July 13, 2015

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comment Letter on the Proposed Rules on Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent (RIN 3235-AL73)

Dear Mr. Fields:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] and the Financial Services Roundtable ("**FSR**")[2] appreciate the opportunity to provide the Securities and Exchange Commission (the "**Commission**") with comments regarding the Proposed Rules on Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent (the "**Proposal**").[3]

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[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] As *advocates for a strong financial future*™, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[3] Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Proposed Rules, 80 Fed. Reg. 27,444 (proposed May 13, 2015).

We greatly appreciate the Commission's efforts to bring further clarity to the cross-border reach of Title VII security-based swap regulation and, in particular, to the situations in which conduct in the United States would lead to the application of the Commission's security-based swap rules. We recognize and appreciate the Commission's efforts, by shifting from looking to "transactions conducted within the United States" to transactions that are "arranged, negotiated, or executed" by personnel located in the United States, to harmonize the cross-border treatment of security-based swaps with the cross-border rules of other regulators, particularly the Commodity Futures Trading Commission ("**CFTC**"). We strongly encourage the Commission to continue coordinating with the CFTC and other regulators, including the Board of Governors of the Federal Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (collectively with the SEC, the "**Volcker Regulators**") in an attempt to reach consensus and uniformity as to the scope of "arranging, negotiating, or executing" across the various regulations and guidance in which that phrase is used. We hope that continued coordination will result in a shared understanding of conduct-based application of derivatives rules.

We strongly believe that the Commission has taken the correct approach in focusing on market-facing activity of sales and trading personnel in defining the "arrange, negotiate, or execute" nexus that subjects security-based swap activity to the Commission's regulations based on location of conduct. Focusing on market-facing activities results in a definable standard that will bring clarity to the application of security-based swap requirements to security-based swap dealers, and is appropriate and consistent with the expectations of the parties as to when U.S. security-based swap requirements will apply. We urge the Commission to encourage the CFTC to adopt a similar approach as the CFTC works to evaluate and provide further guidance on CFTC Staff Advisory 13-69, as inconsistent application of Title VII swap and security-based swap requirements will lead to confusion among counterparties that transact with dealers registered in both capacities.

We further agree with the Commission's approach of looking solely to the conduct of the dealer in determining whether the Commission's security-based swap regulations apply. By engaging in a robust, data-driven analysis of the security-based swap market, the Commission confirmed that the vast majority of transactions in this market involve at least one dealer counterparty, resulting in an appropriate decision to look to the dealing entity's activities alone in determining rule applicability.

However, as described below, we believe that the Proposal could be amended in a number of ways to decrease the burden on market participants while still serving to meet the Commission's regulatory goals. In particular, we strongly urge the Commission to reconsider the relevance of U.S.-located conduct to *de minimis* calculations for security-based swap dealer registration. We also urge the Commission to reconsider rules that would have the effect of disrupting prudent risk management practices and fragmenting markets. Furthermore, while we agree with the Commission that it is appropriate to apply trade-specific conduct-focused requirements (such as certain external business conduct obligations) based on the location of trade-specific market-facing conduct, we believe it is inappropriate to apply relationship-level requirements (including certain

other external business conduct obligations) and risk-based requirements (such as clearing) solely based on location of conduct without further U.S. nexus. Finally, we believe that the Commission should reconsider certain elements of re-proposed Regulation SBSR to minimize unnecessary burdens on market participants.

To this end, we have provided below specific observations and recommendations regarding the Proposal. Each topic includes a summary of the particular observation or recommendation followed by a more detailed discussion.

I. Arrange, Negotiate, or Execute

> ***Observation:*** We strongly agree with the Commission's proposed approach of focusing the interpretation of "arrange," "negotiate" and "execute" on market-facing sales and trading activity.

