December 8, 2020

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

Re: Notice of Substituted Compliance Application Submitted by the Bundesanstalt für Finanzdienstleistungsaufsicht in Connection With Certain Requirements Applicable to Security-Based Swap Entities Subject to Regulation in the Federal Republic of Germany; Proposed Order (File No. S7-16-20)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to comment on the above-captioned notice by the Securities and Exchange Commission ("**SEC**" or "**Commission**") regarding the substituted compliance application submitted by the Bundesanstalt für Finanzdienstleistungsaufsicht ("**BaFin**") in connection with certain requirements applicable to security-based swap ("**SBS**") dealers ("**SBSDs**") and major SBS participants (together with SBSDs, "**SBS Entities**") subject to regulation in the Federal Republic of Germany and proposed Order providing for the conditional substituted compliance in connection with the application (together, the "**Proposal**").[2]

In many respects, the Proposal reflects a thoughtful, holistic approach to substituted compliance. However, the Proposal still includes certain conditions and limitations that raise significant issues. Our comments below mainly focus on those issues raised by the Proposal that we believe are relevant not only for SBS Entities based in Germany but also for SBS Entities based in other non-U.S. jurisdictions. We also have

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry, nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry-coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Securities Exchange Act of 1934 **("Exchange Act**") Release No. 90378 (Nov. 9, 2020), 85 Fed Reg. 72726 (Nov. 13, 2020).

attached an Annex providing comments relevant to certain technical matters specific to Germany and the European Union ("**EU**").

I. Trading Relationship Documentation – Disclosure Regarding Legal and Bankruptcy Status

SEC Rule 15Fi-5 requires that an SBS Entity establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes written SBS trading relationship documentation with its counterparties. This requirement applies to a non-U.S. SBS Entity on an "entity-wide" basis, including in connection with SBS with non-U.S. counterparties.[3] The Proposal would permit a German firm to substitute compliance with comparable EU and German requirements for compliance with Rule 15Fi-5, except that substituted compliance would not extend to disclosures required by Rule 15Fi-5(b)(5) regarding (a) the status of the SBS Entity or its counterparty as an insured depository institution (as defined in 12 U.S.C. § 1813) or financial company (as defined in 12 U.S.C. § 5381(a)(11)) and (b) the possibility that in certain circumstances the SBS Entity or its counterparty may be subject to the insolvency regime set forth under Title II of the Dodd-Frank Act (the "**Orderly Liquidation Authority**" or "**OLA**") or the Federal Deposit Insurance Act ("**FDIA**"), which may affect rights to terminate, liquidate or net SBS.[4]

In our view, the Proposal's exclusion of Rule 15Fi-5(b)(5)'s disclosure requirements is not consistent with the Commission's statement that it will "endeavor to take a holistic approach" to evaluating comparability, focusing on "the comparability of regulatory outcomes rather than predicated substituted compliance on requirement-by-requirement similarity."[5] Rather than a holistic examination of whether relevant German and EU requirements are sufficient to achieve the rule's goal of "enhancing transparency and legal certainty regarding each party's rights and obligations under the transaction,"[6] the proposed exclusion instead embodies a requirement-by-requirement approach to Rule 15Fi-5.

The mere fact that German and EU laws do not require the same disclosure as Rule 15Fi-5(b)(5) regarding U.S. insolvency procedures does not mean that those laws, which require documentation of the parties' rights and obligations,[7] do not provide

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[3] *See* Exchange Act Release No. 87782 (Dec. 18, 2019) , 85 Fed. Reg. 6359, 6378 (Feb. 4, 2020) ("**Risk Mitigation Adopting Release**").

[4] *See* Proposal, 85 Fed. Reg. at 72731-32. In addition, the firm could not treat its counterparties as "eligible counterparties" for purposes of the relevant EU Markets in Financial Instruments Directive ("**MiFID**") provisions needed to establish comparability. We address this condition in the attached Annex.

