SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-75845; File No. S7-15-15]

RIN 3235-AL74

Access to Data Obtained by Security-Based Swap Data Repositories and Exemption from Indemnification Requirement

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: Pursuant to section 763(i) of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing amendments to rule 13n-4 under the Securities Exchange Act of 1934 ("Exchange Act") related to regulatory access to security-based swap data held by security-based swap data repositories. The proposed rule amendments would implement the conditional Exchange Act requirement that security-based swap data repositories make data available to certain regulators and other authorities, and would set forth a conditional exemption from the statutory indemnification requirement associated with that regulatory access provision.

DATES: Submit comments on or before [insert date 45 days after publication in Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-15-15 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-15-15. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Carol McGee, Assistant Director, or Joshua Kans, Senior Special Counsel, at (202) 551-5870; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing to add paragraphs (b)(9) and (b)(10) to Exchange Act rule 13n-4 to implement the statutory requirement that security-based swap data repositories conditionally provide data to certain regulators and other authorities. The Commission also is proposing to add paragraph (d) to rule 13n-4 to provide a conditional exemption from the associated statutory indemnification requirement.

I. Background

A. Statutory Requirements for Access to Security-Based Swap Data Repository Information

Title VII of the Dodd-Frank Act amended the Exchange Act to provide a comprehensive regulatory framework for security-based swaps, including the regulation of security-based swap data repositories.[1]

Those amendments, among other things, require that security-based swap data repositories make data available to certain regulators and other entities. In particular, the amendments conditionally require that security-based swap data repositories "on a confidential basis pursuant to section 24, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual

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[1] Pub. L. No. 111-203, section 761(a) (adding Exchange Act section 3(a)(75) (defining "security-based swap data repository")) and section 763(i) (adding Exchange Act section 13(n) (establishing a regulatory regime for security-based swap data repositories)).

References in this release to the terms "data repository," "trade repository," "repository" or "SDR" generally address security-based swap data repositories unless stated otherwise.

counterparty trade and position data."[2] The repositories must make that data available to: "each appropriate prudential regulator"[3]; the Financial Stability Oversight Council ("FSOC"); the Commodity Futures Trading Commission ("CFTC"); the Department of Justice; and "any other person that the Commission determines to be appropriate," including foreign financial supervisors (including foreign futures authorities), foreign central banks and foreign ministries.[4]

This access to data is conditional, however. In part, before a repository shares such data, the repository "shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided."[5] Moreover, before such data is shared, "each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24."[6]

B. Prior Proposals and Comments Received

1. 2010 proposal

In 2010, the Commission proposed several rules to implement statutory provisions related to the registration process, duties and core principles applicable to security-based swap data

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[2] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G). The confidentiality requirements addressed by Exchange Act section 24, 15 U.S.C. 78x, are addressed below. See note 84, infra.

[3] As discussed below, the term "prudential regulator" encompasses the Board of Governors of the Federal Reserve System and certain other regulators, with regard to certain categories of regulated entities. See note 44, infra.

[4] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G).

[5] Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i).

[6] Exchange Act section 13(n)(5)(H)(ii), 15 U.S.C. 78m(n)(5)(H)(ii).

repositories.[7] That proposal, among other things, encompassed rules that incorporated the statutory language that set forth the data access provisions.[8]

In proposing those rules, the Commission recognized that "regulators may be legally prohibited or otherwise restricted from agreeing to indemnify third parties, including SDRs as well as the Commission," and that the "indemnification provision could chill requests for access to data obtained by SDRs, thereby hindering the ability of others to fulfill their regulatory mandates and responsibilities."[9] The Commission added that it expected that a repository "would not go beyond the minimum requirements of the statute so as not to preclude [recipient entities described by the statute] from obtaining the data maintained by an SDR."[10] The Commission further noted that the Commission itself had the authority to share nonpublic information with, among others, certain domestic and foreign regulatory authorities.[11]

In response, four commenters addressed the data access provisions.[12] Those commenters generally supported providing relevant authorities with access to security-based swap data maintained by repositories when the access is within the scope of those authorities' mandates, but expressed particular concerns relating to the indemnification requirement and to the scope of

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7 See Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010), corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) ("SDR Proposing Release").

8 See SDR Proposing Release, 75 FR at 77368 (paragraphs (b)(9) and (b)(10) of proposed Exchange Act rule 13n-4 incorporated relevant language of Exchange Act sections 13(n)(5)(G) and (H).