The Proposal states that the Commission intends for "arrange," "negotiate" and "execute" to indicate market-facing activity of sales and trading personnel in connection with a particular transaction, including interactions with counterparties or their agents.[4] This is a definable standard, which promotes clarity regarding the application of the Commission's security-based swap rules. In addition, we strongly believe that this market-facing focus is appropriate and consistent with the expectations of the parties as to when U.S. regulations will apply. In general, the Commission's conduct-based requirements address counterparty protection, including disclosure requirements and obligations of fair dealing. As a result, these requirements are appropriately limited to situations in which U.S.-based personnel face the counterparty.

II. Use of Arrange, Negotiate or Execute Beyond Commission Title VII Rules

> ***Recommendation:*** The terms "arrange," "negotiate" and "execute" should have a consistent meaning for purposes of the Proposal, the Commission's Final Cross-Border Definitions Rule, the CFTC's cross-border application of Title VII swap requirements and the Volcker Final Implementing Regulations.

As the Commission is aware, various regulations and guidance in recent years out of the Commission and other U.S. regulators have used the phrase "arrange, negotiate, or execute." Specifically, the phrase appears in the following contexts:

- *The Commission's Final Cross-Border Definitions Rule § 240.3a71-3* – Under the Commission's Final Rule on Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities, a security-based swap is a transaction "conducted through a foreign branch" when, among other things, the security-based swap is

[4] Proposal, 80 Fed. Reg. 27,444 at 27,467.

"arranged, negotiated, and executed" on behalf of the foreign branch solely by persons located outside the United States.[5]

- *CFTC Staff Advisory 13-69* – Under CFTC Staff Advisory 13-69,[6] a non-U.S. swap dealer (or its agent) that regularly uses personnel in the United States to "arrange, negotiate, or execute" swap transactions would be required to comply with the CFTC's transaction-level requirements without the availability of substituted compliance.

- *Section __.6(e) of the Volcker Final Implementing Regulations* – Under the final regulations implementing Section 13 of the Bank Holding Company Act (the "**Volcker Final Implementing Regulations**"),[7] a non-U.S. banking entity relying on the exemption for the permitted trading activities of foreign banking entities (commonly referred to as the "**TOTUS exemption**") may not allow its personnel, or that of its affiliates, to "arrange, negotiate, or execute" a purchase or sale of a financial instrument in the United States. In addition, a non-U.S. banking entity relying on the TOTUS exemption may not conduct a purchase or sale with or through any U.S. entity, unless, among other exceptions, the purchase or sale is with the foreign operations of the U.S. entity, provided that no personnel of that U.S. entity that are located in the United States are involved in the "arrangement, negotiation, or execution" of the transaction.[8]

We believe that the Commission has greatly furthered the analysis by providing guidance on the scope of activities intended to be captured by these terms. However, we are concerned that differing interpretations of these identical terms, either among regulators or among market participants (in the absence of guidance from regulators), could lead to regulatory uncertainty and severe operational difficulties. Such a result would cause confusion within firms and in the market and lead to severe operational difficulties in implementation, training and compliance, particularly when more than one regulation applies to a single activity. Therefore, we strongly recommend that the Commission encourage the CFTC and the Volcker Regulators to similarly focus on market-facing conduct when using these terms.

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[5] Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Final Rule; Republication, 79 Fed. Reg. 47,278 (Aug. 12, 2014), § 240.3a71-3(a)(3)(i)(B) (hereinafter, "**Final Cross-Border Definitions Rule**").

[6] CFTC Staff Advisory No. 13-69, Division of Swap Dealer and Intermediary Oversight Advisory Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-69.pdf.

[7] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule, 79 Fed. Reg. 5,536 (Jan. 31, 2014).

[8] *Id.*, § __.6(e).

III. ***Security-Based Swap Dealer De Minimis Counting Methodology for Non-U.S. Persons***

> ***Recommendation:*** A non-U.S. entity should not be required to count a security-based swap toward its security-based swap dealer *de minimis* threshold solely because of the conduct of its or its agent's U.S.-located personnel.

