



8011-01p

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-67177; File No. S7-05-12

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

AGENCY: Securities and Exchange Commission.

ACTION: Notice of statement of general policy with request for public comment.

SUMMARY: We are requesting public comment on a statement of general policy (“Statement”) on the anticipated sequencing of the compliance dates of final rules to be adopted by the Securities and Exchange Commission pursuant to certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Securities Exchange Act of 1934, as amended by those provisions (“Exchange Act”). These provisions establish a framework for the regulation of security-based swaps and security-based swap market participants under the Exchange Act. The Statement presents a sequencing of the compliance dates for these final rules by grouping the rules into five categories and describes the interconnectedness of the compliance dates for these rules, both within and among the five categories. The Statement also describes the timing of the expiration of the relief previously granted by the Commission that provided exemptions from certain provisions of the Exchange Act, the Securities Act of 1933, and the Trust Indenture Act of 1939.

DATES: Comments regarding the Statement should be received on or before *[insert date 60 days from 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/policy.shtml>);
- Send an email to rule-comments@sec.gov. Please include File Number S7-05-12 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 Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. S7-05-12. 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. We will post all comments on the Commission's Internet website (<http://www.sec.gov>). Comments also are available for website viewing and printing at 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.

FOR FURTHER INFORMATION CONTACT: Ann Parker McKeehan, Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551-5797, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, or, with respect to the Securities Act of 1933, the Trust Indenture Act of 1939, and Exchange Act section 12, Andrew Schoeffler, Special Counsel, Office of Capital Markets Trends, Division of Corporation Finance,

at (202) 551-3860, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background and Overview of Statement

A. Background

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”) into law.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 Title VII of the Dodd-Frank Act (“Title VII”) establishes a regulatory regime applicable to the over-the-counter (“OTC”) derivatives markets by providing the Securities and Exchange Commission (“Commission” or “we”) and the Commodity Futures Trading Commission (“CFTC”) with authority to oversee these heretofore largely unregulated markets.³ Title VII provides that the CFTC will regulate “swaps,” the Commission will regulate “security-based swaps,” and the CFTC and the Commission will jointly regulate “mixed swaps.”⁴

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² See, e.g., Pub. L. No. 111-203, Preamble.

³ Generally, Subtitle A of Title VII creates and relates to the regulatory regime for swaps, while Subtitle B of Title VII creates and relates to the regulatory regime for security-based swaps.

⁴ Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall further define the terms “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” “eligible contract participant,” and “security-based swap agreement.” These terms are defined in sections 721 and 761 of the Dodd-Frank Act and the Commission and the CFTC have proposed to further define these terms in joint rulemakings. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” Release No. 34-63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (“Entity Definitions Proposing Release”); and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9204 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Release No. 33-9204A (June 1, 2011), 76 FR 32880 (June 7, 2011) (“Product Definitions Proposing Release”). The rules further defining the terms “swap dealer,” “major swap participant,” “security-based swap dealer,” “major security-based

Title VII amends the Securities Act of 1933 (“Securities Act”)⁵ and the Exchange Act⁶ to substantially expand the regulation of the security-based swap (“SB swap”) market by establishing a new regulatory framework intended to make this market more transparent, efficient, fair, accessible, and competitive.⁷ The Title VII amendments to the Exchange Act require, among other things, the following: (1) registration and comprehensive oversight of security-based swap dealers (“SBSDs”) and major security-based swap participants (“MSBSPs”);⁸ (2) reporting of SB swaps to a registered security-based swap data repository (“SDR”), or to the Commission (if the SB swap is uncleared and no SDR will accept the SB swap), and dissemination of SB swap information to the public;⁹ (3) clearing of SB swaps at a registered clearing agency (or a clearing agency that is exempt from registration) if the Commission makes a determination that such SB swaps are required to be cleared, unless an exception from the mandatory clearing requirement applies;¹⁰ and (4) if an SB swap is subject to

swap participant,” and “eligible contract participant” were adopted by the Commission on April 27, 2012 and published in the Federal Register on May 23, 2012. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (“Entity Definitions Adopting Release”).

⁵ 15 U.S.C. 77a et seq.

⁶ 15 U.S.C. 78a et seq.

⁷ See generally Subtitle B of Title VII.

⁸ See section 15F of the Exchange Act, 15 U.S.C. 78o-10.

⁹ See section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75) (defining the term “security-based swap data repository”); section 13(m) of the Exchange Act (regarding public availability of SB swap data); section 13(n) of the Exchange Act (regarding requirements related to SDRs); and section 13A of the Exchange Act (regarding reporting and recordkeeping requirements for certain SB swaps). See also Security-Based Swap Data Repository Registration, Duties, and Core Principles, Release No. 34-63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010); corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (“SDR Proposing Release”); and Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Release No. 34-63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) (“Regulation SBSR Proposing Release”).

¹⁰ See section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1). See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies: Technical

the clearing requirement, execution of the SB swap transaction on an exchange, on a security-based swap execution facility (“SB SEF”) registered under the Exchange Act,¹¹ or on an SB SEF that has been exempted from registration by the Commission under the Exchange Act,¹² unless no SB SEF or exchange makes such SB swap available for trading.¹³ Title VII also amends the Securities Act and the Exchange Act to include “security-based swaps” in the definition of “security” for the purposes of those statutes.¹⁴ As a result, “security-based swaps” are subject to the provisions of the Securities Act and the Exchange Act and the rules thereunder applicable to “securities.”

Since the Dodd-Frank Act was enacted, the Commission has adopted joint rules with the CFTC further defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant”¹⁵ and has proposed rules in the following twelve areas required by Title VII:

1. Rules prohibiting fraud and manipulation in connection with SB swaps;¹⁶

Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010) (“Clearing Procedures Proposing Release”).

¹¹ 15 U.S.C. 78c-4.

¹² Id. at 78c-4(e).

¹³ See section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g) and section 3C(h) of the Exchange Act, 15 U.S.C. 78c-3(h). See also section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term “security-based swap execution facility”). See also Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (“SB SEF Proposing Release”).

¹⁴ See sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending sections 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), and 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), respectively). The Dodd-Frank Act also amended the Securities Act to provide that SB swaps could not be used by an issuer, its affiliates, or underwriters to circumvent the registration requirement of section 5 of the Securities Act with respect to the issuer’s securities underlying the SB swap. See section 768(a) of the Dodd-Frank Act (amending section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3)).

¹⁵ See Entity Definitions Adopting Release.

¹⁶ See Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Release No. 34-63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010) (“SB Swap Antifraud Proposing Release”).

2. Rules regarding trade reporting and real-time public dissemination of trade information for SB swaps that would lay out who must report SB swaps, what information must be reported, and where and when such information must be reported;¹⁷
3. Rules regarding the SDR registration process and the obligations of SDRs, including confidentiality and other requirements with which they must comply;¹⁸
4. Rules relating to mandatory clearing of SB swaps that would specify the process for a registered clearing agency's submission for review of SB swaps that the clearing agency plans to accept for clearing and rules to establish a process for a registered clearing agency to file advance notices with the Commission pursuant to Title VIII of the Dodd-Frank Act;¹⁹
5. Rules regarding the steps that a party electing to use the end-user exception to the mandatory clearing requirement must follow to notify the Commission of how it generally meets its financial obligations associated with non-cleared SB swap transactions when it is using SB swaps to hedge or mitigate commercial risk;²⁰
6. Rules regarding the confirmation of SB swap transactions that would govern the way in which certain of these transactions are acknowledged and verified by the parties who enter into them;²¹

¹⁷ See Regulation SBSR Proposing Release.

¹⁸ See SDR Proposing Release.

¹⁹ See Clearing Procedures Proposing Release.

²⁰ See End-User Exception of Mandatory Clearing of Security-Based Swaps, Release No. 34-63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) ("End-User Exception Proposing Release").

²¹ See Trade Acknowledgment and Verification on Security-Based Swap Transactions, Release No. 34-63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) ("Trade Documentation Proposing Release").

7. Rules defining and regulating SB SEFs, which would specify their registration requirements, establish the duties, and implement the core principles for SB SEFs specified in Title VII;²²
8. Rules regarding certain standards that clearing agencies would be required to maintain with respect to, among other things, their risk management and operations;²³
9. Joint rules with the CFTC further defining the terms “swap,” “security-based swap,” and “security-based swap agreement” and regarding the regulation of mixed swaps and SB swap agreement recordkeeping;²⁴
10. Rules regarding business conduct that would establish certain minimum standards of conduct for SBSBs and MSBSPs, including in connection with their dealings with “special entities,” which include municipalities, pension plans, endowments and similar entities;²⁵
11. Rules regarding the registration process for SBSBs and MSBSPs;²⁶ and
12. Rules intended to mitigate conflicts of interest at SB swap clearing agencies, SB SEFs, and exchanges that trade SB swaps.²⁷

In addition, the Commission intends to propose rules establishing capital, margin, and segregation requirements applicable to SBSBs and MSBSPs pursuant to Exchange Act sections

²² See SB SEF Proposing Release.

²³ See Clearing Agency Standards for Operation and Governance, Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (“Clearing Agency Standards Proposing Release”).

²⁴ See Product Definitions Proposing Release.

²⁵ See Business Conduct Standards for Security-Based Swaps Dealer and Major Security-Based Swap Participants, Release No. 34-64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (“Business Conduct Standards Proposing Release”).

²⁶ See Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-65543 (Oct. 12, 2011), 76 FR 65784 (Oct. 24, 2011) (“SB Swap Participant Registration Proposing Release”).

²⁷ See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, Release No. 34-63107, (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (“Proposed Regulation MC”).

3E²⁸ and 15F(e)²⁹ and rules regarding the reporting and recordkeeping requirements to which SBSDs and MSBSPs will be subject pursuant to Exchange Act section 15F(f).³⁰ The Commission also intends to address the international implications of Title VII in a single proposal that would present an approach to the registration and regulation of foreign entities engaged in cross-border SB swap transactions, among other areas.³¹

Moreover, while not mandated by Title VII, the Commission has adopted exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 (“Trust Indenture Act”) for SB swaps issued by certain clearing agencies satisfying specified conditions to facilitate the intent of Title VII with respect to the clearing of SB swaps.³²

The provisions of Title VII were generally effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act, the “Effective Date”), unless a provision required a rulemaking, in which case such provision would go into effect “not less than” 60 days after

²⁸ 15 U.S.C. 78c-5.

²⁹ Id. at 78o-10(e).

³⁰ Id. at 78o-10(f).

³¹ The Commission also adopted an interim final temporary rule that required counterparties to SB swaps entered into prior to the date of enactment of the Dodd-Frank Act, the terms of which had not expired as of that date, to report certain information relating to such SB swaps to a registered SDR, after such registered SDR is operational, or to the Commission and to report information relating to such SB swaps to the Commission upon request. The Commission also issued an interpretive note to the rule requiring counterparties to retain information relating to the terms of such SB swaps. See Reporting of Security-Based Swap Transaction Data, Release No. 34-63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010). This interim final temporary rule was to remain in effect until the earlier of the operative date of the permanent recordkeeping and reporting rules for SB swap transactions to be adopted by the Commission or January 12, 2012. Commission staff currently is considering what further action, if any, to recommend the Commission take with regard to the interim final temporary rule and interpretive note.

³² See Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). These exemptions supplant the temporary exemptions the Commission adopted to facilitate the operation of clearing agencies as central counterparties for eligible credit default swaps. See Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009). See also Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9232 (Jul. 1, 2011), 76 FR 40223 (Jul. 8, 2011) (extending the expiration date of the temporary exemptions until April 16, 2012).

publication of the related final rules in the Federal Register or on July 16, 2011, whichever is later.³³ Because the Commission did not complete its rulemaking prior to the Effective Date, we took a number of actions intended to clarify which U.S. securities laws would apply to security-based swaps as of July 16, 2011 and to provide exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act.

First, the Commission provided guidance as to which of the requirements of the Exchange Act, as amended by Title VII, would apply to SB swap transactions as of the Effective Date and granted temporary relief to market participants from compliance with certain of those requirements.³⁴ As a result, SB swap market participants were not required to comply with substantially all of Title VII's requirements applicable to SB swaps under the Exchange Act. The expiration dates of the temporary exemptions granted pursuant to the Effective Date Order are triggered by the effective or compliance dates for certain final rules required to be adopted by the Commission pursuant to Title VII.³⁵

Second, the Commission approved an order granting temporary relief and providing interpretive guidance to make it clear that a substantial number of the requirements of the Exchange Act would not apply to SB swaps when the revised definition of "security" went into effect on July 16, 2011.³⁶ Additionally, this order provided temporary relief from provisions of

³³ See section 774 of the Dodd-Frank Act, 15 U.S.C. 77b note.

³⁴ Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting 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, and Request for Comment, Release No. 34-64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) ("Effective Date Order").