[5] See Exchange Act Release No. 77617 (Apr. 14, 2016), 81 Fed. Reg. 29960, 30078 (May 13, 2016) ("**Business Conduct Adopting Release**").

[6] *See* Risk Mitigation Adopting Release, 85 Fed. Reg. at 6361.

[7] *See* MiFID art. 25(5).

adequate transparency and legal certainty. Indeed, for SBS between a non-U.S. SBS Entity and a non-U.S. person, requiring disclosures regarding the status of either of the parties as an insured depository institution or financial company and the potential applicability of OLA or the FDIA is more likely to *reduce* legal certainty because, by definition, non-U.S. persons cannot be insured depository institutions or financial companies or subject to OLA or the FDIA. The receipt of such disclosure is therefore likely to foster confusion regarding the territorial scope of those U.S. insolvency regimes, not certainty. At the most, a non-U.S. SBS Entity should be required to comply with Rule 15Fi-5(b)(5) for its SBS with U.S. counterparties, which are the only counterparties that might potentially be subject to those regimes.

For these reasons, the Commission should replace the Proposal's exclusion for Rule 15Fi-5(b)(5) with a condition that requires compliance with that rule's disclosure requirements solely for SBS with U.S. counterparties.

II. Daily Mark Disclosure

Exchange Act Section 15F(h)(3)(B)(iii) and SEC Rule 15Fh-3(c)(2) require an SBS Entity to disclose, for an uncleared SBS, the daily mark of the SBS, together with certain related information, without charge or restrictions on internal use.[8] Under SEC Rule 3a71-3(c), these requirements apply to a non-U.S. SBSD's U.S. business, *i.e.*, both (a) its SBS with U.S. persons (other than transactions conducted through a foreign branch) *and* (b) its SBS arranged, negotiated, or executed by personnel of the non-U.S. SBSD located in a U.S. branch or office or by personnel of an agent of the non-U.S. SBSD located in a U.S. branch or office ("**ANE Transactions**"). The Proposal would provide substituted compliance in connection with these requirements only to the extent a German firm participates in daily portfolio reconciliation exercises that include the relevant SBS, pursuant to German and EU requirements.[9]

This relatively limited approach to substituted compliance is likely to create significant issues for non-U.S. SBSDs and the SBS market in general. As the Commission notes, daily portfolio reconciliation is only required for the largest portfolios (*i.e.*, those with 500 or more OTC derivatives contracts outstanding). Therefore a great number of SBS counterparties would not be eligible for substituted compliance. Although it would be relatively straightforward for a non-U.S. SBS Entity to provide

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[8] Specifically, the SBS Entity must disclose "the midpoint between the bid and offer, or the calculated equivalent thereof, as of the close of business, unless the parties agree in writing otherwise to a different time, on each business day during the term of" the SBS. That daily mark "may be based on market quotations for comparable [SBSs], mathematical models or a combination thereof," and the SBS Entity must disclose its data sources and a description of the underlying methodology and assumptions, and promptly disclose any material changes to the data sources, methodology and assumptions during the term of the SBS.

[9] *See* Proposal, 85 Fed. Reg. at 72735.

daily mark disclosures to its U.S. counterparties who are not subject to daily portfolio reconciliation, this is not the case for non-U.S. counterparties to ANE Transactions.

In order for a non-U.S. SBSD to provide daily mark disclosures for its ANE Transactions, it would need to make transaction-by-transaction determinations as to whether the Commission's daily mark requirements apply (*i.e.*, whether the transaction is an ANE Transaction). To make these determinations, the non-U.S. SBSD would need to modify its systems and practices to detect transaction-by-transaction involvement of U.S. personnel on a systematic basis, and then tag the relevant transactions in the back-office systems used to generate daily mark disclosures and set up arrangements with the non-U.S. counterparty so that it can receive daily marks. Identifying ANE Transactions would be particularly challenging and costly in situations where transactions are negotiated over longer periods of time and in multiple time zones. To avoid the inadvertent non-compliance that would result from failing comprehensively to identify ANE Transactions, many non-U.S. SBSDs may instead block U.S. personnel from taking part in SBS with non-U.S. counterparties not subject to daily portfolio reconciliation. This approach would cause competitive disparities that impair global firms' ability to manage risk and execute transactions effectively using U.S.-located personnel.