9 75 FR at 77318-19.

10 75 FR at 77319.

11 Id.

12 Cleary Gottlieb comment (Sept. 20, 2011) at 31-32 (comment was provided in response to a joint SEC-CFTC roundtable regarding the cross-border application of Title VII, and can be found at http://www.sec.gov/comments/4-636/4-636.shtml), DTCC comment (Nov. 15, 2010) at 3, ESMA comment (Jan. 17, 2011) at 2 and Managed Funds Association comment (Jan. 24, 2011) at 3.

authorities' access to data. Two commenters concurred that relevant authorities likely would be unable to agree to indemnify data repositories or the Commission.[13] One commenter expressed the concern that the statutory requirement is vague and could result in a data repository providing

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[13] Prior to the proposed rules, one of those commenters described the indemnification requirement as contravening the purpose of data repositories and jeopardizing market stability by diminishing regulators' ability to carry out oversight functions. See DTCC comment (Nov. 15, 2010) at 3. This comment and other comments that addressed data repository issues in response to a general request for comments regarding the implementation of Title VII are located on the Commission's website at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml.

Subsequently, in response to the proposed rules, that commenter further: (1) stated that the indemnification requirement should not apply where relevant authorities carry out their regulatory responsibilities in accordance with international agreements and while maintaining the confidentiality of data provided to them; (2) suggested that the Commission provide model indemnification language; and (3) urged that "any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community." See DTCC comment (Jan. 24, 2011) at 12. These and other comments addressing the proposed implementation of the data access provisions (as well as other aspects of the Commission's 2010 proposal regarding security-based swap data repository registration, duties and core principles) are located on the Commission's website at http://www.sec.gov/comments/s7-35-10/s73510.shtml.

Another commenter stated that because indemnification would not be feasible, "it would be problematic for [the Commission and the CFTC] to require non-U.S. SDRs to register with the Commissions," and that the indemnification requirement could impede effective regulatory coordination. See Cleary Gottlieb comment (Sept. 20, 2011) at 31-32.

That commenter further stated that when a non-U.S. data repository registers with the Commission "but is also subject to regulatory oversight by an appropriate non-U.S. regulator," the SEC should adopt the CFTC's interpretation "that the non-U.S. regulator is not as a result subject to Dodd-Frank's notice and indemnification provisions." See id. The Commission since then has issued final rules and interpretations regarding the cross-border application of the registration requirement for security-based swap data repositories, which exempts certain non-U.S. data repositories subject to regulation abroad from having to comply with requirements otherwise applicable to repositories. See Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438, 14450-51, 14516-17, 14556 (Mar. 19, 2015) ("SDR Adopting Release") (generally stating that a non-U.S. person that performs the functions of a security-based swap data repository within the United States is required to register with the Commission absent an exemption, and adopting Exchange Act rule 13n-12 to provide an exemption from data repository requirements for certain non-U.S. persons when regulators with supervisory authority over those non-U.S. persons have entered into a memorandum of understanding ("MOU") or other arrangement with the Commission regarding the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission). Also, under the preliminary interpretation discussed below, the conditions to the Exchange Act data access requirements would not restrict access when a repository registered with the Commission also is registered or licensed with a foreign authority that obtains the data pursuant to foreign law. See part IV.A, infra.

access to persons without proper authority.[14] Another commenter recommended that the Commission adopt rules to help streamline the indemnification requirement for an "efficient exchange of information."[15]

2. 2013 cross-border proposal

a. Proposed exemption to indemnification requirement

In 2013, the Commission proposed a number of rules related to the cross-border application of the Title VII security-based swap requirements. At that time, recognizing the significance of commenter concerns and understanding that certain authorities may be unable to agree to indemnify a data repository and the Commission, the Commission preliminarily concluded that the indemnification requirement could frustrate the purposes of the statutory requirement that repositories make available data to relevant authorities. The Commission further took the view that the indemnification requirement should not be applied rigidly so as to frustrate the statutory purposes of data repositories, and hinder relevant authorities' ability to fulfill their regulatory mandates and legal responsibilities.[16]

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[14] That commenter particularly expressed concern regarding the possibility of "unfettered access" to security-based swap information by regulators, including foreign financial supervisors, foreign central banks and foreign ministries, "beyond their regulatory authority and mandate." See Managed Funds Association comment (Jan. 24, 2011) at 3. That comment further recommended that the Commission take an approach similar to that taken by rules proposed by the CFTC, requiring any regulator requesting access to such data to certify the statutory authority for the request and detail the basis for the request. See id. at 3-4. The CFTC subsequently adopted that certification requirement as a final rule, but did not adopt the proposed requirement that the regulator also detail the basis for the request. See note 31, infra, and accompanying text.