The Final Cross-Border Definitions Rule requires non-U.S. persons that are not conduit affiliates to count security-based swaps entered into in a dealing capacity with (1) U.S. persons, other than foreign branches of U.S. security-based swap dealers, unless the counting entity is guaranteed by a U.S. affiliate, and (2) non-U.S. persons to the extent that the counterparty has a right of recourse against a U.S. affiliate of the counting entity.[9] The Proposal would add to this calculation those security-based swap dealing transactions that are arranged, negotiated or executed by personnel of the non-U.S. entity or its agent located in the United States.[10]

A non-U.S. entity should not be required to count a security-based swap dealing transaction with a non-U.S. person toward its security-based swap dealer *de minimis* threshold solely on the basis of the conduct of its or its agent's U.S.-located personnel. As described below, such transactions between non-U.S. persons, where none of the risks of the transactions reside in the United States, do not have a sufficient nexus to the United States to be included in a determination of whether a non-U.S. entity should need to register with the Commission.

First, the Commission has recognized that the key purpose of its security-based swap dealer registration regime is the protection of security-based swap dealers and the market as a whole against risk. In its release accompanying the Final Cross-Border Definitions Rule, the Commission stated that in adopting the May 2012 final security-based swap dealer definitions rule,[11] it sought to require registration of those entities active in the security-based swap market that warrant regulation to promote, among other things, market stability.[12] The Commission also recognized that rules that depend on the definition of security-based swap dealer, such as margin and capital rules, "will reduce the financial risks of these institutions and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally."[13] This focus on risk has continued in the Proposal, as the Commission has correctly determined that requiring a security-based swap to be cleared solely as a result of U.S.-located conduct is

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[9] Final Cross-Border Definitions Rule, 79 Fed. Reg. 47,278 at 47,370.

[10] Proposal, 80 Fed. Reg. 27,444 at 27,466.

[11] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security- Based Swap Participant" and "Eligible Contract Participant"; Joint Final Rule, 77 Fed. Reg. 30,596 (May 23, 2012) (hereinafter, "**Security-Based Swap Dealer Definitions Rule**").

[12] Final Cross-Border Definitions Rule, 79 Fed. Reg. 47,278 at 47,286

[13] *Id.*

not necessary where the counterparty credit risk and operational risk of a transaction reside primarily outside the United States because a key objective of the clearing requirement is to mitigate systemic and operational risk in the United States.

Given this focus of the regime on risk, we think it is inappropriate to require registration based on the location of conduct. We strongly believe that the Commission's view that "subjecting such security-based swaps to the clearing requirement would not significantly advance what [the Commission] views as a key policy objective of the clearing requirement"[14] applies equally (if not more) when considering other Commission rules, such as capital, margin, segregation, trade acknowledgement and verification, certain external business conduct requirements and financial reporting and recordkeeping. To the extent the Commission is concerned about conduct of non-registered dealers, it has more targeted tools at its disposal, including existing antifraud and anti-manipulation provisions and broker-dealer regulatory obligations applicable to registered agents.

In addition, a conduct-based registration requirement is inconsistent with the security-based swap dealer *de minimis* threshold. The *de minimis* threshold is based on the aggregate notional size of security-based swaps, not the extent of U.S. involvement in security-based swaps. This indicates that the *de minimis* threshold is concerned with the risk posed to the entity, not the extent of involvement by the entity. Since the amount that a particular security-based swap contributes to an entity's *de minimis* threshold depends on notional amount rather than the significance of U.S. conduct, a non-U.S. entity could breach the *de minimis* threshold based on minimal U.S. conduct associated with a few large trades with non-U.S. counterparties—an incongruous result.

The minimal benefits of conduct-based registration are far outweighed by significant costs. For example, a conduct-based *de minimis* threshold counting requirement may lead to market fragmentation and a loss of skilled trading and risk management expertise from the U.S. markets. Since the risk and trading functions of global security-based swap dealers are intertwined, many entities that act as dealers in the security-based swap market organize their front office personnel to maximize risk management expertise and to leverage that expertise in providing client services. For U.S.-listed products and security-based swaps based on those products, many non-U.S. dealing entities concentrate that expertise in the United States to better serve client demands. If forced to comply with onerous registration and related U.S. regulatory requirements based on conduct in the United States, these same dealers may rationally choose to move that expertise outside of the United States. This will lead to reduced U.S. market liquidity and increased fragmentation in the global security-based swap market.