Notably, in its recent rulemaking to address the cross-border application of the SBSD *de minimis* threshold, in which the Commission identified certain business conduct requirements to apply to ANE Transactions involving a non-U.S. dealer transacting through a registered U.S. affiliate, the Commission did not identify daily mark disclosure requirements. Instead, the Commission stated that "those requirements are predicated on there being an ongoing relationship between the registered entity [*i.e.*, the entity whose personnel interact with the counterparty] and the counterparty that may not be present in connection with the transactions subject to the exception, and further would be linked to risk management functions that are likely to be associated with the entity in which the resulting [SBS] position is booked."[10] A similar rationale should apply for why daily mark requirements should not apply to a non-U.S. SBSD's ANE Transactions. There is no ongoing relationship between the SBSD's non-U.S. counterparty and the U.S. personnel whose activities trigger application of the daily mark requirements. Nor does the involvement of U.S. personnel implicate any Commission risk management interest in the non-U.S. SBSD or its non-U.S. counterparty. The Commission has a much less significant interest in applying daily mark requirements to ANE Transactions than it does SBS with U.S. counterparties.

We recognize, however, that the Proposal was not intended to address these broader considerations raised by the application of daily mark requirements to ANE Transactions. That said, these considerations should, in our view, inform the Commission's holistic evaluation of the relevant German and EU requirements, and the Commission should accordingly limit its proposed condition regarding daily reconciliation requirements to SBS with U.S. counterparties. This approach would promote U.S. counterparty protection and ameliorate any potential competitive disparities

[10] Exchange Act Release No. 87780 (Dec. 18, 2019), 85 Fed. Reg. 6270, 6288 (Feb. 4, 2020).

within the U.S. market by treating U.S. counterparties consistently, while avoiding the problems created by applying daily mark requirements to ANE Transactions, as described above.

We also think the Commission should reconsider its comparability analysis relating to EU mark-to-market (or mark-to-model) and reporting requirements, at least for SBS with non-U.S. counterparties:

- The Proposal rejected comparability for EU mark-to-market (or mark-to-model) requirements because those requirements do not require disclosure to counterparties. But, for counterparties that are in-scope for uncleared margin requirements (*e.g.*, financial counterparties), variation margin must be calculated in accordance with those mark-to-market (or mark-to-model) requirements,[11] thus effectively necessitating disclosure of the relevant valuations. And although the Commission previously rejected a commenter's suggestion that margining uncleared SBS should satisfy daily mark requirements, the Commission's decision in that regard was based on a concern that variation margin computations may diverge from daily marks due to adjustments for position size, position direction, credit reserve, hedging, funding, liquidity, counterparty credit quality, portfolio concentration, bid-ask spreads, or other costs.[12] Those adjustments are generally not permissible under the EU's margin requirements, however, because the EU requires variation margin to be calculated in accordance with mark-to-market (or mark-to-model) requirements, which as noted in BaFin's application generally look to end-of-day settlement prices or closing mid-prices.

- The Proposal rejected comparability for EU reporting requirements because U.S. counterparties may, in practice, encounter challenges when attempting to access daily marks for different SBS reported to multiple EU trade repositories with which they may not otherwise have business relationships. However, this concern should not be as relevant (or relevant at all) for non-U.S. counterparties, especially EU counterparties who themselves are subject to EU reporting obligations. The Proposal also notes that the reported valuations may be less current, given the time necessary for reporting and for the trade repository to make the information available. We note, however, that the EU requires valuation reporting on a daily basis, and in our experience data is available promptly from trade repositories.