[15] That commenter also reiterated the notion that relevant authorities must ensure the confidentiality of security-based swap data provided to them, and that the indemnification requirement "undermines the key principle of trust according to which exchange of information [among relevant authorities] should occur." See ESMA comment (Jan. 17, 2011) at 2.

[16] See Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968, 31048-49 (May 23, 2013) ("Cross-Border Proposing Release").

To address these concerns, the Commission proposed an exemption to provide that a data repository "is not required" to comply with the indemnification requirement, conditioned on: (1) an entity requesting the information "to fulfill a regulatory mandate and/or legal responsibility"; (2) the request pertaining "to a person or financial product subject to the jurisdiction, supervision or oversight of the entity"; and (3) the entity having entered into a supervisory and enforcement memorandum of understanding ("MOU") or other arrangement addressing the confidentiality of the information provided and any other matter as determined by the Commission.[17] The Commission took the preliminary view that the proposed exemption was consistent with commenters' views, including one commenter's suggestion that the indemnification requirement not apply when relevant authorities carry out their responsibilities in accordance with international agreements and while maintaining the confidentiality of data provided to them.[18]

The Commission further stated that the exemption's proposed condition that the request be for the purpose of fulfilling a relevant authority's regulatory mandate or legal responsibility was aligned with statutory requirements to protect the security-based swap information maintained by a repository, including proprietary and highly sensitive data, from unauthorized disclosure, misappropriation or misuse.[19] The Commission also expressed the preliminary view that the proposed condition that the Commission enter into an MOU or other arrangement with a relevant authority represented an effective way to streamline the indemnification requirement for

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[17] See id. at 31209 (paragraph (d) of proposed Exchange Act rule 13n-4).

[18] See id. at 31049 (addressing DTCC comment from Jan. 24, 2011). The Commission also stated that the proposal was consistent with commenter suggestions that the exemption be "location agnostic" (by treating relevant domestic and foreign authorities similarly), and that the exemption was intended to help preserve the "spirit of cooperation and coordination" between regulators around the world. See id.

[19] See id. at 31049-50.

an "efficient exchange of information" to help protect the confidentiality of information and further the purposes of the Dodd-Frank Act.[20]

b. Additional guidance

In the Cross-Border Proposing Release, the Commission also addressed the application of the statutory requirement that repositories notify the Commission regarding data requests. The Commission stated its preliminarily belief that repositories could satisfy that requirement by providing the Commission with notice of an initial request by a relevant authority, and maintaining records of the initial request and all subsequent requests.[21] The Commission further expressed preliminary views regarding the process for determining which additional authorities may obtain information from data repositories pursuant to these data access provisions.[22]

c. Comments

In response to this proposal, the Commission received one comment that addressed the data access provisions, including the indemnification requirement. That commenter stated that the proposal "did not erase the need for a legislative solution to clarify the scope and

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[20] See id. at 31050. The Commission moreover expressed the preliminary view that, in determining whether to enter into such an MOU or other arrangement, the Commission would consider, among other things, whether: (1) "the relevant authority needs security-based swap information from an SDR to fulfill its regulatory mandate or legal responsibilities; (2) the relevant authority agrees to protect the confidentiality of the security-based swap information provided to it; (3) the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction; and (4) a supervisory and enforcement MOU or other arrangement would be in the public interest." See id. at 31049-50.

[21] See id. at 31046-47.

[22] See id. at 31047-48 (indicating that the Commission would make such determinations by order, and that the Commission would consider a variety of factors, including whether there is a supervisory and enforcement MOU between the Commission and the relevant authority, and whether the relevant authority has a legitimate need for the information).

applicability" of the indemnification requirement.[23] The commenter further recommended that the Commission incorporate, as part of the exemption, a "safe harbor provision from liability for information shared pursuant to global information sharing agreements."[24]

The commenter also objected to the prospect that repositories would be required to notify the Commission of an initial information request, stating that such a requirement could lead authorities to hesitate to make requests if that would trigger notice, "particularly if such request is pursuant to an investigation." The commenter instead recommended that the Commission consider the notification requirement to be satisfied if the request is made "pursuant to an established information sharing agreement."[25]