³⁵ See Effective Date Order at 36306-7.

³⁶ Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Release No. 34-64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) ("Exchange Act Exemptive Order").

the Exchange Act that allow the voiding of contracts made in violation of those laws.³⁷ The exemptions granted will expire upon the compliance dates of certain of the rules required to be promulgated pursuant to Title VII, including rules further defining the terms “security-based swap” and “eligible contract participant”³⁸ and the rules regarding the registration of SB SEFs.³⁹

Third, the Commission provided, until the compliance date for the final rules to be adopted by the Commission further defining the terms “security-based swap” and “eligible contract participant,”⁴⁰ interim exemptions from all provisions of the Securities Act (other than the section 17(a) antifraud provisions), the registration requirements of the Exchange Act relating to classes of securities, and the indenture provisions of the Trust Indenture Act for those SB swaps that would have been, prior to the Effective Date, within the definition of “security-based swap agreement” under Securities Act section 2A⁴¹ and Exchange Act section 3A⁴² and are entered into solely between eligible contract participants (as defined prior to the Effective Date).⁴³ As a result, pursuant to the interim exemptions, the offer and sale of such SB swaps between eligible contract participants may be made pursuant to exemptions under the Securities

³⁷ Id. at 39930, 39940.

³⁸ Id. at 39938.

³⁹ Id. at 39939.

⁴⁰ Further definition of the term “security-based swap” was proposed in the Product Definitions Proposing Release and the term “eligible contract participant” was further defined in the Entity Definitions Adopting Release.

⁴¹ 15 U.S.C. 77b(b)-1.

⁴² Id. at 78c-1.

⁴³ Exemptions for Security-Based Swaps, Release No. 33-9231 (July 1, 2011), 76 FR 40605 (July 11, 2011) (“SB Swaps Interim Final Rule”). These interim exemptions will expire upon the compliance date for the final rules further defining the terms “security-based swap” and “eligible contract participant.” Further, the Division of Corporation Finance issued a no-action letter that addressed the availability of these interim exemptions to offers and sales of SB swaps that are based on or reference only loans or indexes only of loans. See Cleary Gottlieb Steen & Hamilton LLP (July 15, 2011) (“Clearly Gottlieb Letter”). We understand that Commission staff intends to withdraw the Cleary Gottlieb Letter upon the expiration of these interim exemptions.

Act without registration of the class under Exchange Act sections 12(a) and 12(g), and without qualification of an indenture under the Trust Indenture Act.⁴⁴

As previously announced, the Commission has been considering how to implement the new requirements that will be applicable to SB swaps pursuant to the rules described above in a practical and efficient manner that avoids unnecessary disruption to the SB swap market.⁴⁵ As noted in the Effective Date Order, the Commission has the ability to establish effective dates and compliance dates – which may be later than the effective dates – for provisions of Title VII that are subject to rulemaking.⁴⁶ Given this ability, the Commission seeks to sequence the implementation of the final rules to be adopted pursuant to Title VII of the Dodd-Frank Act in an appropriate manner.

To engage the public on these issues, the staffs of the Commission and the CFTC held a two-day joint public roundtable on May 2 – 3, 2011, to discuss the sequencing of the implementation of the final rules to be adopted under Title VII.⁴⁷ In connection with this roundtable, the Commission and the CFTC solicited comment on issues pertaining to the phased implementation of Title VII's final rules.⁴⁸ Additionally, the Commission and the CFTC have received comment letters in response to specific rules proposed under and orders issued in connection with Title VII that address implementation issues pertaining to those rules, as well as implementation issues more generally.

⁴⁴ SB Swaps Interim Final Rule at 40611-2.

⁴⁵ See Financial Regulatory Reform: The International Context: Hearing Before the H. Comm. on Fin. Serv., 112th Cong. 18 (2011) (statement of Mary L. Schapiro, Chairman of the Commission).

⁴⁶ See Effective Date Order at 36289.

⁴⁷ 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, Release No. 34-64314 (Apr. 20, 2011), 76 FR 23221 (Apr. 26, 2011) (Request for Comment; Notice of Roundtable Discussion).

⁴⁸ See id.

Many commenters have noted that the Commission and the CFTC have the flexibility to phase in or sequence the issuance of final rules, as well as the compliance dates for those rules, in a manner that produces an orderly implementation plan,⁴⁹ as opposed to a “big bang” approach where all of the rules to be adopted under Title VII go into effect simultaneously.⁵⁰ Commenters have advocated that such an implementation plan should allow market participants enough time to come into compliance with rules to be adopted under Title VII⁵¹ and be sequenced in some manner to provide for differing compliance dates depending upon the requirements involved.⁵²

⁴⁹ See, e.g., letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; stating that the CFTC “should phase in the implementation of the Dodd-Frank Act rules over time”); letter from Edison Electric Institute (June 3, 2011), 76 FR 25274, at 7 (CFTC only letter); letter from Morgan Stanley (Nov. 1, 2010), File No. S7-16-10, at 6 (noting that “Dodd-Frank does not require application of the various requirements across all over-the-counter products on a single effective date or a limited range of effective dates. To the contrary, the statute permits and even contemplates that implementation of the requirements will be phased in over time, as appropriate and necessary to the continued operation of the markets.”); letter from NextEra Energy Resources, LLC (Mar. 11, 2011), 75 FR 80174, at 4 (CFTC only letter; noting that “[t]he market place is far better served if the [CFTC] considers all of the final rules in a comprehensively organized and logical fashion.”).

⁵⁰ See, e.g., letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; “we believe that market participants should be given sufficient time to properly understand and prepare themselves to comply with the new regulatory requirements.”); letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 1 (CFTC only letter); letter from Tradeweb Markets LLC (June 3, 2011), 76 FR 25274, at 2 (CFTC only letter; “[a]t the outset, we encourage the [CFTC] to implement the regulatory requirements over time rather than all at once because a ‘big bang’ approach to implementation would be too disruptive to the marketplace – particularly given the breadth and complexity of the new rules to be implemented and the varying states of readiness of market participants.”).

⁵¹ See, e.g., letter from American Bankers Association, ABA Securities Association, The Clearing House Association L.L.C., Financial Services Forum, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Managed Funds Association, and Securities Industry and Financial Markets Association (Dec. 6, 2010) (“December Trade Association Letter”), Commission “Other Comments” file, at 3 (stating that “[t]o implement a complex new regulatory structure without adequate time to adapt, prepare, and test systems also could lead to an ineffective or poorly designed reporting, clearing, and exchange infrastructure...”); letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; noting that “market participants should be given sufficient time to properly understand and prepare themselves to comply with the new regulatory requirements.”); letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 4-5; letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 6 (“[p]hasing in the rules will provide market participants with essential time to identify the cumulative impact of the rule changes, build upon the actions of other market participants, and manage the cumulative costs of the rule changes.”).

⁵² See, e.g., letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 7-8 (recommending that Title VII’s requirements be phased in by asset class and market participant type);

In September 2011, the CFTC published two notices of proposed rulemakings⁵³ that propose to phase in compliance with the swap clearing, trading, trade documentation, and margining requirements of Subtitle A of Title VII of the Dodd-Frank Act⁵⁴ by category of market participant in the following manner:

- Category 1 Entities, which would include swap dealers, SBSBs, major swap participants and MSBSs that will be required to register with the CFTC or the Commission and “active funds” (defined as any private fund, as defined in section 202(a) of the Investment Advisers Act of 1940,⁵⁵ that is not a third-party subaccount and that executes 20 or more swaps per month based upon a monthly average over the 12 months preceding the CFTC issuing a mandatory clearing determination), would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 1 Entities within 90 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.

letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 11; letter from Swaps & Derivatives Market Association (June 1, 2011), File No. S7-06-11, at 2, 5 (recommending that at each phase of implementation (namely, clearing, trading and data reporting), compliance should be further sequenced by market participant, with “those with the highest volume share....lead[ing] the implementation, allowing less frequent users more time to comply.”).

⁵³ Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA (Sept. 8, 2011), 76 FR 58186 (Sept. 20, 2011) (“CFTC Clearing and Trade Execution Implementation Proposal”); Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4s of the CEA (Sept. 8, 2011), 76 FR 58176 (Sept. 20, 2011) (“CFTC Trading Documentation and Margining Implementation Proposal”).

⁵⁴ The analogues to the CFTC Clearing and Trade Execution Implementation Proposal and the trade documentation portion of the CFTC Trading Documentation and Margining Implementation Proposal are the Commission’s rule proposals set forth in the Clearing Procedures Proposing Release, the SB SEF Proposing Release, and the Trade Documentation Proposing Release. The analogue to the margining proposals in the CFTC Trading Documentation and Margining Implementation Proposal is the Commission’s forthcoming proposed rules on margin requirements for SBSBs and MSBSs.

⁵⁵ 15 U.S.C. 80b-2(a).

- Category 2 Entities, which would include commodity pools, a private fund as defined in section 202(a) of the Investment Advisers Act of 1940⁵⁶ other than an active fund, employee benefit plans as defined under the Employee Retirement Income Security Act (“ERISA”),⁵⁷ and persons predominantly engaged in activities that are financial in nature as defined under the Bank Holding Company Act,⁵⁸ provided that the entity is not a third-party subaccount, would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 2 Entities within 180 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.
- Category 3 Entities, which would include third party sub-accounts and “all other swap transactions not excepted from the mandatory clearing requirement”, would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 3 Entities within 270 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.
- With regard to the trade documentation and margining requirements, the CFTC Trading Documentation and Margining Implementation Proposal adds an additional fourth category of entities – Category 4 Entities – for any persons not included in Categories 1 through 3.

⁵⁶ Id.

⁵⁷ Pub. L. No. 93-406, 88 Stat. 829 (1974).

⁵⁸ 12 U.S.C. 1841 et seq.

Under this proposal, Category 4 Entities would be subject to the same compliance date scheduling as Category 3 Entities.

In its Clearing and Trade Execution Implementation Proposal and its Trading Documentation and Margining Implementation Proposal, the CFTC did not propose specific adoption or compliance dates for rules, but did note that certain final rules must be adopted before compliance with others would be required. For example, the CFTC noted in its Clearing and Trade Execution Implementation Proposal that before the mandatory clearing of swaps begins, the final rules establishing the product and entity definitions, the end-user exception from mandatory clearing, and pertaining to the segregation of customer collateral must be adopted and that before swap market participants could be required to comply with a trade execution requirement, the CFTC must adopt final rules related to swap execution facilities and designated contract markets.⁵⁹

B. Overview of Statement

In order to better effectuate the purposes of Title VII and to address the comments received from market participants, the Commission has developed, and is seeking public comment on, this Statement, which discusses issues pertaining to, and presents a general sequence for, the anticipated compliance dates of final rules to be adopted by the Commission under Subtitle B of Title VII. The issues discussed in this Statement are set out in relation to the following five categories of rules:⁶⁰ (1) the rules further defining the terms “security-based swap,” “security-based swap agreement,” “mixed swap,” “security-based swap dealer,” “major

⁵⁹ See CFTC Clearing and Trade Execution Implementation Proposal at 58188-9.

⁶⁰ For the purposes of this Statement, the Commission has categorized the twelve rule proposals and one adopting release the Commission has published pursuant to Title VII (other than the SB Swap Antifraud Proposing Release, compliance with which will be addressed in the release adopting the final rules contemplated therein) along with the proposals the Commission has yet to publish, as described above, into five categories.

security-based swap participant,” and “eligible contract participant,” (the “Definitional Rules”) and the rules concerning the treatment of cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Subtitle B of Title VII (the “Cross-Border Rules”); (2) rules pertaining to the registration and regulation of SDRs, the reporting of SB swap transaction data to SDRs, and the public dissemination of SB swap transaction data; (3) rules pertaining to the mandatory clearing process of SB swap transactions, clearing agency standards, and the end-user exception from mandatory clearing; (4) rules pertaining to the registration and regulation of SBSDs and MSBSPs; and (5) rules pertaining to the mandatory trading of SB swap transactions, including the rules pertaining to the registration and regulation of SB SEFs.