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[11] *See* Commission Delegated Regulation (EU) 2016/2251 of October 4, 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty ("**EMIR**") art.10, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R2251-20170104&from=EN.

[12] *See* Business Conduct Adopting Release, 81 Fed. Reg. at 29988.

For these reasons, the Commission should limit the Proposal's daily portfolio reconciliation condition to SBS with U.S. counterparties and otherwise permit substituted compliance with EU mark-to-market (or mark-to-model) and reporting requirements.

III. Recordkeeping, Reporting, and Notification Requirements for Non-bank SBS Entities

Subject to certain conditions, the Proposal would permit substituted compliance in connection with recordkeeping, reporting, and notification requirements for prudentially regulated SBS Entities. In contrast, the Proposal does not address substituted compliance in connection with those requirements for non-bank SBS Entities, noting the "close relationship" of those requirements and the administration of capital and margin requirements.[13]

Where prudentially regulated SBS Entities and non-bank SBS Entities are subject to substantially the same requirements under Commission rules, as well as substantially the same non-U.S. requirements, the Commission should permit substituted compliance for both types of SBS Entities. Otherwise, the Commission would create an un-level playing field between similarly situated firms, without justification for doing so. In this regard, we note that the Commission has adopted most of the same recordkeeping requirements for prudentially regulated SBS Entities as for non-bank SBS Entities, thus suggesting that only the subset of requirements applicable solely to non-bank SBS Entities are connected with capital or margin requirements.[14] Accordingly, where there is overlap in the Commission's recordkeeping, reporting, and notification requirements as for prudentially regulated SBS Entities and non-bank SBS Entities, and the Proposal would permit a prudentially regulated German firm to rely on substituted compliance for those requirements, the Commission should likewise permit a non-bank German firm to rely on substituted compliance.

IV. Condition Requiring the Filing of Financial and Operational Information in the Manner and Format Required by SEC Rule or Order

SEC Rule 18a-7 requires prudentially regulated SBS Entities, on a quarterly basis, to file an unaudited financial and operational report known as FOCUS Report Part IIC ("**Part IIC**"). Part IIC is a streamlined version of the financial and operational report that must be filed by non-bank SBS Entities. This is because prudentially regulated SBS Entities are not subject to the Commission's capital requirements in Rule 15c3-1, Rule 18a-1 or Rule 18a-2, and so accordingly Part IIC is designed to fulfill a more limited purpose of providing the Commission with information that can be used by the

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[13] *See* Proposal, 85 Fed. Reg. at 72736, n. 91.

[14] These requirements relate to financial ledgers (SEC Rule 18a-5(a)(2)), options records (SEC Rule 18a-5(a)(8)), records of trial balances and capital computations (SEC Rule 18a-5(a)(9)), records of margin computations (SEC Rule 18a-5(a)(12)), preservation of certain financial records (SEC Rule 18a-6(b)(1)(ii), (iii), and (v)), preservation of certain risk management records (SEC Rule 18a-6(b)(1)(ix)), and preservation of records of credit risk weights (SEC Rule 18a-6(b)(1)(x)).

Commission for cross-firm analysis and monitoring. The line items of information required by Part IIC are meant largely to be information that banks are required to provide in Call Reports submitted by U.S. banks to U.S. prudential regulators. However, a non-U.S. bank is not required to file a Call Report except for its U.S. branch, if any, and the activity of a U.S. branch of a non-U.S. bank typically represents a subset of a prudentially regulated SBS Entity's activities.

