval by the stockholders.

each calendar quarter at a price equal to the original amount paid for such shares, plus an additional "gross up" amount to compensate the holders of the Class C Common Stock for taxes on dividend income (if any) that they may have to recognize as a result of such repurchase.[17] For this purpose, "Available Funds" will equal, as of the end of any calendar quarter, the excess, if any, of (x) shareholders' equity over (y) the Minimum Replenishment Level. The "Minimum Replenishment Level" will mean $20 million above the Hard Trigger Threshold, so that OCC's shareholders' equity will remain at or above the Minimum Replenishment Level after giving effect to the repurchase.

According to OCC, the capital base described above will permit OCC to hold at all times cash and other assets of high quality and sufficiently liquid to allow OCC to meet its current and projected operating expenses under a range of scenarios, including adverse market conditions. OCC expects it will hold at all times liquid net assets funded by equity sufficient to cover potential general business losses so that OCC can continue operations and services as a going concern if those losses materialize, which assets will always be greater than either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the Board of Directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services. These assets will be held in addition to resources held to cover participant defaults, among other risks.[18]

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17 According to OCC, based on current federal tax rates, if the full amount of the payment is classified as a dividend and the recipient is entitled to a dividends received deduction, this gross up is estimated to be approximately 12% of the payment.

18 OCC stated that these assets will be held in addition to resources held to cover participant defaults or other risks covered under certain credit risk standards and

II. Summary of Comments Received

The Commission received five comment letters on OCC's proposal and three comment letters from OCC responding to the issues raised by the commenters.[19] Three of the five commenters generally supported OCC's need to raise additional capital,[20] but all five commenters opposed how the Capital Plan raised the additional capital.[21] After careful review of those comments, the Commission has determined that most of the issues raised by the commenters do not relate to the nature or level of risks presented by OCC.

One commenter, however, raised the issue that the Replenishment Capital Plan may create a misalignment of interests between the exchanges and clearing members, which could in turn create an imbalance in the management of certain risks.[22] Specifically, this commenter stated that because no refunds are paid to clearing members while any portion of that Replenishment Capital remains outstanding and that refunds are discontinued permanently if the Replenishment Capital remains outstanding for two years, the plan effectively uses the fees to maximize and prioritize the dividends payable to the Stockholder Exchanges, which is at the expense of the clearing

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liquidity risk standards set forth in proposed Commission rules. *See* Securities Exchange Act Release No. 74202 (February 4, 2015), 80 FR 7056 (February 9, 2015) (SR-OCC-2014-813).

19 The Commission received one comment letter on the proposed rule change and advance notice (*See* SIFMA Letter) and four comment letters on the proposed rule change only (*See* BOX Letter; BATS Letter; MM Letter; and MIAX Letter). *See supra* note 5.

20 *See* BOX Letter; SIFMA Letter; and MM Letter.

21 *See* BOX Letter; SIFMA Letter; BATS Letter; MM Letter; and MIAX Letter.

22 *See* SIFMA Letter.

members.[23] Further, this commenter notes that the proposed amendments to OCC's By-Laws would allow the Stockholder Exchanges to manage the risk of their Replenishment Capital being required by determining whether retained earnings could be used to compensate for a loss or deficiency in the clearing fund, thereby also allowing the Stockholder Exchanges to determine to fund clearing fund deficiencies through additional retained earnings rather than risk having to fund their required Replenishment Capital commitment.[24] As a result, this commenter believes that the Replenishment Capital Plan may create a misalignment of interests between the Stockholder Exchanges and clearing members, which could in turn create an imbalance in the management of certain risks.[25]

OCC asserts in its response that these concerns regarding Replenishment Capital are misplaced.[26] OCC contends that its By-Laws provide that in lieu of charging a loss or deficiency proportionately to the clearing fund computed contributions of non-defaulting clearing members, OCC may, in its discretion, and subject to the unanimous approval of the holders of Class A Common Stock and Class B Common Stock, elect to charge such loss or deficiency in whole or in part to OCC's current earning or retained earnings.[27] Accordingly, OCC considers the net effect of its Replenishment Capital Plan to be simply a timing effect, with Replenishment Capital treated as an advance against the refunds to

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23 *Id.*

24 *Id.*

25 *Id.*

26 *See* OCC Letter III.