The first category of rules affects compliance with rules in the other four categories. As a result, the Commission believes the Definitional Rules would need to be adopted and effective prior to requiring compliance with any of the other rules to be adopted under Title VII of the Dodd-Frank Act. The Definitional Rules would help inform market participants as to whether they will be subject to the requirements of Subtitle B of Title VII, section 12 of the Exchange Act, and the relevant provisions of the Securities Act and the Trust Indenture Act. Additionally, the Commission generally believes the Cross-Border Rules should be proposed before final rules with cross-border implications are adopted. We believe the Commission would benefit by being able to take into account comments on its proposed approach to cross-border issues before final rules with cross-border implications are adopted.⁶¹

With regard to the rules in the remaining four categories, the Statement describes the interconnectedness of the compliance dates of the final rules within one category, and where

⁶¹ For example, before requiring compliance with the registration requirements for SBSDs, the Commission believes the proposed applicability of such registration requirements to non-U.S. persons should be addressed and subject to public comment.

applicable, the impact of compliance dates of final rules within one category upon those of another category. The Statement also discusses the dependencies that exist between the categories of rules. The Statement does not provide specific compliance dates for the final rules to be adopted under Subtitle B of Title VII, nor does it provide a conclusive sequencing of compliance dates. However, the Statement does explain how such dates could be sequenced in relative terms and, in this way, seeks to give SB swap market participants clarity into and an opportunity to comment upon the general order in which they might expect to consider and prepare for compliance with these final rules. The Statement also discusses the relief the Commission has previously granted by providing exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act for certain SB swaps and when these exemptions will expire.

In general, in formulating the sequencing of compliance dates described herein, the Commission has taken into consideration four principles in addition to the primacy of the Definitional Rules and Cross-Border Rules described above: (1) compliance with the final rules establishing the registration process and duties of SDRs and the rules governing the reporting of SB swap transaction data should be the next step in the implementation process, following the adoption and effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, so that the Commission would be able to begin utilizing comprehensive SB swap transaction data reported to registered SDRs in making certain determinations required by Subtitle B of Title VII;⁶² (2) before SB swaps are required to be cleared, the Commission intends to determine

⁶² See Letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 1 (CFTC only letter; noting that certain rules should be delayed “in favor of obtaining market data or allowing time for the build out of necessary systems prior to adoption (e.g., position limits and real-time reporting).”); but cf., letter from Swaps & Derivatives Market Association (June 1, 2011), File No. S7-06-11, at 2 (stating that “[c]entral clearing paves the way for electronic trading, which facilitates trade reporting and data gathering.”).

whether to propose amendments to its rules regarding net capital and customer protection specifically with regard to SB swap clearing activity in a broker-dealer and whether margin for SB swaps that are required to be cleared can be calculated on a portfolio margining basis with swaps;⁶³ (3) the Dodd-Frank Act establishes a sequencing of the mandatory clearing and mandatory trading requirements of Subtitle B of Title VII, as only SB swaps that the Commission requires to be cleared will be required to be traded on an exchange or SB SEF, provided that an exchange or SB SEF makes such SB swaps available to trade, and the implementation process should take this sequencing into account;⁶⁴ and (4) without unnecessarily delaying the implementation of Title VII's reforms of the SB swap market, at all stages of the implementation process, persons regulated pursuant to Subtitle B of Title VII should be given adequate, but not excessive, time to come into compliance with the final rules applicable to them, which includes (a) having an appropriate amount of time to analyze and understand the final rules to be adopted pursuant to Title VII, (b) having an appropriate amount of time to develop and test new systems required as a result of the new regulatory requirements for SB swaps, and (c) being subject to a phasing in of the requirements arising from the final rules to be adopted pursuant to Title VII, as appropriate.⁶⁵

The Commission is seeking public comment on all aspects of this Statement. The Commission appreciates the importance of SB swap market participants having the opportunity

⁶³ See infra note 138.

⁶⁴ See, e.g., letter from Wholesale Market Brokers' Association (June 3, 2011), 76 FR 1214, at 5 (noting that "upon the plain language of the Dodd-Frank Act, the mandatory trade execution requirement will become effective at the time that swaps are deemed 'clearable' by the appropriate Commission.").

⁶⁵ Any potential phasing in of any such requirements could take a variety of forms, including, for example, the further sequencing of the compliance dates of a particular final rule by SB swap asset class, SB swap market participant type, and/or the specific requirements arising from such rule.

to comment upon the sequencing discussed herein.⁶⁶ Comments received will be addressed in the relevant final rulemakings to which they pertain.

II. Statement 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

A. Definitional and Cross-Border Rules

(i) Definitional Rules

The Commission believes the Definitional Rules, the rules further defining the terms “security-based swap,” “security-based swap agreement,” and “mixed swap” and the rules further defining “security-based swap dealer,” and “major security-based swap participant,” should be the earliest of the final rules of Subtitle B of Title VII that are adopted and effective. As noted above, the Commission already has adopted joint rules with the CFTC further defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant”.⁶⁷

Many commenters have noted the importance of the early finalization of these definitional rules, as they provide the foundation for the remainder of Title VII’s rules by providing further guidance as to what products constitute SB swaps and which participants

⁶⁶ See, e.g., letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 2 (requesting that the Commission and the CFTC “publish for comment their proposed timelines to phase in implementation of the new swaps rules.”); letter from International Swaps and Derivatives Association, Inc. (June 2, 2011), 76 FR 25274, at 4 (CFTC only letter; recommending that the CFTC “propose a step-by-step implementation schedule upon which the public may comment that builds on the discussions currently underway between the financial regulators and the industry.”); letter from BlackRock, Inc. (June 3, 2011), 76 FR 25274, at 1 – 2 (CFTC only letter; noting that “[a] proper sequencing of the [CFTC’s] consideration of final rules and a phased, publicly-vetted schedule for implementation of compliance with such final rules will promote a more orderly transition from the current OTC bilateral market and will allow for the development of a new market structure for cleared derivatives where the interdependent and interoperable relationships among the various entities and market participants (including some new participants) is well thought through so as to preserve and even enhance liquidity.”); letter from Bloomberg L.P. (Apr. 4, 2011), File No. S7-06-11, at 7.

⁶⁷ See Entity Definitions Adopting Release.

constitute SBSs and MSBSs.⁶⁸ Once adopted and effective, the Definitional Rules should help provide certainty to market participants with regard to whether the products in which they transact and the activities they undertake will be subject to the regulatory regime to be established through Subtitle B of Title VII and the rules to be adopted by the Commission pursuant to it. Except as otherwise noted below with regard to section 6(l) of the Exchange Act, upon their effectiveness, the Definitional Rules will not, on their own, impose upon market participants engaged in SB swaps any of the new requirements to be adopted under Subtitle B of Title VII.⁶⁹

Upon the compliance date of the final rules further defining the term “security-based swap” and “eligible contract participant,” two of the temporary exemptions granted by the Commission pursuant to the Exchange Act Exemptive Order will expire:⁷⁰

- The exemption for any person meeting the definition of “eligible contract participant” that was in effect prior to the enactment of the Dodd-Frank Act, other than a registered broker-dealer or a self-regulatory organization, from the provisions of the

⁶⁸ See, e.g., December Trade Association letter at 2; letter from American Gas Association (June 3, 2011), 76 FR 25274, at 2 (CFTC only letter; stating that “any sequencing of final rules must begin with the foundational definitions of ‘swap,’ ‘swap dealer,’ and ‘major swap participant.’” Industry participants must understand whether and to what extent their activities will be regulated before they can assess how those activities should be regulated.”); letter from Edison Electric Institute (June 3, 2011), 76 FR 25274, at 7 (CFTC only letter; advocating that the implementation process “start with basic definitions of ‘swap,’ ‘swap dealer,’ and ‘major swap participant.’”); letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 3 (CFTC only letter); letter from NextEra Energy Resources, LLC (Mar. 11, 2011), 75 FR 80174, at 6 (CFTC only letter); letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 3 (CFTC only letter; “[i]t is essential that the definitions of products and the categories of firms to whom final rules will apply are finalised before implementation of any of the other final rules.”); letter from CME Group, Inc. (June 3, 2011), 76 FR 25274, at 3 (CFTC only letter).

⁶⁹ As of the Effective Date of the Dodd-Frank Act, SB swaps, as securities, were subject to the general antifraud and anti-manipulation provisions of the federal securities laws and the regulations thereunder. See, e.g., Exchange Act section 10(b), 15 U.S.C. 78j, and Securities Act section 17(a), 15 U.S.C. 77q(a).

⁷⁰ The Commission has subsequently received and is considering a request for certain permanent exemptions upon the expiration of the temporary exemptions contained in the Exchange Act Exemptive Order. See SIFMA SBS Exemptive Relief Request (Dec. 5, 2011), <http://www.sec.gov/comments/s7-27-11/s72711-10.pdf>.

Exchange Act and the rules and regulations thereunder (other than those provisions expressly excluded pursuant to the Exchange Act Exemptive Order), in connection with a person's activities involving SB swaps;⁷¹ and

- The exemption for a broker or dealer registered under section 15(b) of the Exchange Act⁷² from certain provisions of the Exchange Act and the rules and regulations thereunder with respect to SB swaps.⁷³

At the same time, the following exemptions granted pursuant to the SB Swaps Interim Final Rule⁷⁴ will expire, unless the Commission extends or modifies the exemptions or adopts other exemptions:⁷⁵

- The exemption pursuant to Securities Act rule 240 ("Rule 240") from all provisions of the Securities Act, except the anti-fraud provisions of section 17(a), subject to certain conditions, of the offer and sale of those SB swaps that under pre-Dodd-Frank Act law were "security-based swap agreements" (which, under that definition, must be entered into between eligible contract participants and subject to individual negotiation) and that were defined as "securities" under the Securities Act on the Effective Date solely due to the provisions of Title VII;⁷⁶

⁷¹ Exchange Act Exemptive Order at 39938-40.

⁷² 15 U.S.C. 78o(a).

⁷³ Id. at 39939-40.

⁷⁴ See supra note 43.

⁷⁵ The interim exemptions provide that upon their expiration, the Commission must publish a rule to remove the interim exemptions from the Code of Federal Regulations. See, e.g., 17 CFR 230.240. Further, we understand that Commission staff intends to withdraw the Cleary Gottlieb Letter upon the expiration of these interim exemptions.

⁷⁶ SB Swaps Interim Final Rule at 40611.

- The exemptions from the provisions of Exchange Act sections 12(a)⁷⁷ and 12(g)⁷⁸ for any SB swaps offered and sold in reliance on Rule 240;⁷⁹ and
- The exemption from the provisions of the Trust Indenture Act for any SB swaps offered and sold in reliance on Rule 240.⁸⁰

In light of the fact that these exemptions expire upon the compliance date of the final rules further defining the term “security-based swap” and “eligible contract participant,” the Commission is considering what the appropriate compliance date for the rules further defining the term “security-based swap” should be.

Additionally, upon the effective date of the final rules further defining the term “eligible contract participant,” the limited exemption granted pursuant to the Effective Date Order permitting compliance with section 6(l) using the definition of “eligible contract participant” as set forth in section 1a(12) of the Commodity Exchange Act (as in effect on July 20, 2010),⁸¹ as opposed to the definition of “eligible contract participant” as amended by the Dodd-Frank Act, will expire.⁸² Section 6(l) of the Exchange Act makes it unlawful for any person to effect a transaction in an SB swap with or for a person that is not an “eligible contract participant,” unless such transaction is effected on a national securities exchange registered pursuant to section 6(b) of the Exchange Act.⁸³ Upon the effective date of the final rules further defining the

⁷⁷ 15 U.S.C. 78l(a).

⁷⁸ 15 U.S.C. 78l(g).

⁷⁹ Id. at 40612.

⁸⁰ Id.

⁸¹ 7 U.S.C. 1a(12).

⁸² Effective Date Order at 36307.

⁸³ 15 U.S.C. 78f(l).

term “eligible contract participant,” which will be 60 days after the rule’s publication in the Federal Register, or July 23, 2012,⁸⁴ section 6(l) of the Exchange Act will apply to persons in connection with SB swap transactions with counterparties that do not meet the “eligible contract participant” definition, as amended by the Dodd-Frank Act and as further defined by such rules.

(ii) Cross-Border Rules

The Commission expects to propose the Cross-Border Rules as a single release addressing the application of the requirements of Subtitle B of Title VII to cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Subtitle B of Title VII. The Cross-Border Rules, which the Commission expects to propose prior to adopting any rules other than the Definitional Rules (except as otherwise noted in sections II.C.(i) and (ii) below), generally would not propose to impose additional requirements or obligations upon SB swap market participants, but rather would propose to address the extent to which non-U.S. SB swap market participants would be subject to the requirements arising from Subtitle B of Title VII by defining the scope of Title VII as it applies to these market participants and their SB swap transactions involving the U.S. market. Because the Cross-Border Rules are expected to be directly related to, among other things, SB swap data reporting, clearing and trading, as well as various registration categories under Title VII, the Commission anticipates that certain rulemakings that are affected by the Cross-Border Rules would address comments received on the relevant proposals in the Cross-Border Rules. In other substantive areas, the Commission could address comments received by adopting final rules addressing cross-border issues in a complementary separate rulemaking. In either case, the Commission does not expect to require

⁸⁴ See supra note 4.

compliance by participants in the U.S. SB swap market with the final rules arising under the Exchange Act before addressing the cross-border aspects of such rules.⁸⁵

(iii) Request for Comment

- In addition to the Definitional Rules and the Cross-Border Rules, are there any other rules arising under Title VII that should be proposed or adopted before all other Title VII rules? If so, which ones, and why?
- Are there any sets of rules included in this first category that should not be? If so, which ones, and why?