3. Final rules reserving action on the data access provisions

In February 2015, the Commission adopted a number of final rules governing the registration process, duties and core principles applicable to security-based swap data repositories.[26] Those final rules, however, neither addressed the statutory data access requirements applicable to data repositories, nor provided an exception to the indemnification requirement. The Commission instead stated that final resolution of the issue would benefit from further consideration and public comment.[27]

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[23] See DTCC cross-border comment (Aug. 21, 2013) at 6-7 (expressing concern that the indemnification provision would continue to limit data sharing across jurisdictions, leading foreign regulators to seek to establish "national" repositories that would fragment data among jurisdictions). That comment and other comments responding to the cross-border proposal are located on the Commission's website at: http://www.sec.gov/comments/s7-02-13/s70213.shtml.

[24] See DTCC cross-border comment at 8.

[25] See id. at 7.

[26] See SDR Adopting Release.

[27] See id., 80 FR at 14487-88 (further noting that repositories will have to comply with all statutory requirements, including the indemnification requirement, when the current exemptive relief from requirements applicable to repositories expires). As a result, in adopting those final rules the Commission

C. Treatment of These Issues in the Swaps Context

The Dodd-Frank Act also revised the Commodity Exchange Act ("CEA") to impose comparable data access requirements – including confidentiality and indemnification conditions – upon swap data repositories that are subject to CFTC jurisdiction.[28]

1. Certification of scope of jurisdiction

To implement those requirements, the CFTC adopted rules that in part identify the domestic[29] and foreign regulators[30] to which a swap data repository must make swap data available. The rules provide that when those regulators seek access to data maintained by a swap data repository, they must file a request with the swap data repository and certify that they are acting within the scope of their jurisdiction.[31]

2. Scope of confidentiality and indemnification requirements

The CFTC implementing rules generally require domestic and foreign regulators to execute confidentiality and indemnification agreements with the swap data repository prior to

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reserved paragraphs (b)(9) and (b)(10) of Exchange Act rule 13n-4 (which as proposed would have addressed the data access obligations of registered security-based swap data repositories), and did not adopt the indemnification exemption proposed as paragraph (d) of rule 13n-4.

[28] See CEA sections 21(c)(7), (d), 7 U.S.C. 24a(c)(7), (d) .

[29] The CFTC has defined "Appropriate Domestic Regulator" to mean: (i) the SEC; (ii) each prudential regulator "with respect to requests related to any of such regulator's statutory authorities, without limitation to the activities listed for each regulator" in the statutory definition; (iii) the Financial Stability Oversight Council; (iv) the Department of Justice; (v) any Federal Reserve Bank; (vi) the Office of Financial Research; and (vii) any other person the CFTC deems appropriate. See 17 CFR 49.17(b)(1).

[30] The CFTC has defined "Appropriate Foreign Regulator" to mean foreign regulators "with an existing memorandum of understanding or other similar type of information sharing arrangement" executed with the CFTC, and/or foreign regulators "without an MOU as determined on a case-by-case basis" by the CFTC. See 17 C.F.R. 49.17(b)(2).

[31] See 17 CFR 49.17(d)(1). In this regard, the CFTC did not adopt proposed requirements to require regulators to set forth the basis for their requests in sufficient detail, and to require a swap data repository to provide access only if it is satisfied that the regulator is acting within the scope of its authority. See 76 FR 54538, 54553 (Sept. 1, 2011).

receipt of any requested swap data.[32] The CFTC, however, also recognized that it might be difficult for certain regulators to implement those confidentiality and indemnification requirements.[33] Accordingly, the CFTC provided that a domestic regulator with regulatory jurisdiction over a swap data repository registered with it pursuant to separate statutory authority may access such data without the need to enter into confidentiality or indemnification agreements if: (i) the domestic regulator executes an MOU or similar information sharing arrangement with the CFTC; and (ii) the CFTC designates the domestic regulator to receive direct electronic access.[34]

The CFTC implementing rules further provided that a foreign regulator with supervisory responsibility over a swap data repository registered with the foreign regulator pursuant to foreign law and/or regulation would not need to enter into such confidentiality or indemnification agreements.[35] In addition, the CFTC noted that the confidentiality and

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[32] See 17 CFR 49.17(d)(6), 49.18(b).

[33] See 76 FR at 54554.