27 *Id.*

which Stockholder Exchanges otherwise would have been entitled.[28] OCC contends that it is neither the purpose nor the effect of the Replenishment Capital Plan to shift the potential loss from a clearing member default, which has always been mutualized, so long as OCC remains solvent.[29]

III. Discussion and Commission Findings

Although the Payment, Clearing and Settlement Supervision Act does not specify a standard of review for an advance notice, its stated purpose is instructive.[30] The stated purpose is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically-important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[31]

Section 805(a)(2) of the Payment, Clearing and Settlement Supervision Act[32] authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator. Section 805(b) of the Payment, Clearing and Settlement Supervision

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28 *Id.*

29 *Id.*

30 *See* 12 U.S.C. 5461(b).

31 *Id.*

32 12 U.S.C. 5464(a)(2).

Act[33] states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

After carefully considering OCC's proposal, the comments received, and OCC's responses thereto, the Commission finds that OCC's Capital Plan is consistent with the objectives and principles described in Section 805(b) of the Payment, Clearing and Settlement Supervision Act.[34]

While most of the issues raised by the commenters do not relate to the nature or level of risks presented by OCC, one commenter raised a specific concern with respect to OCC's Replenishment Capital Plan. The Commission, however, believes that OCC's Capital Plan, when considered in its totality, does not adversely change the nature or level of risks presented by OCC. Although this commenter alleged a potential misalignment of interests between the Stockholder Exchanges and clearing members when Replenishment Capital is outstanding, decisions made regarding the capitalization of OCC are made by the Board of Directors. OCC's By-Laws address the use of capital to cover clearing member defaults in lieu of using the clearing fund and address the power of the Board of Directors to make decisions in such circumstances. Further, the Board of Directors' obligations under corporate law will require the Board of Directors to revisit on a

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33 12 U.S.C. 5464(b).

34 *Id.*

periodic basis material provisions of the Capital Plan in the future, including those related to decisions regarding Replenishment Capital, and to review any credible new capital proposals that may be brought forward by management or members of the Board of Directors from time to time. The Commission believes such processes create a reasonable expectation that the potential concerns described by the commenter can be controlled by OCC, and therefore the Commission agrees with OCC that the commenter's contentions regarding the purpose and use of the Replenishment Capital are misplaced.

The Capital Plan will provide OCC with an immediate injection of capital and future committed capital to help ensure that it can continue to provide its clearing services if it suffers business losses as a result of a decline in revenues or otherwise. Given that OCC has been designated as a systemically important financial market utility, OCC's ability to provide its clearing services if it suffers business losses contributes to reducing systemic risks and supporting the stability of the broader financial system. In so doing, OCC's Capital Plan is consistent with the objectives of Section 805(b) of the Payment, Clearing and Settlement Supervision Act,[35] which are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.

[35] 12 U.S.C. 5464(b).

IV. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Payment, Clearing and Settlement Supervision Act,[36] that the Commission DOES NOT OBJECT to advance notice proposal (File No. SR-OCC-2014-813) and that OCC is AUTHORIZED to implement the proposal as of the date of this notice or the date of an order by the Commission approving a proposed rule change that reflects rule changes that are consistent with this advance notice proposal (File No. SR-OCC-2015-02), whichever is later.

By the Commission.