The Proposal would grant prudentially regulated German SBS Entities substituted compliance with the reporting requirements of SEC Rule 18a-7, but subject to the condition that the SBS Entity file financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order. The Proposal included this condition in order to facilitate cross-firm analysis and monitoring of all registered SBS Entities.[15] The Proposal further contemplates that the Commission might, pursuant to this condition, require prudentially regulated German SBS Entities to file financial and operational information with the Financial Industry Regulatory Authority ("**FINRA**") using Part IIC but permitting the information input into the form to be the same information that the SBS Entity reports to BaFin or other relevant supervisors, with the information presented in accordance with generally accepted accounting principles ("**GAAP**") that the SBS Entity uses to prepare general purpose financial statements in its home jurisdiction instead of U.S. GAAP if other GAAP, such as International Financial Reporting Standards, is used by the SBS Entity in preparing general purpose financial statements.[16]

We support the Commission's view that objectives meant to be advanced by filing information using Part IIC can be achieved by these flexible means. Preparing financial information in full conformance with Part IIC, especially if that information must be presented in accordance with U.S. GAAP, would require affected non-U.S. SBS Entities to engage in significant systems builds, at great expense and with limited benefit to the Commission. In this spirit, we make the following observations and recommendations:

- Financial and operational information reported to home country supervisors may not be the only, or even the most effective, source for the information to be input into Part IIC. For example, certain prudentially regulated non-U.S. SBS Entities are also foreign private issuers that are already submitting SEC Form 6K and 20F filings, which provide the Commission with some but not all of the information required by Part IIC. Other prudentially regulated non-U.S. SBS Entities are foreign subsidiaries of U.S. banking organizations required to report financial and operational information to the Board of Governors of the Federal Reserve System (the "**FRB**") on its form FR 2314. Although SIFMA and its members continue to conduct detailed line-by-line analysis as requested by the Commission, we believe it is possible that filings currently being

[15] *See* Proposal, 85 Fed. Reg. at 72738.

[16] *See id.*

made with the Commission or FRB are, for at least some line items, a better source of information required by Part IIC than filings submitted by the SBS Entity with home country supervisors. Accordingly, the Commission should consider providing SBS Entities covered by the Order with the option to fulfil their Rule 18a-7 financial reporting requirements using these Commission or FRB filings in lieu of or in combination with extracts from filings made with home country supervisors. If the Commission wishes, an SBS Entity could identify which filing serves as the source for each relevant line item.

- We also propose that that the Commission allow SBS Entities to submit their Part IIC reports at the same consolidation level that is used in the relevant Commission, FRB or home jurisdiction reports, even if this means the reports are submitted on a group consolidated level rather than entity level. Reporting at the consolidated level would be subject to conditions or parameters designed to ensure that the consolidation level of the other financial reporting regime is sufficiently representative of the financial and operational condition of the SBS Entity to allow the Commission to perform the monitoring intended under Rule 18a-7. We would be pleased to discuss what conditions or parameters might be appropriate to permit such consolidated level reporting.

- Part IIC includes information relating to a prudentially regulated SBS Entity's amounts of capital and capital ratios. Although generally consistent with Basel capital standards, bank capital requirements in non-U.S. jurisdictions nonetheless differ in notable respects with U.S. bank capital standards (*e.g.*, differences in the approach to calculating risk-weighted assets and in what instruments qualify for certain types of capital). Accordingly, the Commission should permit a non-U.S. SBS Entity to satisfy these aspects of Part IIC in a manner consistent with its home country capital standards and related reporting.

- Part IIC is due within 30 days after the end of each calendar quarter. This frequency and timing is not consistent with the other reporting requirements described above. In some cases registrants file the relevant information with their other regulators on a semi-annual basis, not quarterly. Our members have also indicated that, depending on which other filing requirement (*e.g.,* home country, FRB, or SEC) serves as the source for the Part IIC information, additional time beyond the 30 days is likely to be needed to correspond to the deadline for the source filing and to provide time to input the information from that source filing into Part IIC. Additional time is also likely to be needed for a year-end filing relative to other quarters. Depending on what other filings the Commission permits as the sources for Part IIC, we can provide additional feedback regarding what timing would be appropriate.