Finally, we believe that including security-based swap positions toward the *de minimis* threshold based solely on conduct in the United States may impose a disparate burden on certain market participants based on their organizational structure. For example, where a dealer books trades into several local subsidiaries rather than a single

[14] Proposal, 80 Fed. Reg. 27,444 at 27,481.

booking entity, but uses personnel in the United States, that market participant may need to track the activity of, and potentially register, a greater number of entities. Similarly, a market participant that uses U.S.-based personnel to arrange, negotiate or execute a security-based swap in one asset class but does not use U.S.-based personnel for another asset class may need to register as a security-based swap dealer, which would subject all security-based swaps (even those without U.S.-based conduct) to a number of substantive security-based swap requirements.

Recommendation: In the alternative, if the location of conduct is relevant for counting toward the security-based swap dealer *de minimis* threshold, security-based swap transactions entered into anonymously on an exchange and cleared should not be counted toward a non-U.S. person's *de minimis* threshold based on the conduct of its or its agent's U.S.-located personnel.

If, however, a non-U.S. entity is required to count security-based swap dealing transactions with non-U.S. persons toward its security-based swap dealer *de minimis* threshold on the basis of the conduct of its or its agent's U.S.-based personnel, we encourage the Commission to adopt the exception for security-based swap transactions that are entered into anonymously on an exchange and cleared.

The Commission proposes to remove the exception from inclusion in a non-U.S. entity's *de minimis* calculation for transactions entered into anonymously on an exchange and cleared where the non-U.S. entity or its agent has U.S.-located personnel involved in arranging, negotiating or executing the security-based swap. We disagree with this proposed approach. As discussed above, where the risk of a transaction resides outside the United States, that transaction should not be included in the *de minimis* threshold calculation. This is even more true when a counterparty does not have an expectation of the protections of the Commission's Title VII security-based swap regulations, as is the case where the transaction is conducted anonymously on an exchange. In addition, the clearing of such transactions mitigates risk, further supporting the lack of inclusion of these transactions in the determination of whether a non-U.S. person must register.

Recommendation: Even if the location of conduct is relevant for counting toward the security-based swap dealer *de minimis* threshold, a non-U.S. entity that uses a U.S.-located and regulated bank or registered broker-dealer to arrange, negotiate or execute transactions should not be required to count such transactions toward its security-based swap dealer *de minimis* threshold.

We understand the Commission's supervisory interest in ensuring that entities engaged in dealing activity using personnel located within the United States but not required to register with the Commission as security-based swap dealers are appropriately regulated and subject to oversight. However, we recommend that if a non-U.S. entity is required to count a security-based swap dealing transaction with a non-U.S. person toward its security-based swap dealer *de minimis* threshold on the basis of the conduct of its U.S.-based personnel, then the Commission should provide for an exception for a non-U.S. entity that uses a U.S.-located and regulated bank or registered broker-dealer to

arrange, negotiate or execute transactions. An agent that is a U.S.-regulated bank or registered broker-dealer would already be subject to substantive regulation by the Commission or a prudential regulator. Such regulation and oversight by the Commission or the applicable prudential regulator significantly diminishes concerns about improper activity of the agent and its personnel and essentially severs the nexus between the dealer counterparty and the U.S. market.

To the extent that the Commission remains concerned about risks associated with these transactions, it could condition use of this exception on whether such a non-U.S. entity provides access to its books and records related to these transactions. Alternatively, or in addition, the Commission could condition use of this exception on the non-U.S. entity (i) being an affiliate of the U.S.-located registered broker-dealer, (ii) being registered as a dealer in a local jurisdiction recognized by the Commission as comparable, and/or (iii) being located in a Basel-compliant jurisdiction and subject to such capital requirements under its local regime.

*IV. **Application of External Business Conduct Rules***

Recommendation: Only transaction-specific external business conduct rules, and not relationship-level external business conduct rules, should apply based on location of conduct.