Brent J. Fields
Secretary

By: Jill M. Peterson
Assistant Secretary

[36] 12 U.S.C. 5465(e)(1)(I).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74391 / February 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16410

In the Matter of **Agent155 Media Corp.,** **QSound Labs, Inc.,** **STEN Corp., and** **Wind Energy America, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Agent155 Media Corp., QSound Labs, Inc., STEN Corp., and Wind Energy America, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Agent155 Media Corp. (CIK No. 1389405) is a Nevada corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Agent155 Media is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2011, which reported a net loss of $364,327 for the prior nine months. As of February 12, 2015, the company's stock (symbol "AGMC") was quoted on OTC Link, (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. QSound Labs, Inc. (CIK No. 840518) is an Alberta corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). QSound Labs is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2007, which reported a net loss of $1,306,067 for the prior twelve months. As of February 12, 2015, the company's stock (symbol "QSND") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. STEN Corp. (CIK No. 350557) is a Minnesota corporation located in Minnetonka, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). STEN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended September 28, 2008, which reported a net loss of $8,021,386 for the prior twelve months. As of February 12, 2015, the company's stock (symbol "STEN") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Wind Energy America, Inc. (CIK No. 351809) is an inactive Minnesota corporation located in Eden Prairie, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wind Energy America is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended June 30, 2010, which reported a net loss of $5,394,342 for the prior twelve months. As of February 12, 2015, the company's stock (symbol "WNEA") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the Municipal
Advisor and NRSRO bars.
Commissioner Piwowar
Dissented as to the
Section 15(c)(1)(A)
Charges

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9733 / February 27, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74395 / February 27, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31489 / February 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16412

In the Matter of

HAJIME SAGAWA,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Hajime Sagawa ("Sagawa" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the

Investment Company Act of 1940, Making Findings, And Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. These proceedings arise out of the involvement of Hajime Sagawa ("Sagawa"), the principal and minority owner of a now-defunct registered broker-dealer, in a cover-up of billions of dollars in losses by Olympus Corp. ("Olympus").

2. From the late 1990s to 2010, two Olympus executives hid billions of dollars in Olympus's losses by transferring them to a secret web of entities in the Caymans and British Virgin Isles (collectively, "Off B/S Entities") that they controlled but, contrary to Japanese GAAP at the time, did not consolidate in Olympus's financial statements. These Off B/S Entities "purchased" Olympus's soured investments at their historical cost with bank loans secured by collateral pledged by Olympus.

3. After completing these sham sales, the Olympus executives needed to find a way to repay the banks that had loaned the Off B/S Entities the amounts they had transferred to Olympus. To repay some of these loans, they retained Axes America, LLC ("Axes"), a registered broker-dealer partially owned by Sagawa, to serve as its financial advisor in connection with an acquisition. With Sagawa's assistance, the Olympus executives devised a scheme whereby Olympus would pay a disproportionate financial advisory fee to Axes that Axes would then transfer to the Off B/S Entities so that they could repay the bank loans.

4. Axes began advising Olympus on a possible acquisition of a manufacturer of medical devices which had shares of common stock that traded on the New York Stock Exchange. After talks with the manufacturer's Board of Directors broke down, Axes and Olympus identified Gyrus Group PLC ("Gyrus"), a UK company that specialized in endoscopes, as another possible target. In February 2008, Olympus acquired Gyrus for approximately $2 billion. Olympus then paid Axes an "advisory fee" in the form of cash and Gyrus preference shares worth approximately $687 million, i.e., 38% of the purchase price.

5. In 2008 and again in 2010, Sagawa offered the Gyrus preference shares back shares to Olympus. In April 2010, the Olympus Board of Directors approved the purchase of these shares for $622 million. Axes and an affiliate, Axam Investments, Ltd. ("Axam"), routed this $622

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

million as well as other funds that Axes received to the Off B/S Entities, which in turn used the money to repay the bank loans they had used to purchase Olympus's soured investments.

Respondent

6. Hajime Sagawa, age 67, is a resident of Boca Raton, Florida. From 1997 to 2008, he was a registered representative, a founding member, minority owner, and a director of Axes as well as its President and CEO. From 2007 to 2010, Sagawa was also the sole director of Axam. From 2006 to 2010, Sagawa resided in the United States and lived at different times in New York, Connecticut, and Florida.

Other Relevant Entities

7. Olympus Corp. is a Japanese corporation that sells cameras, microscopes, endoscopes, and other medical equipment. Olympus's ordinary shares are listed on the Tokyo Stock Exchange.