SIFMA and its members continue to perform the line-by-line comparison between Part IIC and the reports already submitted to the Commission, FRB, and home country supervisors, and we welcome continued discussions with Commission staff once this analysis is complete. In this regard, we support the Commission's suggested approach of requiring SBS Entities covered by the Order to satisfy their Rule 18a-7 obligations by completing a limited number of the required line items for two years. This approach would enable the Commission to evaluate further whether scope of information that an SBS Entity provides to the Commission under the final Order in lieu of the full Part IIC might satisfactorily achieve the Commission's needs and if not, what changes need to be made. We welcome the opportunity to discuss with the Commission which aspects of Part IIC should be in-scope for this more limited reporting.

Finally, we note that non-U.S., non-bank SBS Entities will face many of the same issues described above. Although we recognize that financial reporting by these registrants raises additional policy considerations for the Commission, due to its responsibility for the capital and margin requirements applicable to them, it will remain necessary for the Commission to balance those considerations against the significant costs and burdens associated with requiring non-U.S. registrants to satisfy U.S. reporting requirements and accounting standards. Particularly if the Commission grants substituted compliance to a non-U.S., non-bank SBS Entity in connection with capital and margin requirements, the Commission should likewise permit such an SBS Entity to leverage other regulators' reporting standards and requirements when preparing information to be filed with the Commission.

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SIFMA appreciates the opportunity to comment on the Proposal and the Commission's consideration of our views. SIFMA looks forward to continuing dialogue with the Commission regarding substituted compliance. If you have questions or would like additional information, please contact Kyle Brandon, at 212-313-1280 or kbrandon@sifma.org.

Very truly yours,

Kyle L Brandon
Managing Director, Head of Derivatives Policy
SIFMA

cc:

Honorable Jay Clayton, Chairman, Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, Securities and Exchange Commission
Honorable Allison Herren Lee, Commissioner, Securities and Exchange Commission
Honorable Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission

Ms. Carol M. McGee, Assistant Director, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission
Ms. Laura Compton, Senior Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission

Enclosure

Annex: Comments Regarding Certain EU/German Matters[17]

Scope of Required Compliance with EU and German Laws

The proposed Order would require a German firm to comply with specified EU and German laws in order to avail itself of substituted compliance. Many of these laws apply more broadly than the corresponding Exchange Act requirement. For example, MiFID suitability requirements are not limited to recommendations of SBS or trading strategies involving SBS. Accordingly, we request that the Commission confirm that non-compliance with the specified EU or German laws would not violate the Order's conditions unless such non-compliance pertained to a transaction or activity that would fall within the scope of the relevant Exchange Act requirement (*e.g.*, a failure to satisfy MiFID suitability requirements for a recommendation involving a financial instrument other than an SBS would not violate the relevant condition of the Order).

Internal Risk Management

The proposed Order's conditions to substituted compliance in connection with internal risk management requirements would not incorporate certain CRD requirements related to management body activities and recruitment. We agree with this aspect of the Proposal. In addition, in our view, the other CRD requirements identified as conditions to substituted compliance, as well as MiFID Org Reg Articles 22 (*compliance*), also should not be required to find comparability with relevant Exchange Act requirement, which solely requires that a prudentially regulated SBS Entity establish robust and professional risk management systems adequate for managing its day-to-day business (as well as related policies and procedures).[18] Also, not all of the specified MiFID provisions (*e.g.*, MiFID Article 16(4) and MiFID Org Reg Article 21 (*general organisational requirements*)) are limited in scope to internal risk management (as opposed to other topics). In light of these considerations, we recommend that the Commission revise paragraph (b)(1) of the proposed Order as follows:

"(1) *Internal risk management*. The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: MiFID articles 16(4) and 16(5); WpHG section 80; MiFID Org Reg articles 21**–, 23, and** 24; ~~CRD articles 74, 76 and 79–87; KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25(c) and 25(f); CRR articles 286–88 and 293~~; and EMIR Margin RTS article 2**, in each case relating to risk management**."