The Commission has proposed to apply the external business conduct requirements, other than diligent supervision, to the "U.S. business"[15] of registered U.S. and foreign security-based swap dealers, but not to their "foreign business."[16, 17] The external business conduct rules are designed to provide counterparty protection by expanding the obligations of security-based swap dealers in dealings with their counterparties.[18] These rules can be divided into two categories: (i) relationship-level rules and (ii) transaction-specific rules. Each category of rules is described further below. We believe that only the transaction-specific requirements should apply based on location of conduct of U.S.-based personnel.

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[15] "U.S. business" means (1) for a U.S. security-based swap dealer: any transaction by or on behalf of the U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch; (2) for a non-U.S. security-based swap dealer: any security-based swap transaction entered into, or offered to be entered into, by or on behalf of the non-U.S. security-based swap dealer with a U.S. person (other than a transaction through a foreign branch); or (3) any security-based swap transaction arranged, negotiated or executed by U.S.-located personnel. Proposal § 240.3a71-3(a)(8).

[16] Proposal, 80 Fed. Reg. 27,444 at 27,473.

[17] "Foreign business" means any security-based swap transaction entered into, or offered to be entered into, by or on behalf of a U.S. security-based swap dealer or non-U.S. security-based swap dealer, other than U.S. business. Proposal § 240.3a71-3(a)(9).

[18] Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 42,496, 42,396 (hereinafter, the "**External Business Conduct Rule**").

a. Relationship-Level Rules

Certain of the external business conduct rules apply to the entire relationship between the security-based swap dealer and its counterparty. These include counterparty status,[19] disclosure of daily marks,[20] know your counterparty requirements and counterparty suitability requirements.[21] Where the relationship is between a non-U.S. security-based swap dealer and a non-U.S. counterparty, that non-U.S. counterparty would not expect the protections of the U.S. security-based swap regulatory regime. In addition, such non-U.S. counterparties will not expect to be required to provide representations, agree to covenants or fill out questionnaires designed to comply with U.S. relationship-level requirements, as their relationship is with a non-U.S. entity. Imposing all of the relationship-level obligations on the relationship between two non-U.S. counterparties based on conduct (which may be *de minimis*) in the United States adds significant burden without corresponding benefit.

In addition, non-U.S. security-based swap dealers are often subject to home country relationship-level rules. Subjecting non-U.S. security-based swap dealers using U.S. personnel to potential duplicative application is unnecessary, particularly because the home country regulators of the two counterparties have a more compelling interest in relationship-level counterparty protection than the Commission. As such, these counterparties would reasonably expect the protection of their home country's regulatory regime and application of the Commission's relationship-level rules would only subject them to greater burdens.

It is worth noting that since special entities are, by definition, U.S. persons,[22] all of the requirements meant to provide additional protection to special entities will apply in every transaction between a security-based swap dealer and a special entity. This ensures that those counterparties deemed to be entitled to the further protections of the Commission's external business conduct rules focused on special entities, will receive the benefits of those protections in any case and therefore there is no reason for the Commission to look to the dealer's use of U.S.-located personnel to arrange, negotiate or execute the transaction.

b. Transaction-Specific Rules

In contrast, certain external business conduct rules apply to individual communications between the security-based swap dealer and its counterparty on a transaction-by-transaction basis. These include disclosures of material risks and

[19] Commission Proposed Rule § 240.15Fh-3(a).

[20] Commission Proposed Rule § 240.15Fh-3(c).

[21] Commission Proposed Rule § 240.15Fh-3(e).

[22] Securities Exchange Act of 1934 § 15F(h)(2)(C), 15 U.S.C. 78o-10(h)(2)(C); Commission Proposed Rule § 240.15Fh-2(e).

characteristics and material incentives or conflicts of interest and related recordkeeping,[23] disclosures regarding clearing rights and related recordkeeping,[24] product suitability,[25] fair and balanced communications[26] and supervision.[27] We generally agree with the Commission's proposed approach to apply these transaction-specific external business conduct rules to transactions that a non-U.S. security-based swap dealer arranges, negotiates or executes using personnel located in a U.S. branch or office, even if the counterparty is also a non-U.S. person. We believe that the Commission's approach is appropriately balanced to address, to the extent possible, the expectation of the parties. However, the same rationale dictates that such transaction-specific external business conduct rules not apply based on the involvement of a non-U.S. branch of a U.S. security-based swap dealer.