8. Axes America, LLC was a Delaware corporation with a last known principal place of business at 420 Lexington Ave., Suite 225, New York, NY 10170. Axes was a registered broker-dealer from April 1997 to May 5, 2008, when it voluntarily withdrew its registration. Axes was dissolved on March 12, 2008.

9. Axam Investment, Ltd. is a Cayman Islands limited company that was established in November 2007 and struck from the Cayman Islands corporate registry in June 2010. While active, it appears to have had no business purpose other than transferring funds to Olympus. Sagawa was the sole director of Axam.

10. Olympus Executive No. 1 worked in the accounting department of Olympus from 1980 to 2009 and in 2011 was appointed as the company's internal auditor.

11. Olympus Executive No. 2 was an employee of Olympus from 1981 to 2011, and during most of this period was the subordinate of Olympus Executive No. 1. From 2005 to 2011, he served as the head of management planning.

Background

A. Olympus Accrues Losses

12. To combat a decrease in operating income due to a sharp rise in the Japanese yen beginning in the mid-1980s, Olympus's management began supplementing that income through *zaiteku*, a Japanese word for speculative investments. Over the next several years, Olympus conducted an aggressive financial asset management program led by Olympus Executive No. 1, then the company's assistant manager of the Finance Group. When the bubble burst in the Japanese economy in 1990, Olympus sustained substantial losses in these speculative investments. Olympus's response was to doubly commit to its strategy by making even riskier investments that

it hoped would wipe out its recent losses. This approach backfired, and at the end of 1990, Olympus's losses had piled up to approximately ¥100 billion ($691 million).[2]

13. Olympus Executives Nos. 1 and 2 avoided a mark-down of these assets by placing them in *tokkin* trusts.[3] These trusts held a basket of assets, and, under accounting rules at the time, Olympus was required to disclose losses only if the aggregate market value of the trust declined by 50% or more. Therefore, filling a *tokkin* trust with several assets that were performing well would obviate the need to disclose the substantial decline in value of other assets in the trust.

14. By 1995, the continuing decline in value of Olympus's assets in *tokkin* trusts made it increasingly difficult to offset them with other well-performing assets and thereby take advantage of the basket method of valuation.

B. <u>Olympus Moves Its Losses Off of Its Balance Sheet</u>

15. To avoid disclosing the losses incurred on soured investments held in the *tokkin* trusts, Olympus Executives Nos. 1 and 2 worked to transfer the failed investments to the Off B/S Entities, a secret web of entities in the Cayman Islands and British Virgin Isles that they created and controlled but did not consolidate in Olympus's financial disclosures. Through an exceedingly complex series of transactions that involved dozens of entities, Olympus "sold" its soured investments to the Off B/S Entities at prices that were roughly equivalent to their historical cost. In simplified form, these series of transactions took the following steps:

i. Olympus entered into lending agreements with several banks. Pursuant to these lending agreements, Olympus would deposit funds into a time deposit held by the banks, and the banks would use that deposit as collateral for a revolving credit facility that they extended to entities designated by Olympus.

ii. The banks extended the credit facilities to the *tokkin* trusts. In its financial statements, Olympus disclosed its deposits but did not disclose they were pledged as collateral for loans to the *tokkin* trusts.

iii. The *tokkin* trusts initially drew $535 million from the revolving credit facility and transferred these funds and their portfolios, which included Olympus's soured investments, to the Off B/S Entities. At the time of their transfer, the portfolios had a book value of approximately ¥68.3 billion ($625 million) and a market value of approximately ¥11.6 billion ($105 million). Therefore, the borrowed funds combined with the current market value of the portfolios were roughly equivalent to the investments' book value.

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2 Dollar conversions of amounts in Japanese yen reflect historical exchange rates.