B. SDR Registration and SB Swap Transaction Reporting

Following the adoption and effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, the Commission believes the next step in the implementation process should be requiring SDRs to register with the Commission and comply with applicable duties and core principles. Compliance earlier in the implementation process should facilitate the development and utilization of SDRs in a regulated manner and facilitate the reporting of SB swap transaction data by SB swap market participants to registered SDRs, as well as the public dissemination of SB swap data by registered SDRs. Because the Regulation SBSR Proposing Release links the timeframes for reporting and publicly disseminating SB swap transaction data to the registration of SDRs,⁸⁶ the Commission anticipates that the sooner SDRs are required to register with the Commission and comply with applicable duties and core principles, the sooner SB swap transaction data on all SB swaps can be promptly reported to such SDRs and

⁸⁵ For example and as noted above, before requiring compliance with the registration requirements for SBSRs, the Commission believes the applicability of such registration requirements to non-U.S. persons should be addressed.

⁸⁶ Regulation SBSR Proposing Release at 75187-8.

disseminated to the public. The Commission also believes it should require the reporting of SB swap transactions to registered SDRs earlier in the implementation process, as has been suggested by commenters, to enable the Commission to utilize the data reported to registered SDRs to inform other aspects of the Commission's efforts with respect to Title VII.⁸⁷

The Commission further believes compliance with final rules resulting from the SDR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and proposal of the Cross-Border Rules, taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them, to facilitate the establishment and utilization of registered SDRs. Furthermore, the Commission believes compliance with final rules resulting from the Regulation SBSR Proposing Release should be required at approximately the same time as compliance with final rules resulting from the SDR Proposing Release, also taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. As a result, the requirement to report SB swap transactions to registered SDRs would facilitate the comprehensiveness of SB swap data contained in SDRs. Accordingly, except as otherwise noted in sections II.C.(i) and (ii) below, the final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release would be the first sets of rules with which compliance

⁸⁷ See, e.g., letter from MarkitSERV (June 10, 2011), 75 FR 63113, at 2 – 3 (CFTC only letter; noting that “[d]ata reporting to the Commission will provide the Commission with the significant amount of market data needed before it can determine which swaps should be subject to the clearing mandate, which ones are ‘available to trade’, and what are the appropriate thresholds for block trade sizes.”); letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 2, 5-6 (noting that “the Commissions will be in a better position to adopt rules that achieve Dodd-Frank’s goals while maintaining active and viable [SB swap] markets” if SDRs are required to register and data reporting is enabled).

would be required by the Commission, following the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules.

The following subsections discuss certain additional issues concerning the compliance dates for final rules resulting from (i) the SDR Proposing Release and (ii) the Regulation SBSR Proposing Release.

(i) SDR Proposing Release

In accordance with section 763(i) of Title VII, the Commission issued the SDR Proposing Release, which proposed new rules under the Exchange Act governing the SDR registration process, duties, and core principles. This subsection discusses issues surrounding the timing of the SDR registration process and compliance with the duties, core principles, and other requirements resulting from these proposed rules, as well as the relationship of certain of the proposed rules in the Regulation SBSR Proposing Release to those in the SDR Proposing Release.

a. Registration and Compliance with Regulatory Requirements

The Regulation SBSR Proposing Release would require that an entity registered with the Commission as an SDR also register with the Commission as a securities information processor (“SIP”) on existing Form SIP.⁸⁸ The Commission anticipates that the timeframe within which persons seeking to operate as SDRs will be required to register with the Commission would be established in the release adopting final rules resulting from the SDR Proposing Release. As noted above, the Commission believes compliance with final rules resulting from the SDR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, taking into account the necessity

⁸⁸ Regulation SBSR Proposing Release at 75211.

of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. Accordingly, the Commission anticipates that the final rules governing the SDR registration process and applicable duties, core principles, and other requirements, as explained immediately below, would be one component of the two sets of rules with which compliance would be required first.

Proposed rules 13n-4 through 13n-11 are intended to implement the duties and core principles established by section 763(i) of the Dodd-Frank Act, which amended the Exchange Act to add Exchange Act section 13(n).⁸⁹ An SDR would be required to comply with the final rules establishing the duties and core principles resulting from proposed rules 13n-4 through 13n-11 as soon as the Commission approves the SDR's application for registration.⁹⁰

b. Expiration of Exemptions Granted Pursuant to the Effective Date Order

The Effective Date Order granted temporary exemptions from compliance with a number of provisions of section 13(n) of the Exchange Act that apply to SDRs generally, as they do not require a rulemaking or other Commission action or do not apply only to registered SDRs. Specifically, the Effective Date Order provided temporary exemptions from compliance with the following sections:

⁸⁹ SDR Proposing Release at 77367-9.

⁹⁰ 15 U.S.C. 78m(n). Proposed rule 13n-1(c) provides that the Commission shall grant the registration of an SDR if the Commission finds that such 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. See SDR Proposing Release at 77313.

- Section 13(n)(5)(D)(i) of the Exchange Act,⁹¹ which would require an SDR to provide direct electronic access to the Commission or any designee of the Commission;
- Section 13(n)(5)(F) of the Exchange Act,⁹² which would require an SDR to maintain the privacy of any and all SB swap transaction information that the SDR receives from an SBSB, counterparty, or other registered entity;
- Section 13(n)(5)(G) of the Exchange Act,⁹³ which would require an SDR, on a confidential basis and after notifying the Commission of the request, to make available all data obtained by the SDR, including individual counterparty trade and position data, to certain enumerated entities;
- Section 13(n)(5)(H) of the Exchange Act,⁹⁴ which would require an SDR, before sharing information with certain enumerated entities, to (1) receive a written agreement from each such entity that the entity will abide by certain confidentiality provisions relating to the information on SB swap transactions that is provided and (2) have each such entity agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided;
- Section 13(n)(7)(A) of the Exchange Act,⁹⁵ which would prohibit an SDR from adopting any rule or taking any action that results in any unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions;

⁹¹ 15 U.S.C. 78m(n)(5)(D)(i).

⁹² Id. at 78m(n)(5)(F).

⁹³ Id. at 78m(n)(5)(G).

⁹⁴ Id. at 78m(n)(5)(H).

⁹⁵ Id. at 78m(n)(7)(A).

- Section 13(n)(7)(B) of the Exchange Act,⁹⁶ which would require an SDR to establish transparent governance arrangements for certain enumerated reasons; and
- Section 13(n)(7)(C),⁹⁷ which would require an SDR to establish rules to minimize conflicts of interest and establish a process for resolving conflicts of interest.

These temporary exemptions will expire upon 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. In setting the compliance dates of final rules resulting from the SDR Proposing Release, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to any of the above-described exemptions.

(ii) Regulation SBSR Proposing Release

In accordance with sections 763 and 766 of the Dodd-Frank Act, the Commission issued the Regulation SBSR Proposing Release, which, among other things, proposed timeframes for the reporting of SB swap information to registered SDRs or to the Commission and for the public dissemination of SB swap transaction, volume, and pricing information.⁹⁸ As noted in the Regulation SBSR Proposing Release, the Commission understands that market participants would need a reasonable period of time in which to acquire or configure the necessary systems, engage and train the necessary staff, and develop and implement the necessary policies and procedures that would be required by the final rules regarding SB swap transaction reporting.⁹⁹

⁹⁶ Id. at 78m(n)(7)(B).

⁹⁷ Id. at 78m(n)(7)(C).

⁹⁸ See Regulation SBSR Proposing Release at 75287-8.

⁹⁹ Id. at 75242.

Accordingly, through proposed rule 910, as set forth in the Regulation SBSR Proposing Release, the Commission aimed to provide clarity as to SB swap reporting and public dissemination timelines by establishing a phased-in compliance schedule for those requirements.¹⁰⁰ The following section discusses certain issues concerning the timing-related aspects of the Regulation SBSR Proposing Release.

A. Reporting Requirements for Pre-Enactment SB Swaps

Proposed rule 910(a) would have required reporting parties to report any pre-enactment SB swaps required to be reported pursuant to proposed rule 901(i) to a registered SDR no later than January 12, 2012 (180 days after the effective date of the Dodd-Frank Act), pursuant to the requirement of section 3C(e)(1) of the Exchange Act.¹⁰¹ However, as acknowledged by the Commission in the Effective Date Order, “even after an SDR is registered, market participants will need additional time to establish connectivity and develop appropriate policies and procedures to be able to deliver information to the registered SDR.”¹⁰² Accordingly, pursuant to the Effective Date Order, the Commission granted temporary exemptive relief such that no person would be required to report pre-enactment SB swaps pursuant to section 3C(e)(1) of the Exchange Act to a registered SDR until six months after the SDR that is capable of accepting the asset class of the pre-enactment SB swap is registered by the Commission.¹⁰³ The Regulation

¹⁰⁰ Id. at 75242-4.

¹⁰¹ Id. at 75243. Section 3C(e)(1) of the Exchange Act requires SB swaps entered into before the date of enactment of section 3C to be reported to a registered SDR or the Commission no later than 180 days after the effective date of section 3C (i.e., no later than January 12, 2012). 15 U.S.C. 78c-3(e)(1).

¹⁰² Effective Date Order at 36291.

¹⁰³ Id. at 36291.

SBSR Proposing Release proposed to define pre-enactment SB swaps as those entered into before July 21, 2010 the terms of which had not expired as of that date.¹⁰⁴

¹⁰⁴ Regulation SBSR Proposing Release at 75209, 75223-4.

B. Compliance with Other Reporting Requirements

As discussed in section B.(i) above, the Commission believes SDRs should be required to register with the Commission and comply with the duties, core principles and other requirements applicable to SDRs, as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. The Commission also believes compliance with final rules resulting from the Regulation SBSR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules. Accordingly, the reporting of SB swap transaction information to registered SDRs and the dissemination of SB swap transaction information to the public pursuant to the implementation timeframes that would be set forth by the Commission final rules resulting from the Regulation SBSR Proposing Release would begin as soon as practicable after the registration of SDRs, also taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them, which would be the triggering event for the reporting obligations contemplated by the Regulation SBSR Proposing Release.¹⁰⁵

C. Establishment of Block Trade Thresholds

With respect to defining block trade thresholds for SB swaps, the Commission stated in the Regulation SBSR Proposing Release that “it would be appropriate to seek additional comment from the public, as well as to collect and analyze additional data on the [SB swap]

¹⁰⁵ Id. at 75243 n.156.

market, in the coming months” before proposing specific block trade thresholds.¹⁰⁶ The Commission further noted its intent to propose specific block trade thresholds simultaneously with the adoption of final rules resulting from the Regulation SBSR Proposing Release.¹⁰⁷

The Commission recognizes that current data on the nature and size of SB swap transactions reflects a market that is not yet subject to any of the requirements to be adopted under Title VII, including the requirement that such SB swap transaction data be disseminated to the public. Data collected after these requirements are implemented may provide additional insight into the SB swap market, including whether these requirements are associated with a change in the nature and size of SB swap transactions. The Commission therefore is considering various means of how to approach establishing block trade thresholds, including, for example, establishing an initial period during which information regarding SB swaps would be reported (and subsequently disseminated publicly) on a delayed basis, while giving reporting parties the option of reporting their trades on a shorter timeframe.

The Commission continues to analyze the comments it received relating to block trade issues, and to consider how to implement the reporting and dissemination requirements of sections 763 and 766 of the Dodd-Frank Act in an appropriate manner. The Commission notes that it already has proposed a staged implementation schedule for the final rules resulting from the Regulation SBSR Proposing Release via proposed rule 910.¹⁰⁸ The Commission also is considering whether and how it might revise that schedule in light of comments received, and whether certain issues relating to block trades – such as the required time delays – should be

¹⁰⁶ Id. at 75228.

¹⁰⁷ Id.

¹⁰⁸ See id. at 75243-4.

reopened for comment in connection with the future Commission proposal regarding how to define block thresholds.

(iii) Request for Comment

- Should the Commission adopt a phase-in of the SDR duties, core principles and other requirements resulting from the SDR Proposing Release that includes sequenced effective and compliance dates aimed at providing time for SDRs to complete their analysis of the final rules, develop and test systems, submit a completed Form SDR, and be in a position to demonstrate compliance with the federal securities laws and the rules and regulations thereunder? How would such a phase-in period affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages or disadvantages of such a phase-in period? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission offer SDRs an avenue to secure a grace period to defer compliance with some or all requirements of section 13(n) of the Exchange Act and the SDR duties, core principles and other requirements resulting from the SDR Proposing Release, in order for SDRs to obtain additional time to demonstrate compliance with the SDR duties, core principles and other requirements and to obtain registration with the Commission? If so, for which requirements should a grace period be made available and how long should such a grace period be? Should such a grace period be conditioned on any steps taken by the SDR, such as submission of a complete Form SDR within a certain time-frame? Would there be potential advantages or disadvantages of such a grace period? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?