We do suggest, however, that due to the possibility that a dually-registered security-based swap dealer / broker-dealer may be subject to these transaction-specific rules, the Commission and the Financial Industry Regulatory Authority ("**FINRA**") must work to harmonize existing sales practice requirements. To the extent existing FINRA requirements differ from the Commission's Title VII transaction-specific external business conduct rules, there may be unnecessary duplication and conflicts that cause a disparate impact on security-based swap dealers acting through broker-dealers as compared to other security-based swap dealers.

Recommendation: In the case of two non-U.S. persons, where the transaction-specific external business conduct standards would be applied solely based on the conduct of the dealer in the United States, the dealer's non-U.S. counterparty should have the option to opt out of the application of these requirements.

In situations where the transaction-specific external business conduct rules would apply to a security-based swap between a non-U.S. security-based swap dealer and its non-U.S. client solely based on the dealer's use of U.S.-located personnel to arrange, negotiate or execute the transaction, the non-U.S. client should have the option to opt out of the application of these external business conduct requirements. Given the tenuous connection of such transactions to the United States, an informed counterparty should be able to waive the protections put into place for its benefit. The Commission could, however, retain antifraud and anti-manipulation authority. In addition, non-U.S. security-based swap dealers will remain subject to the Commission's recordkeeping requirements and the Commission will have access to books and records, which will enable the Commission to exercise its oversight authority over such transactions. Further, the fact

[23] Commission Proposed Rule § 240.15Fh-3(b).

[24] Commission Proposed Rule § 240.15Fh-3(d).

[25] Commission Proposed Rule § 240.15Fh-3(f).

[26] Commission Proposed Rule § 240.15Fh-3(g).

[27] Commission Proposed Rule § 240.15Fh-3(h).

that all transactions entered into by a security-based swap dealer, other than those on a national securities exchange, must be with an eligible contract participant ("**ECP**") reduces the concern that unsophisticated parties may be transacting with non-U.S. security-based swap dealers without the further safeguards of the Commission's relationship-level external business conduct rules.

V. Application of Mandatory Clearing and Trade Execution Rules

> ***Observation:*** We support the Commission's proposal to treat clearing and trade execution rules as risk-based requirements and not to look to the location of conduct as a factor in the application of mandatory clearing and trade execution rules, and encourage the CFTC to take the same approach.

In the release accompanying the Proposal, the Commission states that mandatory clearing would not apply to a security-based swap transaction between two non-U.S. persons where neither counterparty's obligations are guaranteed by a U.S. person, solely because one or both counterparties arrange, negotiate or execute the security-based swap using U.S. personnel.

The Commission has not re-proposed cross-border rules on the application of clearing and trade execution, but we understand that it intends to do so to address the change from "transactions conducted within the United States" to the Proposal's stated risk-based approach. We support the Commission's proposal to treat clearing and trade execution rules as risk-based requirements and not to determine application of these requirements based on the location of conduct, and we encourage the CFTC to take the same approach. We look forward to commenting on the re-proposed rules to implement the risk-based approach, upon their issuance by the Commission.

VI. Application of Reporting and Public Dissemination Rules

> ***Recommendation:*** The Commission should not expand the application of Regulation SBSR's regulatory reporting requirements to include transactions based solely on U.S. conduct.

The Commission published its final rule on Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information ("**Regulation SBSR**")[28] on March 19, 2015. On the same day, the Commission published proposed amendments to Regulation SBSR (the "**March 2015 Proposed Amendments**").[29] In addition to those security-based swaps required to be reported and publicly disseminated under Regulation SBSR and the March 2015 Proposed Amendments, the Proposal would require a

[28] Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information; Final Rule, 80 Fed. Reg. 14,563 (Mar. 19, 2015).