3 A *tokkin* trust is a trust created under Japanese law in which a registered investment advisor appointed by the trustor instructs the trustee regarding the investment of the trust assets.

iv. In exchange for the $535 million and the *tokkin* trusts' portfolios, the Off B/S Entities issued units to the *tokkin* trusts, which then became the sole owners of the Off B/S Entities. Accordingly, the *tokkin* trusts held units in entities whose NAVs were collectively higher than the value of the portfolios. By failing to disclose the relationships between the entities and Olympus as well as the fact that the cash held by the Off B/S Entities was effectively a loan to Olympus, Olympus evaded its obligation to disclose the unrealized investment losses.

16. Because the complex nature of the scheme required devoted advisors, lawyers, and bankers to execute it, the fees charged proved extremely costly. Consequently, the losses that initially prompted Olympus Executives Nos. 1 and 2 to embark on their loss-hiding endeavor were eclipsed by what Olympus paid in scheme maintenance fees, interest payments, and other costs. To pay these costs, Olympus entered into additional lending agreements with the above-referenced banks to create revolving credit facilities that the Off B/S Entities could use to cover these costs.

C. <u>The Repayment of Funds Borrowed through the Lending Arrangements</u>

17. Having sold much of its severely impaired assets at their historical cost to the Off B/S Entities, Olympus now needed to find a way to repay the banks for financing these sales and their associated costs. Because Olympus had not disclosed that its deposits with the banks were pledged as collateral, it could not use these deposits to repay amounts borrowed by the various Off B/S Entities. Rather, Olympus Executives Nos. 1 and 2 hatched a plan in which they would take advantage of Olympus's existing business strategy of growing through a series of corporate acquisitions. Specifically, the two executives planned to siphon some of the funds paid by Olympus in connection with one of its upcoming acquisitions, book the siphoned funds as part of the goodwill of the acquired entity, divert those funds to the banks that made the loans, and then depreciate the goodwill of the acquired entity or record an impairment to goodwill.[4] By transforming decades old losses into recently acquired goodwill, Olympus could account for the losses publicly and gradually over a twenty year amortization period.

18. In 2006, Olympus Executive No. 2 approached Sagawa, who had done work for Olympus in the past and at the time was Axes's principal and minority owner, with his idea of using an acquisition to hide Olympus's losses. Olympus Executive No. 2 proposed that they retain Axes as a financial advisor and then pay it an outsized financial advisory fee that could then be used to repay the loans extended to the Off B/S Entities.

19. On June 5, 2006, Sagawa, on behalf of Axes, and Olympus Executive No. 1, on behalf of Olympus, signed a financial advisory agreement whereby Olympus retained Axes to

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[4] This plan took two forms: the payment of an inflated financial advisory fee in connection with the acquisition of Gyrus and the overpayment for the majority stake in three small Japanese companies. Sagawa was not involved in the overpayment for the stakes in the three Japanese companies. Therefore, this overpayment is not relevant to this proceeding.

serve as a financial advisor on the acquisition of two possible targets, Target No. 1 and Target No. 2, both of which manufactured medical devices and were headquartered in the United States. At the time, Target No. 1 had shares of common stock that were listed on the New York Stock Exchange. Target No. 2 was a privately held company.

20. The financial advisory agreement stated that Olympus would pay Axes's expenses and would pay an advisory fee that consisted of (1) an up-front fee of $3 million, (2) an additional fee of $2 million payable on June 5, 2007, and (3) a Completion Fee paid after the acquisition in the form of (a) a cash payment equivalent to approximately 0.2% of the value of the target and (b) share options of the stock of the target equivalent to 4.9% of the fully diluted share capital of the target. At the time, Olympus Executives Nos. 1 and 2 envisioned an acquisition price of ¥600–800 billion ($5.2–6.9 billion); therefore, the share options would be worth approximately $294 million. According to Olympus Executive No. 2, the hope was that these options would greatly increase in value over the following five years and then could be used to wipe out most of the hidden losses.