- Should SDRs be in compliance with all duties, core principles and other requirements resulting from the SDR Proposing Release at the time they seek to register with the Commission? Why or why not? Should compliance with some of these requirements be delayed until a later point in time? If so, for which requirements, until what point, and why should compliance be delayed? How would such delayed compliance affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of such delayed compliance? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Is it appropriate for the final rules pertaining to the registration and regulation of SDRs resulting from the SDR Proposing Release and the final rules pertaining to the reporting and dissemination of SB swap transaction data resulting from the Regulation SBSR Proposing Release to be the first rules (except as otherwise noted in sections II.C.(i) and (ii) below) after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules with which compliance is required? Why or why not?
- In determining when SDRs should be required to register with the Commission, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- In determining when SB swap transaction data should be reported to registered SDRs, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most

appropriate manner of sequencing in relation to those potentially differing timelines?

What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

- Should the Commission defer its proposed rulemaking regarding block thresholds until after SDRs register with the Commission and the Commission begins to receive and analyze data required to be reported under final rules resulting from the Regulation SBSR Proposing Release? Why or why not? If yes, how many months of data would be sufficient? How would such a deferral affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of such a deferral? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission defer its proposed rulemaking regarding block thresholds until after SB swap transaction information begins to be publicly disseminated? Why or why not? If yes, how many months of public dissemination would be sufficient? How would such a deferral affect the goals of Title VII's reforms of the SB swap market? Would there be potential disadvantages of such a deferral? If so, what would they be and what steps could be taken to mitigate them?
- In the absence of the definition of any block trade thresholds by the Commission, what form could SB swap transaction data dissemination take? For example, should all trades be disseminated with a delay? If so, how long should that delay be? Furthermore, could the public dissemination of SB swap transaction data be phased such that initially, public dissemination is limited only to certain SB swap instruments? If so, which instruments? If not, why not? Alternatively, should the Commission set initial block thresholds based

upon data currently available about the SB swap market and undertake a study to determine whether the thresholds should be modified as a result of how the market develops? How would each of these approaches affect the goals of Title VII's reforms of the SB swap market? What are the potential advantages and disadvantages of each of these approaches? If there are potential disadvantages, what steps could be taken to mitigate them?

- Can the impact of post-trade transparency on market behavior be inferred from data collected before post-trade transparency is required? Why or why not?
- In determining when SB swap transaction data should be disseminated to the public, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

C. Mandatory Clearing

The following discussion explains the sequencing of compliance dates of the final rules regarding mandatory clearing of SB swaps pursuant to section 3C of the Exchange Act.¹⁰⁹ These rules include the process for submitting SB swaps for mandatory clearing determinations, the standards with which clearing agencies must comply, and the end-user exception to mandatory clearing. As explained below, the Commission believes it may be appropriate for the procedural rules related to mandatory clearing determinations to be adopted before the rules further defining the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap”

¹⁰⁹ 15 U.S.C. 78c-3.

are adopted and/or effective or before the Cross-Border Rules are proposed. However, given the dependency of the SB swap mandatory clearing regime upon other Title VII final rules yet to be adopted, the Commission believes SB swaps should not be required to be cleared until after the later of: (1) the compliance date of certain of the final rules resulting from the Clearing Agency Standards Proposing Release; (2) the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release; and (3) the Commission determining whether to propose amendments to the existing net capital and customer protection requirements applicable to broker-dealers with regard to SB swap clearing through such broker-dealers and whether to address portfolio margining with swaps.

(i) Clearing Procedures Proposing Release

The Commission believes it may be appropriate for final rules resulting from the Clearing Procedures Proposing Release to be adopted before the rules further defining the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap” are adopted and/or effective or before the Cross-Border Rules are proposed. The Commission, in the Clearing Procedures Proposing Release, also proposed rule and form amendments to implement the requirement that any financial market utility (“FMU”), which may include registered clearing agencies, that is designated as systemically important by the Financial Stability Oversight Council (“FSOC”) pursuant to Title VIII of the Dodd-Frank Act provide 60 days advance notice to the Commission of changes to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the FMU.¹¹⁰ These final rule and form amendments would need to be effective for registered clearing agencies designated by the FSOC as systemically important because such clearing agencies would be required to begin complying

¹¹⁰ See Clearing Procedures Proposing Release at 82501-3.

with the advance notice requirement as soon as they are designated as systemically important.¹¹¹

To fully capture the efficiencies contemplated by this effort to produce a single package of clearing procedural rules, it therefore might be appropriate to adopt the mandatory clearing submission process rules earlier in the implementation process.

However, given the number of final rules the Commission contemplates would need to be in place before the first SB swap mandatory clearing determination can be made, the Commission is considering bifurcating the effectiveness of final rules resulting from the Clearing Procedures Proposing Release for the purposes of Titles VII and VIII of the Dodd-Frank Act such that the mandatory clearing process for the purposes of Title VII would be effective upon a date later than the rules relating to advance notice under Title VIII. Under such an approach, the Commission would not begin reviewing SB swaps to determine whether such SB swaps are required to be cleared until such later date.

(ii) Clearing Agency Standards

The Commission appreciates the views of commenters who have suggested that market participants that perform central clearing services, like clearing agencies, be required to be in compliance with the rules resulting from the Clearing Agency Standards Proposing Release pertaining to their governance and operation before compliance is required with mandatory clearing requirements.¹¹² As discussed in the Clearing Agency Standards Proposing Release, the rules proposed in that release are aimed at reducing risk within the financial system by

¹¹¹ The Commission understands that the FSOC currently is in the process of considering which FMUs to designate as systemically important in accordance with Title VIII of the Dodd-Frank Act and the rules of the FSOC adopted in July 2011. See Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763 (July 27, 2011).

¹¹² See, e.g., letter from Committee on Capital Markets Regulation (June 24, 2011), 76 FR 25274, at 2 (CFTC only letter; recommending that before requiring “mandatory central clearing, the CFTC first needs to finalize the rules for clearinghouses, including margin, governance, financial resources, and conflicts of interest. This will enable clearinghouses to be in compliance before mandatory clearing begins.”).

facilitating prompt and accurate clearance and settlement of all securities transactions and the safety and soundness of clearing agencies.¹¹³ Given that, the Commission believes clearing agencies should be required to be in compliance with certain key requirements resulting from the Clearing Agency Standards Proposing Release before counterparties are required to clear any SB swaps.

To facilitate this ordering, the Commission believes the compliance dates of final rules resulting from the Clearing Agency Standards Proposing Release should be tranching and broadly sequenced by rule type. Taking into consideration comments received to date by the Commission, we believe the first subset of final rules with which compliance should be required are those resulting from proposed rule 17Ad-22 of the Clearing Agency Standards Proposing Release because this rule would address issues central to clearing agency governance, operation, participation standards, and risk management practices.¹¹⁴ The Commission anticipates that compliance with this subset of final rules would be necessary before any SB swaps are required to be cleared.

Additionally, the Commission understands that the final rules resulting from proposed rule 17Ad-22 should be effective at the time, or soon after, registered clearing agencies are designated by the FSOC as systemically important.¹¹⁵ Under such an approach, these rules, together with the final rules resulting from the Clearing Procedures Proposing Release that relate to the advance notice requirement of Title VIII of the Dodd-Frank Act, might need to be adopted

¹¹³ Clearing Agency Standards Proposing Release at 14474.

¹¹⁴ Proposed rule 17Ad-22 would augment the existing statutory requirements for clearing agencies under the Exchange Act by establishing minimum requirements regarding how clearing agencies must maintain effective risk management procedures and controls as well as meet the statutory requirements under the Exchange Act on an ongoing basis. See Clearing Agency Standards Proposing Release at 14476-14492, 14537-14539.

¹¹⁵ See Dodd-Frank Act section 805, 12 U.S.C. 5464.

before the rules further defining the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap” are adopted and/or effective or before the Cross-Border Rules are proposed.

We believe compliance with a second subset of rules for clearing agencies – those focusing more specifically on matters of governance and mitigation of conflicts of interest – should be complied with subsequently, followed by compliance with a third subset composed of the requirements that address more specific components of a clearing agency’s internal operations and administrative practices and other rules concerning clearance and settlement services. The Commission preliminarily believes the clearing of SB swaps could commence before compliance is required with these two subsets of rules.

The Commission understands the views of those commenters that indicate that clearing agencies will need sufficient time to adjust their current practices and establish new policies, procedures, and processes necessary to comply with final rules resulting from the Clearing Agency Standards Proposing Release.¹¹⁶ Accordingly, the Commission anticipates that the compliance dates set forth in such final rules would reflect these considerations by providing clearing agencies with an appropriate amount of time to comply with these final rules.

(iii) End-User Exception from Mandatory Clearing

Before SB swaps are required to be cleared, the Commission believes compliance with final rules resulting from the End-User Clearing Exception Proposing Release should be

¹¹⁶ See, e.g., letter from The Options Clearing Corporation (Apr. 29, 2011), 76 FR 14472, at 17 (noting that Subtitle B of Title VII of the Dodd-Frank Act will require clearing agencies, at a minimum, to “develop[] extensive new policies and procedures, draft[], propos[e] and obtain[] approval of necessary rules and rules changes, execut[e] plans to raise additional financial resources, conduct[] extensive internal training, hir[e] additional compliance personnel, and many other tasks.”).

required.¹¹⁷ Section 3C(g)(1)(C) requires that a counterparty electing the end-user exception notify the Commission as to how it generally meets its financial obligations associated with non-cleared SB swaps.¹¹⁸ The End-User Exception Proposing Release proposed that a counterparty that invokes the clearing exception under section 3C(g)(1) of the Exchange Act would satisfy the notice requirement of section 3C(g)(1)(C) by delivering or causing such notice to be delivered to a registered SDR (or to the Commission if no SDR is available) in the form and manner required by final rules resulting from the Regulation SBSR Proposing Release¹¹⁹ together with additional information that is intended to affirm compliance with particular requirements of the Exchange Act and to aid the Commission in its efforts to prevent abuse of the end-user exception.¹²⁰

As described in section B above, the Commission anticipates that final rules establishing the SDR registration and regulation regime resulting from the SDR Proposing Release and final rules resulting from the Regulation SBSR Proposing Release would be the first sets of final rules under Title VII with which compliance would be required, following the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules. Given this, compliance with final rules resulting from the Regulation SBSR Proposing Release likely would be required before SB swaps are required to be cleared and before the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release. The Commission believes an appropriate amount of time should be provided between the compliance dates of final rules resulting from the Regulation SBSR Proposing Release and the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release so that SB swap

¹¹⁷ Section 3C(g)(1) of the Exchange Act, 15 U.S.C. 78c-3(g)(1).

¹¹⁸ 15 U.S.C. 78c-3(g)(1)(C).

¹¹⁹ See End-User Exception Proposing Release at 80011.

¹²⁰ See id. at 79995.

counterparties that seek to avail themselves of the end-user clearing exception would already be submitting SB swap transaction information to registered SDRs.

(iv) Mandatory Clearing Determinations

As described above, upon the compliance date of the mandatory clearing submission process rules for SB swap submissions under Title VII of the Dodd-Frank Act, the Commission would begin reviewing SB swaps submitted by clearing agencies to determine whether such SB swaps would be required to be cleared. Pursuant to section 3C(b)(3) of the Exchange Act,¹²¹ the Commission is required to make such determinations not later than 90 days after the submission has been made, or has been considered to have been made,¹²² unless the submitting clearing agency agrees to an extension.

Section 3C(b)(2) of the Exchange Act requires that a clearing agency submit to the Commission the SB swaps it plans to accept for clearing in order for the Commission to determine whether the SB swaps described in the submission are required to be cleared.¹²³ Additionally, pursuant to section 3C(b)(1) of the Exchange Act, on an ongoing basis, the Commission shall review SB swaps to make a determination of whether such SB swaps should be required to be cleared.¹²⁴

¹²¹ 15 U.S.C. 78c-3(b)(3).

¹²² Section 3C(b)(2)(B) of the Exchange Act provides that any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the enactment of section 3C(b)(2)(B) shall be considered submitted to the Commission. 15 U.S.C. 78c3(b)(2)(B).

¹²³ Id. at 78c-3(b)(2). As provided in Exchange Act section 3C(b)(2), such submissions and determinations can be made on an individual basis or by group, category, type, or class of SB swaps. Id.

¹²⁴ Id. at 78c-3(b)(1). As provided in Exchange Act section 3C(b)(1), such determinations can be made on an individual basis or by group, category, type, or class of SB swaps. Id.