Trade Acknowledgement and Verification

The proposed Order's conditions for substituted compliance in connection with SEC Rule 15Fi-2 would include not only the EMIR provisions designed to address the same G-20 commitment as Rule 15Fi-2, but also certain MiFID requirements. In

[17] Capitalized terms used but not defined in this Annex have the meanings given to them by the Proposal.
[18] We note that BaFin's application addressed a broader range of EU and German provisions because the application also covered Exchange Act Rule 18a-1(f).

contrast, the CFTC has found the relevant EMIR provisions, standing alone, to be comparable to its equivalent confirmation rule;[19] indeed, the CFTC staff have described those EMIR provisions as "essentially identical" to the CFTC's rule.[20] Given that the Commission has described Rule 15Fi-2 as "closely aligned" with the CFTC's confirmation rule,[21] those essentially identical EMIR provisions should also be sufficiently comparable to Rule 15i-2 to support substituted compliance without additional dependence on compliance with the MiFID requirements specified in the proposed Order. In light of these considerations, we recommend that the Commission revise paragraph (b)(2) of the proposed Order as follows:

"(2) *Trade acknowledgement and verification*. The requirements of Exchange Act rule 15Fi-2, provided that the Covered Entity is subject to and complies with the requirements of ~~MiFID article 25(6), WpHG section 63(12), MiFID Org Reg articles 59–61,~~ EMIR article 11(1)(a) and EMIR RTS article 12."

Trading Relationship Documentation

The proposed Order's conditions for substituted compliance in connection with SEC Rule 15Fi-5 would include several provisions of MiFID and EMIR. In our view, not all of these provisions are necessary to justify substituted compliance. In particular, compliance with MiFID Org Reg Article 56 (*Assessment of appropriateness and related record-keeping obligations*) should not be required to find comparability with SEC Rule 15Fi-5. Also, not all of the other specified MiFID and EMIR provisions (*e.g.*, MiFID Article 24 *(internal audit*) and EMIR Margin RTS Article 2 (*general requirements*) other than paragraph (2)(g)) are limited in scope to trading relationship documentation, but for purposes of substituted compliance in connection with Rule 15Fi-5 it should be sufficient to comply with the written agreement aspects of those provisions.

Additionally, the proposed Order would require that a German firm not treat its counterparty as an "eligible counterparty" for purposes of MiFID article 30. MiFID Article 30 allows certain MiFID investment firms not to comply with certain MiFID requirements, including—but not limited to—the requirements MiFID Article 25(5) that are cited in the relevant paragraph of the proposed Order. Because the other MiFID requirements covered by Article 30 are not relevant to the Commission's comparability analysis for Rule 15Fi-5, a firm should be permitted to treat its counterparty as an "eligible counterparty" for purposes of Article 30 with respect to the MiFID requirements covered by that election, *other than* Article 25(5) (*i.e.*, Article 25(5) would still apply).

[19] *See* 78 Fed. Reg. 78878, 78885-6 (Dec. 27, 2013).

[20] *See* CFTC Letter No. 13-45 (Jul. 11, 2013).

[21] *See* Exchange Act Release No. 78011 (Jun. 8, 2016), 81 Fed. Reg. 39808. 29843 (Jun. 17, 2016).

In light of these considerations, we recommend that the Commission revise paragraph (b)(4) of the proposed Order as follows:[22]

"(5) Trading relationship documentation. The requirements of Exchange Act rule 15Fi-5, other than paragraph (b)(5) to that rule **as applicable to a security-based swap with a counterparty that is a "U.S. person" as defined in Exchange Act rule 3a71-3**, provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID article 25(5), WpHG section 83(2), MiFID Org Reg articles 24, ~~56,~~ 58, 73 and applicable parts of Annex I, and EMIR Margin RTS article 2**, in each case relating to written agreements with security-based swap counterparties**; and

(ii) The Covered Entity does not treat the applicable counterparty as an 'eligible counterparty' for purposes of MiFID article 30 and WpHG section 68**, in relation to the MiFID and WpHG provisions specified in paragraph (5)(i) above**."