21. As the financial advisor to Olympus, Sagawa, through Axes, worked on a possible acquisition of a majority stake by Olympus in Target No. 1 shares. Specifically, he (i) retained an investment bank as a sub-advisor to consult and provide analyses on the possible acquisition and its benefits, (ii) advocated for the acquisition of a majority stake in Target No. 1 and argued that alternative strategies, such as a leveraged partnership or a spin-off, were less appealing, (iii) worked to bring the parties together by advising Olympus on positions it should take during the negotiations and by proposing that Olympus increase its offer "in order to encourage [Target No. 1] to accelerate their [sic] timing."

22. Despite Sagawa's efforts, the Board of Directors of Target No. 1 indicated in June 2007 that it was not in favor of the deal.

23. Afterwards, Olympus chose not to focus on Target No. 2, but instead identified Gyrus, a publicly-traded endoscope manufacturer based in the United Kingdom, as a possible acquisition target.

D. Sagawa Works to Complete the Scheme by Offering <u>Gyrus Preference Shares Back to Olympus</u>

24. Sagawa acted as a financial advisor on Olympus's acquisition of Gyrus. As part of Axes's advisory fee, it received 177 million Gyrus preference shares. Although the nominal face value of the preference shares was $1 per share and therefore $177 million in the aggregate, these shares paid a dividend of 85% of Gyrus's net profits and therefore were worth much more. Axes transferred its rights to these preference shares to Axam, an entity based in the Cayman Islands that Olympus Executives Nos. 1 and 2 controlled and that had Sagawa as its sole director.

25. On November 25, 2008, Sagawa, acting pursuant to the instruction of Olympus Executive No. 2, emailed a letter on behalf of Axam to Olympus requesting that Olympus buy back the preference shares or allow Axam to sell them to a third party. Sagawa was in New York

when he sent the letter. To obscure the true purpose of the offer, Sagawa falsely claimed in the letter that he was requesting that Olympus repurchase the preference shares "[d]ue to an unexpected indication of redemption request from our investors." In support of this request, Sagawa included two valuations for the preference shares, one of which estimated their value at $592 million and the other of which estimated their value as in between $522–$536 million. Around the same time, a broker retained by Olympus to assess the value of the preference shares had valued them at $557 million. On November 28, 2008, the Olympus Board of Directors approved a purchase price for the preference shares within the range of $530–$590 million.

26. While staged negotiations between Olympus Executive No. 2 and Sagawa dragged on, Olympus's auditors requested that Olympus revoke the November 28 board resolution to repurchase the Gyrus preference shares because it viewed the exorbitant fee to Axes/Axam as problematic. In response, on June 5, 2009, the Olympus Board withdrew its approval for the repurchase. The following month, Olympus replaced its auditors.

27. Shortly thereafter, Sagawa and Olympus Executive No. 2 exchanged emails in which each gave the appearance of negotiating on behalf of Axam and Olympus, respectively. On March 10, 2010, Sagawa, who was in New York at the time, emailed a letter on behalf of Axam to Olympus Executive No. 2 requesting that Olympus repurchase the preference shares for $730 million. Sagawa attributed the increase to the fact that the preference shares paid a dividend equivalent to 85% of Gyrus's net profits and that two years' worth of dividends had not yet been paid.

28. On March 19, 2010, the Olympus Board of Directors approved a repurchase of the preference shares at $622 million. Olympus wired this amount to Axam, which in turn wired it to the Off B/S Entities so that they could use it to repay the revolving credit facilities extended to them.

29. As a result of the conduct described above, Sagawa willfully violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, which prohibits fraudulent conduct in the offer and sale of securities, and willfully aided and abetted and caused Axes's violation of Section 15(c)(1)(A) of the Exchange Act, which prohibits a broker or dealer from effecting transactions, or inducing or attempting to induce the purchase or sale of any security, by means of any manipulative, deceptive, or other fraudulent device or contrivance.

Respondent's Cooperation

30. In determining to accept the Offer, the Commission considered the cooperation Respondent afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 17(a)(1) and (a)(3) of the Securities Act and Section 15(c)(1)(A) of the Exchange Act.