The Commission recognizes the importance of communicating clearly and in a timely fashion to SB swap market participants which SB swaps will be required to be cleared.¹²⁵ One way in which the Commission could help facilitate such communication is to require the mandatory clearing of SB swaps only some specified amount of time after publishing its determination that such SB swaps are required to be cleared so that SB swap market participants are given appropriate notice of the Commission's SB swap clearing determinations. This approach would afford the clearing agency and its members time to prepare to accommodate the SB swaps that will be required to be cleared. Doing so also would allow SB swap market participants time to establish appropriate clearing arrangements with the clearing agency or indirect clearing arrangements with members of the clearing agency.¹²⁶ Furthermore, the Commission believes early designation of the SB swaps that will be required to be cleared would facilitate the voluntary clearing of such products prior to the compliance date of the clearing requirement.

(v) Expiration of Exemptions Granted Pursuant to the Effective Date Order

The Effective Date Order granted a temporary exemption from compliance with Exchange Act section 3C(g)(5)(B), which would permit a counterparty to an SB swap that is not subject to the mandatory clearing requirement to elect to require the clearing of such SB swap in certain circumstances.¹²⁷ In granting this exemption, the Commission noted the exemption was

¹²⁵ See, e.g., letter from the International Swaps and Derivatives Association, Inc. (Feb. 14, 2011), File No. S7-44-10, at 10-11 (recommending that the Commission consider an extended period between a determination being made that a SB swap is required to be cleared and clearing becoming mandatory on that product, as "[t]his period would provide market participants the opportunity to make themselves appropriately ready to clear mandated transactions without risking either (i) disruption to their use of derivatives for hedging or (ii) noncompliance with the law.").

¹²⁶ See, e.g., letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 5; letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 8-10.

¹²⁷ Effective Date Order at 36291.

needed because there currently are no central counterparties offering customer clearing of SB swaps and because additional action by the Commission would be necessary to address segregation and other customer protection issues.¹²⁸ The exemption from compliance with the requirements of section 3C(g)(5)(B) will expire upon the earliest compliance date set forth in any of the final rules regarding section 3C(b) of the Exchange Act,¹²⁹ which pertains to the mandatory clearing submission process.¹³⁰ In setting the compliance date for the final rules pertaining to the mandatory clearing submission process, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to this temporary exemption.

The Effective Date Order also granted a temporary exemption from compliance by registered clearing agencies with Exchange Act section 3C(j) until the earliest compliance date set forth in any of the final rules regarding section 3C(j)(2) of the Exchange Act.¹³¹ Exchange Act section 3C(j) requires registered clearing agencies to designate a chief compliance officer and establishes the duties of the chief compliance officer.¹³² The Clearing Agency Standards Proposing Release contained proposed rules regarding section 3C(j)(2) of the Exchange Act.¹³³ In setting the compliance date for the final rules regarding section 3C(j)(2), the Commission

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ 15 U.S.C. 78c-3(b).

¹³¹ Effective Date Order at 36291-2.

¹³² 15 U.S.C. 78c-3(j).

¹³³ Clearing Agency Standards Proposing Release at 14499-14500.

intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to this temporary exemption.

(vi) Request for Comment

- Are there other final rules or sets of final rules beyond those resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release with which compliance should be required before compliance is required with final rules resulting from the End-User Clearing Exception Proposing Release? If so, which ones, and why? Alternatively, should compliance with final rules resulting from the End-User Clearing Exception Proposing Release be accelerated to allow for the use of the exception to be established by those rules before compliance with final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release is required? For example, should the Commission consider temporarily de-linking the notice requirement of the end-user clearing exception from certain of the final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release, such that it could be utilized earlier in the implementation process? Why or why not? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Would there be positive or negative consequences of the Commission determining what SB swaps will be subject to mandatory clearing and allowing a period of time prior to requiring the clearing of such SB swaps? If so, what are the consequences, why would they occur, and if there are negative consequences, what steps could be taken to mitigate them? How would the allowance of such a period of time affect the goals of Title VII's reforms of the SB swap market?

- Has the Commission appropriately identified in the discussion above those rules with which compliance should be required before SB swaps are required to be cleared? Why or why not?
- Are there other rules or sets of rules with which compliance should be required before SB swaps are required to be cleared? If so, which ones, and why?
- Should the Commission require the mandatory clearing of SB swaps for a subset of SB swap market participants, such as SBSBs and their affiliates, before all of the final rules regarding the SBSB registration and regulation regime are in place? If so, which subset of SB swap market participants and why? Would doing so affect the goals of the Title VII reforms of the SB swap market?
- Should the Commission consider further phasing in such submissions and determinations by type of SB swap? If so, what further phasing in should occur? For example, should the Commission implement the mandatory clearing submission process for credit-related SB swaps, then for other SB swaps?¹³⁴ Would such phasing in affect the goals of the Title VII reforms of the SB swap market? Would there be potential advantages and disadvantages of such phasing in? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission phase in mandatory clearing by type of market participant? For example, should the Commission phase these requirements in the manner proposed by the

¹³⁴ “Credit-related SB swaps” means any SB swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or on a credit event relating to one or more issuers or securities, including but not limited to any SB swap that is a credit default swap, total return swap on one or more debt instruments, debt swaps, debt index swaps, or credit spread. “Other SB swaps” means any SB swap not described in the preceding sentence.

CFTC in its Clearing and Trade Execution Implementation Proposal?¹³⁵ What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

- In determining when SB swaps would be required to be cleared, should the Commission take into account the mandatory clearing timelines of other authorities? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

D. SBSD and MSBSP Registration and Regulation

Pursuant to sections 3E¹³⁶ and 15F¹³⁷ of the Exchange Act, the Commission must adopt rules pertaining to the regulation of SBSDs and MSBSPs in the following areas:

- Registration of SBSDs and MSBSPs;
- Business conduct standards for SBSDs and MSBSPs;
- Trade acknowledgment and verification of SB swap transactions by SBSDs and MSBSPs;
- Capital, margin and segregation requirements applicable to SBSDs and MSBSPs;¹³⁸ and

¹³⁵ See *supra* note 53 and the accompanying text for a discussion of the CFTC Clearing and Trade Execution Implementation Proposal.

¹³⁶ 15 U.S.C. 78c-5.

¹³⁷ 15 U.S.C. 78o-10.

¹³⁸ In addition, the Commission intends to determine whether to propose amendments to its rules regarding net capital and customer protection requirements, Exchange Act Rule 15c3-1 and Rule 15c3-3, respectively, specifically with regard to SB swap activity in a broker-dealer. The Commission understands that many members of clearing agencies are dually-registered broker-dealers and futures commission merchants and that much of the clearing of SB swaps may occur through such dually-registered entities. See, e.g., letter to the Commission from ICE Clear Credit LLC, dated November 7, 2011 (“ICE Clear Credit Letter”), available at: <http://www.sec.gov/rules/petitions/2011/petn4-641.pdf> (requesting exemptive relief from the application of section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder to allow ICE Clear Credit, and its members that are dually-registered broker-dealers and futures commission merchants, to, among other things: (1) hold customer assets used to margin, secure, or guarantee customer positions consisting of cleared credit default swaps that include swaps and SB swaps in a commingled customer omnibus account subject to section 4d(f) of the Commodity

- Reporting and recordkeeping requirements applicable to SBSDs and MSBSPs.

The Commission understands that SBSDs and MSBSPs would need an appropriate amount of time to determine whether they are required to register with the Commission and if so, to put into place the necessary infrastructure and documentation to comply with requirements ultimately applicable to such entities.¹³⁹ The following section discusses the timing of the implementation of these requirements, the proposed registration process set forth in the SB Swap Participant Registration Proposing Release, and other related issues.

(i) SBSD and MSBSP Registration and Regulatory Requirements

In the SB Swap Participant Registration Proposing Release, the Commission proposed that SBSDs and MSBSPs conditionally register with the Commission, and then convert such conditional registration to “ongoing registration” by filing a certification on or before the “last compliance date”.¹⁴⁰ The SB Swap Participant Registration Proposing Release also requested

Exchange Act; and (2) calculate margin for this commingled customer account on a portfolio margin basis); see also Commodity Exchange Act section 4d(F)(1) (making it unlawful for any person to, among other things, accept money and securities from a swaps customer for a cleared swap unless such person has registered with the CFTC as a futures commission merchant). In light of the role broker-dealers perform in clearing SB swaps, the Commission recognizes the importance of considering net capital and customer protection requirements with regard to SB swap clearing through a broker-dealer prior to requiring that SB swaps be cleared.

The Commission also recognizes the importance of determining whether margin for SB swaps that are required to be cleared can be calculated on a portfolio margining basis, as there might be customer capital-related efficiencies that result from holding SB swap and swap positions in a single account as opposed to multiple accounts. See ICE Clear Credit Letter at 6, 13-14. Commission staff currently is evaluating the separate statutory and bankruptcy regimes that apply to SB swaps and swap, and is working with the CFTC staff to develop recommendations on any next steps.

¹³⁹ See, e.g., letter from Financial Services Roundtable (May 12, 2011), File No. 4-625, at 7-8, 11; letter from Financial Services Forum, Future Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 9; letter from International Swaps and Derivatives Association, Inc. (Jan. 24, 2011), 75 FR 71379, at 2 (CFTC only letter).

¹⁴⁰ The term “last compliance date” is defined, in proposed rule 15Fb2-1(e), to mean the latest date, designated by the Commission, by which SBSDs and MSBSPs must comply with any of the initial rules promulgated under section 15F of the Securities Exchange Act of 1934, 15 U.S.C. 78o-10.

comment as to whether the Commission should delay requiring registration until after the last compliance date, rather than adopting a conditional registration process.¹⁴¹

A number of sequencing issues arise in relation to compliance with the requirements applicable to SBSDs and MSBSPs pursuant to sections 3E and 15F of the Exchange Act that are relevant to both conditional and non-conditional registration processes. Specifically, the Commission understands that some of the requirements that would be applicable to SBSDs and MSBSPs could be complied with by SBSDs and MSBSPs in a relatively shorter amount of time, while others would require more time. This, in turn, counsels against imposing all of the compliance dates for these requirements at once and instead suggests phasing in compliance by considering the amount of time estimated to be required for compliance with the relevant provisions. For example, the Commission understands from commenters that SBSDs and MSBSPs might need a shorter amount of time to come into compliance with certain recordkeeping rules applicable to such persons, as these rules likely may not necessitate extensive modifications to SBSDs' and MSBSPs' business practices.¹⁴²

Some commenters have indicated that SBSDs and MSBSPs might need more time to come into compliance with final rules resulting from the Business Conduct Standards Proposing Release, as adherence to these standards and duties could involve changes to the practices, policies, and procedures of SBSDs and MSBSPs.¹⁴³ Among other things, these proposed rules

¹⁴¹ See SB Swap Participant Registration Release at 65788, question #4.

¹⁴² See, e.g., letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 5 (stating that "recordkeeping may rely on internal resources, and therefore may be able to be implemented more quickly....").

¹⁴³ See, e.g., letter from the Futures Industry Association, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association (Aug. 26, 2011), 76 FR 42396; letter from Managed Funds Association (Aug. 29, 2011), 76 FR 42396, at 6-7 (noting that the requirements proposed in the Business Conduct Standards Proposing Release would require MSBSPs to implement new processes and procedures, which could result in "substantial costs" and expenditure of "substantial resources").

would require SBSBs and MSBSBs to communicate with their SB swap counterparties in a fair and balanced manner¹⁴⁴ and to make certain disclosures to such counterparties,¹⁴⁵ and would impose additional requirements for dealings with “special entities.”¹⁴⁶

In addition, the Commission understands from commenters that compliance with documentation standards resulting from the Trade Documentation Proposing Release, which include standards relating to confirmation, processing, netting, documentation, and valuation of all SB swap transactions,¹⁴⁷ may require more time for full implementation. Documentation would need to be developed and processes would need to be established to enable SBSBs and MSBSBs to document, implement, and monitor these new requirements as applied to all SB swap transactions.¹⁴⁸ However, the Commission believes that some of these documentation standards may require less time for compliance than others.¹⁴⁹

The Commission also understands that capital, margin, and segregation requirements could have a significant impact upon the business structure of SBSBs and MSBSBs and this

¹⁴⁴ See proposed rule 15Fh-3(g), Business Conduct Standards Proposing Release at 42418-19, 42455 (proposing to require SBSBs and MSBSBs to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith).

¹⁴⁵ See, e.g., proposed rule 15Fh-3(b), *id.* at 42405-10, 42454 (proposing rules that would require disclosures by SBSBs and MSBSBs to counterparties of information related to material risks and characteristics the SB swap and material incentives or conflicts of interest that an SBSB or MSBSB may have in connection with the SB swap).