[29] Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information; Proposed Rule, 80 Fed. Reg. 14,563 (Mar. 19, 2015).

security-based swap meeting one of a number of conduct-related conditions to be reported to a security-based swap data repository and publicly disseminated, even if both counterparties to the transaction are non-U.S. persons.[30] Further, under the Proposal, registered broker-dealers (including registered security-based swap execution facilities ("**security-based SEFs**")) would be required to report and publicly disseminate any security-based swap that is effected by or through the registered broker-dealer, if both sides of the transaction include only non-U.S. persons that are not registered security-based swap dealers[31] and the counterparties did not arrange, negotiate or execute the transaction using personnel located in the United States.

Transactions between non-U.S. persons, neither of which are guaranteed by a U.S. person, should not be required to be reported or publicly disseminated in the United States, as these transactions lack the requisite nexus to the United States regardless of the location of conduct of the counterparties. There is little benefit in requiring these security-based swap transactions to be reported. First, requiring trades between non-U.S. persons to be publicly disseminated based on U.S.-located conduct may result in information being added to the public dissemination stream that is not informative, or (at worst) gives a distorted view of prevailing market prices. Second, requiring regulatory reporting will result in data at swap data repositories that have minimal U.S. nexus. The cost, however, is high—monitoring for conduct in the United States for purposes of reporting and building the infrastructure necessary to report based purely on conduct will be an unnecessary additional expense for security-based swap market participants.

In addition, in many cases, such transactions are subject to local regulatory reporting requirements and additional reporting under Commission rules would be duplicative. The Commission has less of a vested interest in such data than home jurisdiction regulators. Furthermore, the Commission intends to have information-sharing agreements with foreign regulators and trade repositories, providing it with access to the underlying data for these transactions for oversight and supervisory purposes. Lastly, requiring reporting of transactions between non-U.S. persons would implicate a number of privacy considerations regarding the trading activities of such non-U.S. persons.

If the Commission adopts the approach of requiring reporting of these transactions, it should follow the CFTC's lead and provide relief from the requirement to report these transactions until a substituted compliance determination is made with respect to the relevant jurisdiction of the parties. Requiring the development, testing and implementation of systems and technology necessary to report these transactions pursuant to Commission regulations, as well as connecting to and testing with appropriate trade

[30] These conditions are that the security-based swap is (i) executed on a platform having its principal place of business in the United States (ii) effected by or through a registered broker-dealer (including a registered security-based swap execution facility) or (iii) connected with a non-U.S. person's security-based swap dealing activity that is arranged, negotiated or executed by U.S.-located personnel. Proposal, 80 Fed. Reg. 27,444 at 27,483-84.

[31] For purposes of this Section VI, "security-based swap dealer" should be read to also include "major security-based swap participant."

repositories, solely for an interim period of time before substituted compliance is granted would pose an unnecessary burden. Consistent with our previous comments, we believe the Commission should apply a great deal of flexibility when considering and granting substituted compliance, and should focus on an outcome-based analysis as opposed to a line-by-line review of applicable rules.

Recommendation: If the Commission does expand the application of Regulation SBSR's regulatory reporting requirements to include transactions between two non-U.S. persons, reporting obligations triggered by U.S.-located conduct should only be triggered for registered security-based swap dealers.

Under the proposed amendments to Regulation SBSR, for transactions where neither counterparty is a registered security-based swap dealer, each counterparty will need to know whether its counterparty "arranged, negotiated, or executed" the security-based swap using U.S.-located personnel. In particular, Commission Proposed Rules 901(a)(2)(ii)(E)(2) and (3) would require both sides to know whether the counterparty falls within Proposed Rule 908(b)(5)—which would implement the U.S.-located conduct test—to determine which party is the reporting party. However, making this determination would involve enormous costs and burdens without significant benefit. It is generally not possible to directly determine the location of counterparty conduct without substantial effort, expense and operational changes to systematically capture and process this data—burdens on market participants that will certainly outweigh the perceived regulatory benefits of obtaining transaction data for security-based swaps required to be reported as a result of U.S.-located conduct. These burdens will also fall on unregistered entities that have no reporting infrastructure and that are not well-equipped to ascertain whether they have a reporting obligation, as long as there are trades between non-U.S. persons, neither of which is a dealer.