B. Respondent be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
>
> prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Respondent acknowledges that the Commission is not imposing a civil penalty based upon his cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74393 / February 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16411

In the Matter of **China Pharmaceuticals, Inc., China Printing & Packaging, Inc., Silvan Industries, Inc., and Ziyang Ceramics Corp.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents China Pharmaceuticals, Inc., China Printing & Packaging, Inc., Silvan Industries, Inc., and Ziyang Ceramics Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. China Pharmaceuticals, Inc. (CIK No. 1341808) is a revoked Nevada corporation located in Xi'an, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Pharmaceuticals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-Q for the period ended June 30, 2012, which reported a net loss of $1,764,687 for the prior six months. As of February 10, 2015, the company's stock (symbol "CFMI") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Printing & Packaging, Inc. (CIK No. 1422357) is a defaulted Nevada corporation located in Baoji City, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Printing & Packaging is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012, which reported a net loss of $355,842 for the prior three months. As of February 10, 2015, the company's stock (symbol "CHPI") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Silvan Industries, Inc. (CIK No. 1373683) is a revoked Nevada corporation located in Guiyang, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Silvan Industries is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2011. As of February 10, 2015, the company's stock (symbol "SLVA") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Ziyang Ceramics Corp. (CIK No. 1093903) is a dissolved Florida corporation located in Zhucheng City, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Ziyang Ceramics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2012. As of February 10, 2015, the company's stock (symbol "ZYCI") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

6. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

IT IS HEREBY FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to

notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

美利坚合众国

之

证券交易监督委员会

《1934 年证券交易法》

发行号 74393 / February 27, 2015

行政程序

备案号 3-16411

就以下相对人之事项： **中国制药公司** **中国印刷包装公司** **西尔工业公司和** **紫阳陶瓷公司** **相对人。**	**依据《1934 年证券交易法》第 12(j) 条，** **送达行政程序启动** **暨听证通知令**

I.

证券交易监督委员会（“委员会”）认为，依据《1934 年证券交易法》（“证券法”）第 12(j) 条对相对人中国制药公司、中国印刷包装公司、西尔工业公司和紫阳陶瓷公司特此提起公共行政程序，对保护投资者是必要且适当的。

II.

经调查，执行部诉称：

A. 相对人

1. 中国制药公司 (CIK No. 1341808) 是中国西安市一家已被撤销的内华达州公司，依据证券法第 12(g) 条在委员会注册了一类证券。中国制药公司未按规定向委员会提交定期报告。自提交截止 2012 年 6 月 30 日的修正版 10-Q 表（称前六个月净亏损 1,764,687 美元）后，中国制药公司再未提交任何报告。截至 2015 年 2 月 10 日，该公司股票（代码“CFMI”）仍在 OTC Link 市场挂牌交易，并拥有七家做市商，且符合证券法 15c2-11 (f) (3) 规则中“捎带” (piggyback) 例外的资格。

2. 中国印刷包装公司 (CIK No. 1422357) 是中国宝鸡市一家已违约的内华达州公司，依据证券法第 12(g) 条在委员会注册了一类证券。中国印刷包装公司未按

规定向委员会提交定期报告。自提交截止 2012 年 6 月 30 日的 10-Q 表（称前三个月净亏损 355,842 美元）后，中国印刷包装公司再未提交任何报告。截至 2015 年 2 月 10 日，该公司股票（代码"CHPI"）仍在 OTC Link 市场挂牌交易，并拥有四家做市商，且符合证券法 15c2-11 (f) (3) 规则中"捎带" (piggyback) 例外的资格。

3. 西尔工业公司 (CIK 号 1373683) 是中国贵阳市一家已被撤销的内华达州公司，依据证券法第 12(g) 条在委员会注册了一类证券。西尔工业公司未按规定向委员会提交定期报告。自提交截止 2011 年 12 月 31 日的 10-K 表后，西尔工业公司再未提交任何报告。截至 2015 年 2 月 10 日，该公司股票（代码"SLVA"）仍在 OTC Link 市场挂牌交易，并拥有五家做市商，且符合证券法 15c2-11 (f) (3) 规则中"捎带" (piggyback) 例外的资格。