¹⁴⁶ See, e.g., proposed rule 15Fh-5(a), *id.* at 42425-26, 42457 (proposing to require any SBSB or MSBSB that offers to enter into or enters into an SB swap with a special entity to have a reasonable basis to believe that the special entity has an “independent representative” that meets certain specified requirements).

¹⁴⁷ See *supra* note 21.

¹⁴⁸ See, e.g., letter from the International Swaps and Derivatives Association (Feb. 22, 2011), 76 FR 3859 (noting, for example, the “heavy documentation burden” that would be placed upon the inception of transactions by the proposed rules); letter from MarkitSERV (Feb. 22, 2011), 76 FR 3859, at 11 (noting that “the proposed requirements regarding the confirmation process and time periods for such confirmations would be demanding in many cases.”).

¹⁴⁹ As one commenter has noted, there are aspects of SB swap transaction documentation that are easier to implement, and thus could be implemented earlier, and others that may require a longer implementation window, as “aspects of the trade documentation rules... would represent a significant shift from current industry best practices.” Letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 4.

impact could influence the decision of whether a person registers with the Commission as such or whether it restructures its SB swap business such that registration is not required.

Commenters have noted that the capital and margin requirements required to be adopted by Title VII may result in significant changes to the financial arrangements of the impacted persons and, as a result, should be sequenced in a manner that allows impacted persons enough time to plan to accommodate such changes.¹⁵⁰ Commenters also have noted that ample time would be needed to adhere to the segregation requirements applicable to customer collateral collected for cleared and uncleared SB swaps because these requirements would necessitate the establishment of policies and procedures related to the collection and maintenance of collateral.¹⁵¹ Accordingly, the Commission preliminarily believes the compliance date of these rules should reflect the amount of time that SBSDs and MSBSPs might need to come into compliance with these new requirements and plans to address this issue in the relevant final rules.

Moreover, in the Cross-Border Rules, the Commission intends to address the extent to which non-U.S. SB swap market participants would be subject to the SBSd and MSBSP registration and regulatory requirements. Such market participants would need time to consider the extent to which these requirements apply to their SB swap business.

¹⁵⁰ See, e.g., *id.* at 11 (noting that “capital and margin changes may lead to significant changes in available cash resources that will have broader financial repercussions for affected organizations, including end-users” and recommending that the Commission “recognize the significance of these issues and allow market participants sufficient time to revise their financial planning to accommodate them.”).

¹⁵¹ See, e.g., letter from the Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 5 (noting that “[l]egal documentation, treatment of collateral, margin requirements, account setup, and fee negotiations...between Swap clearing houses and their clearing members will take significant time.”).

(ii) Other Timing Issues and Expiration of the Exemption Granted Pursuant to the Effective Date Order

There are additional timing issues that are relevant regardless of whether a conditional registration process is employed. Upon registration, SBSDs and MSBSPs would be required to adhere to certain self-operating provisions of section 15F of the Exchange Act,¹⁵² specifically, the requirement to designate a chief compliance officer pursuant to section 15F(k)(1) of the Exchange Act¹⁵³ and the obligation of the chief compliance officer to adhere to the duties set forth in section 15F(k)(2) of the Exchange Act.¹⁵⁴ However, the chief compliance officer may not be required to prepare and submit annual reports to the Commission pursuant to section 15F(k)(3) of the Exchange Act, as the process for doing so is subject to rulemaking by the Commission¹⁵⁵ and such rules may not have been adopted by the Commission and/or require compliance at that time.¹⁵⁶

The Effective Date Order granted a temporary exemption from compliance with section 3E(f) of the Exchange Act, which requires SBSDs and MSBSPs to segregate initial margin amounts delivered by their counterparties in uncleared SB swaps if requested to do so by such counterparties.¹⁵⁷ This temporary exemption will expire on the date upon which the rules adopted by the Commission to register SBSDs and MSBSPs become effective.¹⁵⁸

¹⁵² SB Swap Participant Registration Proposing Release at 65787.

¹⁵³ 15 U.S.C. 78o-10(k)(1).

¹⁵⁴ Id. at 78o-10(k)(2).

¹⁵⁵ See id. at 78o-10(k)(3)(A).

¹⁵⁶ These rules have been proposed as part of the Business Conduct Standards Proposing Release. See proposed rule 15Fk-1(c), Business Conduct Standards Proposing Release at 42459.

¹⁵⁷ 15 U.S.C. 78c-5(f).

¹⁵⁸ Effective Date Order at 36294.

If the Commission adopts a conditional SBSD and MSBSP registration process and this temporary exemption expires, SBSDs and MSBSPs would be required to segregate initial margin amounts delivered by their counterparties in uncleared SB swaps before the capital, margin, and segregation rules are adopted or before compliance with such rules is required. However, the Commission believes it would not be appropriate to require SBSDs and MSBSPs to comply with Exchange Act section 3E(f) before the Commission adopts and requires compliance with the rules pertaining to the segregation of margin pursuant to section 3E of the Exchange Act.¹⁵⁹ Given this, if the Commission determines to adopt a conditional registration regime, the Commission will consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to extend the exemption from compliance with section 3E(f) of the Exchange Act until the later of: (1) the date upon which SBSDs and MSBSPs are required to register with the Commission; and (2) the last compliance date of any of the final rules to be adopted under sections 3E and 15F of the Exchange Act.

(iii) Request for Comment

- Should the registration of SBSDs and MSBSPs be required before compliance with some, but not all, of the rules to be adopted under sections 3E and 15F of the Exchange Act is required? Why or why not? If yes, what would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?
- What would be the advantages and disadvantages of requiring SBSDs and MSBSPs to register with the Commission prior to the compliance date of the capital, margin, and segregation requirements? If there are potential disadvantages, what steps could be taken to mitigate them? Would SBSDs and MSBSPs be subject to additional costs or other

¹⁵⁹ 15 U.S.C. 78c-5.

burdens if the Commission were to require such persons to register with the Commission prior to the compliance date for the capital, margin, and segregation requirements? Why or why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?

- In determining when SBSDs and MSBPs should be required to register with the Commission, should the Commission take into account the CFTC's timing for its parallel requirement and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- What would be the advantages and disadvantages of requiring SBSDs and MSBSPs to comply with final rules resulting from the Business Conduct Standards Proposing Release prior to the compliance date of the capital, margin, and segregation requirements and vice versa? If there are potential disadvantages, what steps could be taken to mitigate them? Would SBSDs and MSBSPs be subject to additional costs or other burdens if the Commission were to require compliance with final rules resulting from the Business Conduct Standards Proposing Release prior to the compliance date of the capital, margin, and segregation requirements? Why or why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?
- Would SBSDs and MSBSPs be subject to additional costs or other burdens if the Commission were to require compliance with the capital, margin, and segregation requirements prior to the compliance date of the business conduct standards? Why or

why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?

- Should compliance with the final rules to be adopted under sections 3E and 15F of the Exchange Act be further sequenced in some manner beyond the estimated amount of time needed for compliance, such as by SB swap market participant type (i.e., SBSB or MSBSP)? If so, how? Are there other factors that should be considered in establishing the compliance dates for these rules?
- In determining when SBSBs and MSBs should be subject to the final rules to be adopted under sections 3E and 15F of the Exchange Act, should the Commission take into account the CFTC's timing for its parallel requirements and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission phase the introduction of the SB swap trade documentation and margining requirements by type of SB swap market participant? For example, should the Commission phase these requirements in the manner proposed by the CFTC in its Trading Documentation and Margining Implementation Proposal?¹⁶⁰ What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

E. SB SEF Registration and Regulation and the Mandatory Trade Execution Requirement

¹⁶⁰ See supra note 53 and the accompanying text for a discussion of the CFTC Clearing and Trade Execution Implementation Proposal.

The following section discusses timing issues pertaining to the implementation of the registration requirements and core principles applicable to SB SEFs as set forth in section 3D of the Exchange Act¹⁶¹ and the mandatory trade execution requirement as set forth in section 3C(h) of the Exchange Act.¹⁶² This section also discusses the timing of the compliance dates of final rules resulting from Proposed Regulation MC that would be applicable to SB SEFs and the sequencing of the mandatory trade execution requirement as it relates to both the mandatory clearing requirement and the exception from the mandatory trade execution requirement for any SB swap that is not made available to trade by an exchange or SB SEF. Finally, this section discusses the timing of the expiration of the temporary exemptions granted in the Effective Date Order¹⁶³ and the Exchange Act Exemptive Order¹⁶⁴ that permit certain persons that engage in SB swap activities to continue to do so until the earliest compliance date set forth in any final rules regarding the registration of SB SEFs.

(i) SB SEF Registration and Core Principles

The Dodd-Frank Act amended the Exchange Act to add new section 3D.¹⁶⁵ Section 3D(a)(1) provides that no person may operate a facility for the trading or processing of SB swaps, unless the facility is registered as an SB SEF or as a national securities exchange.¹⁶⁶ Section 3(a)(77) of the Exchange Act defines “security-based swap execution facility” as a

¹⁶¹ 15 U.S.C. 78c-4.

¹⁶² Id. at 78c-3(h). See section II.E.(iii) infra for a discussion of the mandatory trade execution requirement set forth in section 3C(h) of the Exchange Act.

¹⁶³ See supra note 34.

¹⁶⁴ See supra note 36.

¹⁶⁵ See Pub. L. No. 111-203, section 763(c) (adding section 3D of the Exchange Act).

¹⁶⁶ Id.

trading system or platform in which multiple participants have the ability to execute or trade SB swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that (A) facilitates the execution of SB swaps between persons; and (B) is not a national securities exchange. Thus, the Commission has proposed to interpret these two provisions, taken together, to require registration as a SB SEF or a national securities exchange for any entity that meets the definition of SB SEF in section 3(a)(77) of the Exchange Act.¹⁶⁷

To facilitate the start of organized trading of SB swaps, the Commission proposed rule 801(c) of proposed Regulation SB SEF, which would provide a method for the Commission to grant temporary registration to an applicant to become a registered SB SEF.¹⁶⁸ For any application for registration as a SB SEF filed with the Commission on or before July 31, 2014, for which the applicant indicates that it would like to be considered for temporary registration, the Commission proposed to grant such temporary registration as long as certain requirements were met. The Commission believes a temporary (or similar) registration process for prospective SB SEFs would serve as a useful tool during the initial implementation period to allow an applicant to operate as a SB SEF for a period of time while the Commission reviews its SB SEF registration application.

In the SB SEF Proposing Release, the Commission stated that when considering whether to grant a request for temporary registration, the Commission would review the information provided by the applicant that the Commission believes to be relevant, including, but not limited to: whether the applicant's trading system satisfies the definition of a "security-based swap

¹⁶⁷ See SB SEF Proposing Release at 10959 n.62.

¹⁶⁸ See proposed rule 801(c) of proposed Regulation SB SEF, SB SEF Proposing Release at 11054.

execution facility” in section 3(a)(77) of the Exchange Act and any Commission rules, interpretations or guidelines regarding such definition; any access requirements or limitations imposed by the SB SEF; the ownership and voting structure of the applicant; and any certifications made by the applicant, including with respect to its capacity to function as a SB SEF and its compliance with the Exchange Act and the rules and regulations thereunder.¹⁶⁹

Temporary registration would expire on the earlier of: (1) the date that the Commission grants or denies the applicant’s registration as a SB SEF; or (2) the date that the Commission rescinds the applicant’s temporary registration.

As discussed further below, the Commission has exempted entities that meet the definition of “security-based swap execution facility” from having to comply with the registration requirements set forth in section 3D(a)(1) of the Exchange Act until the compliance date set forth in the final rules pertaining to the registration of SB SEFs. The Commission expects to set forth in any future release adopting final SB SEF rules the timing for compliance with the registration requirements (including any temporary registration requirements), the core principles and the rules thereunder.

(ii) Proposed Regulation MC

Proposed Regulation MC would apply governance requirements and ownership and voting limitations to SB SEFs as a means to mitigate conflicts of interest for SB SEFs.¹⁷⁰ The Commission may, taking into account comments received, consider taking final action on the conflicts of interest proposals relating to SB SEFs that are set forth in proposed Regulation MC

¹⁶⁹ SB SEF Proposing Release at 10999.

¹⁷⁰ See Proposed Regulation MC, *supra* note 27. Proposed Regulation MC also would apply governance requirements and ownership and voting limitations on national securities exchanges that post or make available for trading SB swaps.

as part of any final rules the Commission may adopt that relate to the regulation and registration of SB SEFs. The Commission preliminarily believes the proposed rules for SB SEFs contained in Proposed Regulation MC¹⁷¹ align in scope with proposed Rule 820 implementing Core Principle 11, as set forth in proposed Regulation SB SEF,¹⁷² because both proposals include rules that are designed to minimize and resolve conflicts of interest with respect to SB SEFs.