This issue is exacerbated if the Commission intends Regulation SBSR and the reporting provisions in the Proposal to go into effect prior to the time at which entities will be registered as security-based swap dealers. Regulation SBSR appropriately places the vast majority of reporting requirements on registered security-based swap dealers. However, based on the Proposal, during the period before entities are registered as dealers, every bilateral trade between two non-U.S. persons, as well as trades between a U.S. person and a non-U.S. person, would require a determination of which party must report the transaction, and thus an analysis of the location of the conduct of personnel of any non-U.S. person counterparty.

As a result, if the Commission is intent on requiring reporting of transactions of two non-U.S. persons based on U.S.-located conduct, it should focus solely on the location of dealing activity by registered security-based swap dealers. This would lessen the burden imposed by the expansion of reporting requirements on unregistered entities and those parties not acting in a dealing capacity.

Recommendation: The Commission's reporting requirements should not be expanded to apply to transactions effected by a registered broker-dealer between non-U.S. persons where neither counterparty is guaranteed by a U.S. person, neither side used U.S.-located personnel to arrange, negotiate or execute the security-based swap, and neither side includes a registered security-based swap dealer.

We believe that the reporting requirements should not be expanded to include transactions effected by a registered broker-dealer between non-U.S. persons where neither counterparty has an obligation to report. If included, the requirement to report these security-based swaps would create a disproportionate burden on registered broker-dealers relative to the small percentage of the market that these transactions comprise. Further, since the involvement of broker-dealers in such transactions is generally limited to the execution of the security-based swap, it will likely be impossible for these broker-dealers to comply with life-cycle event reporting requirements throughout the life of the security-based swap.

Recommendation*:* The Commission should provide an exemption from the public dissemination requirement for transactions between two non-U.S. persons where only one side includes a U.S. person guarantor, the other side does not include a U.S. person, and neither side includes a registered security-based swap dealer.

We believe that the Commission should provide an exemption from the public dissemination requirement for transactions between two non-U.S. persons where only one side includes a U.S. person guarantor, the other side does not include a U.S. person, and neither side includes a registered security-based swap dealer. We also believe that this exemption should be further expanded to cover situations in which both sides include a U.S. person guarantor, but neither side includes a registered security-based swap dealer or U.S. person as a direct counterparty to the security-based swap. Since these transactions take place outside the United States and are between two non-U.S. persons, neither of which is registered with the Commission, there is insufficient U.S. jurisdictional nexus to justify the public dissemination of the security-based swap data in the United States. In these cases, the security-based swap would be reported to a security-based swap data repository, providing the Commission with access to trade details necessary for oversight and supervision, but trade details need not be publicly disseminated.

VII. ***Implementation Timing***

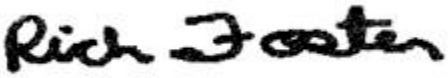
> ***Recommendation****:* The Commission should provide sufficient time for firms to comply with the Proposal's application of security-based swap rules based solely on location of conduct and should seek to align compliance timing with substituted compliance determinations for key foreign jurisdictions and other Commission rules.

If the Commission applies security-based swap rules based solely on location of conduct, we recommend that it defer the compliance date until it has the opportunity to make comparability determinations for key non-U.S. jurisdictions, including Australia, Canada, the European Union, Japan and Switzerland. Requiring the changes to systems, personnel and trade flows necessary to comply with the Commission's Proposal only to later be granted substituted compliance would impose significant and unnecessary burdens for negligible short-term benefits. In addition, the Commission should delay any application of security-based swap reporting rules based solely on conduct until registration of security-based swap dealers is required. As discussed above, doing so would alleviate the unnecessary burden of determining the location of conduct of counterparties to every trade solely because entities are not yet required to register with the Commission as security-based swap dealers.

* * *

We thank the Commission for its consideration of our comments. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



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