4. 紫阳陶瓷公司 (CIK 号 1093903) 是中国诸城市一家已解散的佛罗里达州公司，依据证券法第 12(g) 条在委员会注册了一类证券。紫阳陶瓷公司未按规定向委员会提交定期报告。自提交截止 2012 年 6 月 30 日的 10-Q 表后，紫阳陶瓷公司再未提交任何报告。截至 2015 年 2 月 10 日，该公司股票（代码"ZYCI"）仍在 OTC Link 市场挂牌交易，并拥有七家做市商，且符合证券法 15c2-11 (f) (3) 规则中"捎带" (piggyback) 例外的资格。

B. 未按规定提交定期报告

5. 正如上文详述，所有相对人均未按规定向委员会提交定期报告，屡次不履行按时提交定期报告的义务，且在收到企业金融部发出的催告函，要求其遵守定期申报义务后，仍不予理会，或因未按证监会的规定在证监会维护有效备案地址，从而未收到该等催告函。

6. 根据证券法第 13(a) 条及其发布的规定，依据证券法第 12 条注册的证券发行者，即使是根据第 12(g) 条自愿注册，亦应以定期报告的方式向委员会提交最新且准确之信息。具体而言，第 13a-1 条规定要求发行者提交年报，第 13a-13 条规定要求国内发行者提交季报。

7. 由于上述原因，相对人未遵守证券法第 13(a) 条和根据该法发布的第 13a-1 条和/或 13a-13 条之规定。

III.

鉴于执行部提出的诉称，委员会认为提起公共行政程序确定以下事项对保护投资者是有必要且适当的：

A. 本命令第 II 部分所包含的诉称是否属实，就该诉称而言，给予相对人对该等诉称进行抗辩的机会；以及

B. 就保护投资者而言，对本命令第 II 部分所指定相对人、证券法第 12b-2 条或第 12g-3 条规定下的任何继承人、采用新公司名称的相对人采取以下行为是否有必要且适当——暂停（不超过十二个月）或撤销其依据证券法第 12 条注册的各类证券；

IV.

特此命令，为对第 III 部分所述问题进行取证，应在待定的时间和地点召开公开听证，并由《美国证监会行为规范》第 110 条规定的进一步命令所指定的行政法法官主持[《美国联邦法规》第 17 编第 201.110 节]。

进一步命令，相对人应在本命令送达后十 (10) 日内，按《美国证监会行为规范》第 220(b) 条规定 [《美国联邦法规》第 17 编第 201.220(b) 节] 对本命令中所包含的诉称提交答辩状。

若相对人未提交所规定的答辩状，或在收到通知后未出席听证，则相对人及《美国证监会行为规范》第 12b-2 条或第 12g-3 条规定下的任何继承人，以及拥有新公司名称的相对人，将被视为缺席，且将针对其就命令中的事项确定相应程序，根据《美国证监会行为规范》第 155(a)、220(f)、221(f) 和 310 条规定 [《美国联邦法规》第 17 编第 201.155(a)、201.220(f)、201.221(f) 和 201.310 节]，命令中的诉称将被视为属实。

本命令应以直接送达的方式或通过特快专递或《美国证监会行为规范》允许的其它方式，立即送达相对人。

进一步命令，行政法法官应依据《美国证监会行为规范》第 360(a)(2) 条规定 [《美国联邦法规》第 17 编第 201.360(a)(2) 节]，在不晚于本命令送达之日起的 120 天内做出初始裁决。

如缺少相关弃权，则委员会在本程序或任何事实上相关的程序中从事调查或起诉职能的任何官员或雇员，均不得参加本事项的决策或对本事项的决策提出建议，但依据通知在诉讼中担任证人或律师的除外。
因本程序并非《行政诉讼法》第 551 节定义的“法规制定”，因此不受第 553 条规定的限制，无须推迟委员会任何最终决议的实行日期。

委员会。

秘书
Brent J. Fields