Chief Compliance Officer Reports

The proposed Order's conditions for substituted compliance in connection with Exchange Act Section 15F(k) and SEC Rule 15Fk-1 would include a requirement that the German firm's reports pursuant to MiFID Org Reg Article 22(2)(c) address the firm's compliance with the other conditions to the Order. We request that the Commission confirm that a firm may satisfy this condition so long as only the versions of the reports that the firm submits to the Commission address such compliance (*i.e.*, the firm will not be required to report to its home country regulator information relating to compliance with the conditions to the Order).

Internal Supervision and Compliance

The proposed Order's conditions for substituted compliance in connection with SEC Rule 15Fh-3(h), Exchange Act Sections 15F(j)(4)(A) and (j)(5), Exchange Act Section 15F(k), and SEC Rule 15Fk-1 would include several provisions of MiFID and CRD. In our view, not all of these provisions are necessary to justify substituted compliance. In particular, compliance with MiFID Org Reg Articles 72-76 and Annex IV (*various record-keeping obligations*) and CRD Articles 79 to 87 (*treatment of risk*) should not be required to find comparability with relevant Exchange Act requirements.

Additionally, not all of the specified MiFID and CRD provisions (*e.g.*, MiFID Article 16 *(organisational requirements*), MiFID Org Reg Article 21 (*general organisational requirements*) and Articles 30 to 32 (*outsourcing requirements*) and CRD Articles 92 to 95 (*remuneration arrangements*)) are limited in scope to policies and procedures relating to oversight arrangements, compliance with applicable laws or management of conflicts of interest, but for purposes of substituted compliance in

[22] These revisions also address our recommendation in Part I of our letter.

connection with the relevant Exchange Act requirements it should be sufficient to comply with the related internal supervision and chief compliance officer aspects of those provisions.

In light of these considerations, we recommend that the Commission revise paragraph (c)(3) of the proposed Order as follows:

"(3) Applicable supervisory and compliance requirements. Paragraphs (c)(1) and (c)(2) are conditioned on the Covered Entity being subject to and complying with the **aspects of the** following requirements **that relate to policies and procedures designed to address oversight arrangements, compliance with applicable laws and rules and management of conflicts of interest**: MiFID articles 16 and 23; WpHG sections 63, 80, 83 and 84; MiFID Org Reg articles 21–37~~, 72–76 and Annex IV~~; CRD articles 74, 76, ~~79–87,~~ 88(1), 91(1)-(2), 91(7)-(9) and 92–95; and KWG sections 25a, 25b, 25c (other than 25c(2) **and 25c(4a) sentence 2**), 25d (other than 25d(3) and 25d(11)), 25e and 25f."

Suitability

The proposed Order's conditions for substituted compliance in connection with SEC Rule 15Fh-3(f) would include several provisions of MiFID unrelated to suitability requirements. In particular, in our view, compliance with either MiFID Article 24(3) (*fair, clear and not misleading communications*) or MiFID Org Reg Articles 21(1)(b) and (d)(*general organisational requirements*) should not be required to find comparability with Rule 15Fh-3(f). Accordingly, we recommend that the Commission revise paragraph (d)(4) of the proposed Order as follows:

"(4) Suitability. The requirements of Exchange Act rule 15Fh-3(f), provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID articles 24(2)~~-(3)~~ and 25(1)-(2); WpHG sections 63(5)~~-(6)~~, 80(9)-(13) and 87(1)-(2); and MiFID Org Reg articles ~~21(1)(b) and (d),~~ 54 and 55, in each case in relation to the recommendation **of a security-based swap or trading strategy involving a security-based swap** that is provided by or on behalf of the Covered Entity; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a 'professional client' mentioned in MiFID Annex II section I and WpHG section 67(2) and is not a 'special entity' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d)."