(iii) Statutory Sequencing of the SB Swap Mandatory Trade Execution Requirement

Section 3C(h) of the Exchange Act requires that transactions in SB swaps that are subject to the clearing requirement of section 3C(a)(1) of the Exchange Act must be executed on an exchange or on a SB SEF registered with the Commission (or a SB SEF exempt from registration), unless no exchange or SB SEF makes the SB swap available to trade (referred to as the “mandatory trade execution requirement”) or the SB swap transaction is subject to the clearing exception in section 3C(g) of the Exchange Act.¹⁷³ The Commission believes this section provides a certain sequencing of the SB swap mandatory trade execution requirement, as it states that only a SB swap that has been determined by the Commission to be required to be cleared, and that has been made available to trade on an exchange or registered SB SEF, must be executed on an exchange or registered SB SEF.¹⁷⁴

As discussed in section II.C above, the Commission anticipates that SB swap transactions that the Commission determines are subject to mandatory clearing would not be required to be cleared until the later of: (1) the compliance date of certain of the final rules to be adopted

¹⁷¹ Proposed Regulation MC at 65890-12, 65931-2.

¹⁷² SB SEF Proposing Release at 11064.

¹⁷³ 15 U.S.C. 78c-3(h).

¹⁷⁴ See id.

pursuant to the Clearing Agency Standards Proposing Release; (2) the compliance date of the final rules adopted pursuant to the End-User Exception Proposing Release; and (3) the Commission determining whether to propose amendments to the existing net capital and customer protection requirements applicable to broker-dealers with regard to SB swap clearing through such broker-dealers and whether to address portfolio margining with swaps. The Commission expects there would be no mandatory exchange or SB SEF trading of SB swap transactions (thus allowing such SB swap transactions to continue to trade OTC) before compliance is required with any final rules adopted pursuant to the Clearing Agency Standards Proposing Release and the End-User Exception Proposing Release and before the Commission considers appropriate steps to address potential issues relating to the existing broker-dealer net capital and customer protection requirements and portfolio margining with swaps, as SB swaps would not be required to be cleared until the Commission has determined that SB swaps are required to be cleared and the clearing requirement has become operative.

The Dodd-Frank Act additionally provides that SB swaps that are subject to mandatory clearing but that have not been made available to trade by an exchange or SB SEF would not be subject to the mandatory trade execution requirement.¹⁷⁵ In the SB SEF Proposing Release, the Commission proposed to interpret the phrase “made available to trade” to mean something more than the decision to simply trade an SB swap on a SB SEF or an exchange, and that SB swaps subject to mandatory clearing would not be subject to mandatory exchange or SB SEF trading simply because they are listed on a SB SEF or exchange.¹⁷⁶ The Commission further proposed that the determination as to when a SB swap would be considered to be “made available to trade”

¹⁷⁵ Exchange Act section 3C(h)(2), 15 U.S.C. 78c-3(h)(2).

¹⁷⁶ SB SEF Proposing Release at 10969.

on an exchange or a SB SEF be made pursuant to objective measures established by the Commission, rather than by one or a group of SB SEFs.¹⁷⁷ The Commission further noted that it did not, at that time, have sufficient data to propose standards pursuant to which a determination of whether an SB swap is “made available to trade” should be made, and requested that commenters provide suggestions as to those objective standards that would be appropriate.¹⁷⁸ The Commission is reviewing comments received on its proposal relating to the determination of when a SB swap should be “made available to trade”. If the Commission adopts its interpretation of “made available to trade” as proposed, the Commission anticipates that it would ultimately adopt standards for determining when a SB swap has been “made available to trade.” Thus, if the Commission adopts the proposed interpretation, the Commission expects that there would be no mandatory exchange or SB SEF trading of SB swaps (and thus such SB swaps may continue to trade OTC) before: (1) any such standards have been finalized; (2) a SB swap has been determined to be “made available to trade” pursuant to such standards; and (3) such “made available to trade” determination has become effective.

As discussed above, the specific compliance dates for the core principles applicable to SB SEFs as set forth in the Exchange Act, and any final rules relating to SB SEFs that are adopted by the Commission, including registration rules, will be addressed in any release adopting such final rules. The Commission understands that some entities that intend to seek to register with the Commission as an SB SEF or to be exempt from such registration would do so as soon as

¹⁷⁷ Id.

¹⁷⁸ Id.

possible, which likely would be, as discussed above, before the mandatory trade execution requirement becomes operational.¹⁷⁹

Based upon Commission staff conversations with industry participants, the Commission believes that some entities that meet the definition of an SB SEF may seek to register with the Commission (or be exempt from such registration) before the mandatory trade execution requirement becomes operational.

(iv) Expiration of Exemptions and Exceptions Granted Pursuant to the Effective Date Order and the Exchange Act Exemptive Order

The compliance dates of certain of the rules pertaining to SB SEFs will result in the expiration of certain of the temporary exemptions and exceptions granted pursuant to the Effective Date Order and the Exchange Act Exemptive Order. Specifically, the following temporary exemptions granted pursuant to the Effective Date Order will expire upon the earliest compliance date set forth in any of the final rules pertaining to the registration of SB SEFs:

- The exemption from compliance with section 3D(a)(1) of the Exchange Act's prohibition against any person operating a facility for the trading or processing of SB swaps unless the facility is registered as a SB SEF or as a national securities exchange,¹⁸⁰ and
- The exemption from compliance with section 3D(c) of the Exchange Act's requirement that a national securities exchange (to the extent that it also operates a SB SEF and uses the same electronic trade execution system for listing and executing trades of SB swaps

¹⁷⁹ See, e.g., letter from Tradeweb Markets LLC (Apr. 4, 2011), File No. S7-06-11, at 1; letter from MarketAxess Corporation (Apr. 4, 2011), File No. S7-06-11, at 1.

¹⁸⁰ Effective Date Order at 36306.

on or through the exchange and the facility) identify whether electronic trading of SB swaps is taking place on or through the national securities exchange or the SB SEF.¹⁸¹

Also upon the earliest compliance date set forth in the any of the final rules pertaining to the registration of SB SEFs, the temporary exceptions from the following Exchange Act requirements will expire:

- The temporary exemption from Exchange Act sections 5 and 6;¹⁸²
- The exemption applicable to any person other than a clearing agency acting as a central counterparty in SB swaps from the requirements to register as a national securities exchange under sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with the person's activities involving SB swaps;¹⁸³
- The exemption applicable to broker-dealers from section 5 of the Exchange Act solely in connection with the broker's or dealer's activities involving SB swaps that it effects or reports on an exchange that is exempted from registration pursuant to the Exchange Act Exemptive Order's temporary exemption from Exchange Act sections 5 and 6;¹⁸⁴
- The exemption applicable to credit default swap central counterparties from the requirements of sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with their calculation of mark-to-market prices for opened positions in cleared credit default swaps;¹⁸⁵

¹⁸¹ Id. at 36306.

¹⁸² Exchange Act Exemptive Order at 39939.

¹⁸³ Id.

¹⁸⁴ Id.

¹⁸⁵ Id. at 39939-40.

- The exemption applicable to any member of a credit default swap central counterparty from the requirements of section 5 of the Exchange Act solely to the extent such member uses any transactions in cleared credit default swaps to effect any transaction in cleared credit default swaps, or to report any such transaction, in connection with the credit default swap central counterparty’s clearance and risk management process for cleared credit default swaps.¹⁸⁶

The Commission granted the foregoing exemptions in the Exchange Act Exemptive Order because certain persons, particularly those that would meet the statutory definition of “security-based swap execution facility,” may be engaging in activities that would subject them to the restrictions and requirements of Sections 5 and 6 of the Exchange Act as of the Effective Date. In setting the compliance dates for the final rules pertaining to the registration and regulation of SB SEFs, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to any of the above-described temporary exemptions.

(v) Request for Comment

- Pursuant to the sequencing described herein, rules implementing the regulation and registration of SB SEFs would be sequenced later in the process than other rules implementing SB swap provisions of the Dodd-Frank Act. Do commenters believe this sequencing is appropriate or should any final rules governing SB SEFs be considered at an earlier point in time? Why or why not? How would this sequencing affect the goals of Title VII’s reforms of the SB swap market?

¹⁸⁶ Id. at 39940.

- Should an SB SEF be required to comply with all duties, core principles and other requirements upon receiving approval of its registration with the Commission or should compliance with some of these requirements be delayed until a later point in time? Why or why not? If so, for which requirements and until what point in time should compliance be delayed? What factors, if any, should be considered in establishing the compliance dates for any SB SEF requirements that should be subject to delayed or phased-in compliance, and why should such factors be considered? How would such a delay or phasing in affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of such a delay or phasing in? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- In the SB SEF Proposing Release, the Commission proposed a rule that would permit applicants to apply for temporary registration as a SB SEF.¹⁸⁷ The Commission believes temporary registration for SB SEFs could serve as a useful tool during the initial implementation period and should provide the Commission sufficient time to review an application more thoroughly when considering an application for registration that is not limited in duration.¹⁸⁸ Should the Commission consider granting an exemption from section 3D of the Exchange Act or extending the current exemption from section 3D in the Effective Date Order for any entity that submits an application for temporary SB SEF registration to permit it to operate as a SB SEF pending submission of an application for permanent SB SEF registration, or pending Commission approval or disapproval of its

¹⁸⁷ See SB SEF Proposing Release at 10999-11000; see also section II.E.(i) supra.

¹⁸⁸ See SB SEF Proposing Release at 11000.

permanent application? If so, should the Commission condition such extension or granting of an exemption on the prospective SB SEF complying with certain conditions such as, for example, meeting the Commission's interpretation of the definition of SB SEF, satisfying any requirements relating to fair access, and providing the Commission with access to its books and records? Why or why not? If so, which conditions should the Commission impose on the SB SEF's operations prior to the Commission taking action on its application for registration, and why?

- If the Commission were to permit entities to submit applications for temporary SB SEF registration prior to their permanent SB SEF applications, how soon after an entity submitted its application for temporary SB SEF registration should it be required to submit its application for permanent SB SEF registration? For example, would 360 days be sufficient? Should a shorter or longer time period be applied? If so, what is an appropriate time period and why?
- In the SB SEF Proposing Release, the Commission proposed an initial implementation phase for the registration of SB SEFs, which phase would begin on the date of Regulation SB SEF's effectiveness and end on July 31, 2014.¹⁸⁹ Based upon the sequencing of the compliance dates of the final rules described herein that would result in the regulation and registration of SB SEFs later in the implementation process, is this time period initially proposed to implement the registration of SB SEFs appropriate? Why or why not? If not, what would be a more appropriate time period?
- In determining when to require SB SEFs to register with the Commission, should the Commission take into account the CFTC's timing for its parallel requirement and/or the

¹⁸⁹ See id. at 10998.

timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

- Should the Commission consider a delayed implementation schedule for any conflicts of interest rules that it may adopt for SB SEFs? Why or why not? How would such a delayed implementation schedule affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of doing so? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Are there other rules or sets of rules with which compliance should be required, or which must be effective, before SB swaps subject to the mandatory trade execution requirement are required to be traded? If so, which ones, and why?
- Should the Commission phase in compliance with the mandatory trade execution requirement by type of market participant? For example, should the Commission phase in this requirement by market participant type in the manner proposed by the CFTC in its Clearing and Trade Execution Implementation Proposal?¹⁹⁰ Why or why not? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

¹⁹⁰ See supra note 53 and accompanying text for a discussion of the CFTC's proposals to phase in compliance with the swap clearing, trading, trade documentation, and margining requirements arising under Subtitle A of Title VII of the Dodd-Frank Act by category of market participant. See also supra note 59 and accompanying text noting that, in the CFTC Clearing and Trade Execution Implementation Proposal, the CFTC stated that before the mandatory clearing of swaps begins, the product and entity definitions, the end-user exception from mandatory clearing, and the rules pertaining to the segregation of customer collateral must be adopted and that before swap market participants could be required to comply with a trade execution requirement, the CFTC must adopt final rules related to swap execution facilities and designated contract markets.

- In determining when to require compliance with the mandatory trade execution requirement, should the Commission take into account the CFTC's timing for its parallel requirement and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

III. Solicitation of Comments

The Commission intends to monitor closely the imposition of the new regulatory regime upon SB swaps and SB swap market participants to determine to what extent, if any, additional regulatory action may be necessary. The Commission is soliciting comment on all aspects of this Statement and the guidance it provides regarding compliance dates for the rules to be adopted under Subtitle B of Title VII. Comments received will be addressed in the relevant final rulemakings to which they pertain.

By the Commission.

Elizabeth M. Murphy
Secretary

Date: June 11, 2012

[FR Doc. 2012-14576 Filed 06/13/2012 at 8:45 am; Publication Date: 06/14/2012]