

Staff Guidance—Elements of an Application for Substituted Compliance for Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants

This staff guidance outlines elements that staff encourages applicants to include in a substituted compliance application for non-U.S. person security-based swap dealers and major security-based swap participants pursuant to Rules [0-13](#) and [3a71-6](#) under the Securities Exchange Act of 1934 (“Exchange Act”).

This guidance represents the views of Commission staff. This guidance is not a rule, regulation, or statement of the Securities and Exchange Commission (“Commission”). Furthermore, the Commission has neither approved nor disapproved the content of this guidance. This guidance, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

Applications must be in writing in the form of a letter. Prior to submitting an application, potential applicants are encouraged to contact staff to discuss the application process and to submit draft applications for discussion with staff.

For further information, applicants may contact Carol McGee, Assistant Director, or Laura Compton, Senior Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551-5870 or Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010. Applicants also may contact Jonathan Balcom, Assistant Director, or Stephen Benham, Senior Special Counsel, Office of International Affairs, at (202) 551-6690 or Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

Element 1: Scope of the substituted compliance request.

Applications should identify the types of foreign market participants who wish to use substituted compliance (including the foreign financial regulatory authority or authorities that directly supervise each type of foreign market participant) and the specific Exchange Act provisions and rules for which the applicant requests substituted compliance.

Element 2: U.S. requirements for which the applicant requests substituted compliance.

Applications should identify the Exchange Act provisions and rules for which the applicant requests substituted compliance and may, but need not, include a detailed description of those provisions and rules in the application. Applicants should review those Exchange Act provisions and rules, including both their requirements and their regulatory objectives.

To assist applicants in conducting this review, staff has published [guidance regarding analysis of foreign regulatory requirements](#) that includes brief descriptions of, and examples of objectives for, each Exchange Act provision and rule for which substituted compliance is potentially available.

Element 3: Foreign requirements that are comparable to the U.S. requirements for which the applicant requests substituted compliance and how they are comparable.

Applications should describe in narrative form the foreign requirements, including their regulatory objectives, that are comparable to the Exchange Act provisions and rules for which the applicant requests substituted compliance. These requirements should apply to the types of foreign market participants who wish to use substituted compliance. Applications should explain any differences between the U.S. and foreign requirements and/or regulatory objectives. If the foreign requirements or objectives differ substantially from the U.S. requirements, applicants may wish to explain how those requirements achieve comparable regulatory outcomes and/or identify conditions to the substituted compliance decision that could address any differences in regulatory objectives or outcomes. Comparisons in tabular form that illustrate similarities or differences between U.S. and foreign requirements may be used to complement the narrative legal and policy analysis.

To assist applicants in conducting this analysis, staff has published [guidance regarding analysis of foreign regulatory requirements](#) that includes factors applicants may consider when comparing specific U.S. and foreign requirements. Applicants also should review the comparability factors listed in Exchange Act Rule [3a71-6\(d\)](#).

Element 4: Effectiveness of the supervisory compliance program administered and enforcement authority exercised with respect to the foreign requirements.

Applications should explain how the foreign financial regulatory authority or authorities administer an effective supervisory compliance program and exercise effective enforcement authority with respect to the foreign requirements.

To assist applicants in conducting this analysis, staff has published a [questionnaire on foreign supervisory compliance and enforcement programs](#) that includes factors applicants may consider when making this assessment. Applications may use responses to some or all of the questions in this questionnaire to describe the effectiveness of supervision and enforcement programs or, alternatively, may draft a separate description of their effectiveness.

Element 5: The Commission's access to books and records and onsite inspection and examination.

If the applicant is a foreign market participant or group of foreign market participants, provide the certification and opinion of counsel described in Exchange Act Rule [3a71-6\(c\)\(2\)\(ii\)](#) regarding the Commission's prompt access to the market participants' books and records and submission to onsite inspection and examination by the Commission.

If the applicant is a foreign financial authority or authorities that directly supervise a foreign market participant or group of foreign market participants who wish to use substituted compliance, explain why no law or policy of a relevant foreign jurisdiction would impede the ability of such market participants to provide the Commission prompt access to their respective books and records or to submit to onsite inspection and examination by the Commission.

If any laws or policies of a relevant foreign jurisdiction could have such an effect, applicants could describe the laws and/or policies and identify conditions to the substituted compliance decision or other factors that could avoid this effect. This explanation assists the Commission in determining whether each authority has provided adequate assurances of the absence of such laws and policies as required by Exchange Act Rule [3a71-6\(c\)\(3\)](#).

An applicant for substituted compliance may begin its application even if it cannot yet provide the certification and opinion of counsel or adequate assurances. However, an application will not be complete until the applicant provides the certification and opinion of counsel or adequate assurances, as applicable.

Element 6: The relevant foreign financial authority or authorities and the Commission must enter into supervisory and enforcement arrangements addressing matters arising under the substituted compliance determination.

Before the Commission makes a determination allowing the use of substituted compliance, it first must enter into a supervisory and enforcement memorandum/memoranda of understanding or other arrangement(s) with the relevant foreign financial authority or authorities. This memorandum/memoranda of understanding or other arrangement(s) must address supervisory and enforcement cooperation and other matters arising under the substituted compliance determination, which are matters that memoranda of understanding not specific to substituted compliance do not address.

An applicant for substituted compliance may submit its application even if the Commission has not yet finalized the required memorandum of understanding or other arrangement. Any applicant that is unsure about the status of this requirement in relation to its application should contact staff for guidance.