[34] See 17 CFR 49.17(d)(2), 49.18(c); 76 FR at 54554 (also referencing a separate statutory provision, CEA section 21(c)(4)(A), 7 U.S.C. 24a(c)(4)(A), that requires swap data repositories to provide "direct electronic access" to the CFTC and its designees).

There are differences between the Commission's proposed approach, discussed below, and the approach the CFTC has taken in adopting rules to implement the data access requirement under the CEA. In part, while the CFTC rule requires that entities accessing swap data certify that they are acting within the scope of their jurisdiction, the Commission's proposal instead anticipates considering an entity's interest in the security-based swap information when determining whether to determine that entity may access security-based swap information. See part II.A.3.a, infra. Also, the Commission's proposed exemption from the indemnification requirement is conditioned in part on an entity requesting security-based swap information in connection with a regulatory mandate, or legal responsibility or authority. See part III.B.1.a, infra.

[35] See 17 CFR 49.17(d)(3), 49.18(c); 76 FR at 54555 n.166 (adding that the CFTC does not interpret the notification and indemnification provisions to apply "in circumstances in which an Appropriate Foreign Regulator possesses independent sovereign legal authority to obtain access to the information and data held and maintained by an SDR").

indemnification requirements would not apply when the CFTC itself shares information in its possession with foreign authorities.[36]

The CFTC subsequently issued an interpretative statement that the indemnification and confidentiality provisions under the CEA generally apply only to such data reported pursuant to the CEA and CFTC regulations, and that those confidentiality and indemnification provisions "should not operate to inhibit or prevent foreign regulatory authorities from accessing data in which they have an independent regulatory interest (even if that data also has been reported pursuant to the CEA and [CFTC] regulations)."[37] The CFTC further stated that a registered swap data repository would not be subject to the indemnification and confidentiality provisions under the CEA if the swap data repository is "registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime," when the data sought to be accessed by the foreign regulatory authority has been reported to the swap data repository "pursuant to the foreign jurisdiction's regulatory regime."[38]

D. The Current Proposal

The Commission today is proposing rules related to the data access obligation applicable to security-based swap data repositories, including rules to provide a conditional exemption from the indemnification requirement. This new proposal builds upon the earlier proposals, but with certain changes.

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[36] See 76 FR at 54554.

[37] See Swap Data Repositories: Interpretative Statement Regarding the Confidentiality and Indemnification Provisions of the Commodity Exchange Act, 77 FR 65177, 65180-81 (Oct. 25, 2012).

[38] See id. The CFTC added that this principle applies even if the applicable data also is reported pursuant to CFTC rules, and that foreign and domestic regulatory authorities also may receive data from the CFTC (rather than the swap data repository) without execution of a confidentiality and indemnification agreement. See id. at 65181.

Among other aspects, as discussed below, the proposal would provide for the statutory confidentiality agreement requirement to be satisfied via the use of MOUs or other agreements between the Commission and the entity accessing data from a security-based swap data repository. The proposal also encompasses an indemnification exemption that would be effective when the relevant conditions are met, in contrast to the earlier proposed approach of conditionally allowing a data repository to elect whether to waive the indemnification requirement.

Taken as a whole, the proposal would provide that when the conditions to the data access provisions are satisfied – including as applicable the conditions to the indemnification exemption – a repository would be required to provide security-based swap data to relevant authorities.

II. Proposed Data Access Rules

The Commission is proposing rules, to implement the data access provisions of Exchange Act sections 13(n)(5)(G) and (H),[39] that address commenter concerns and reflect the Commission's further consideration of the issues. Under the proposal:

- Security-based swap data repositories generally would be required, on a confidential basis after notifying the Commission, to make available security-based swap data, including individual counterparty trade and position data, to certain entities that are identified in the proposed rules and any other persons that are determined by the Commission to be appropriate.[40]
- The data access requirement would be subject to a confidentiality provision that conditions the data access requirement on there being an agreement between the

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39 15 U.S.C. 78m(n)(5)(G) and (H).

40 See proposed Exchange Act rule 13n-4(b)(9).

Commission and the entity (in the form of an MOU or otherwise) that addresses the confidentiality of the information received.[41]

- In addition, as discussed below, there would be a conditional exemption to the statutory provision that conditions the data access on the recipient of the data agreeing to indemnify the repository and the Commission for expenses arising from litigation related to the information provided.[42]

A. Data Access Requirement

1. Application to prudential regulators and Federal Reserve Banks

The Exchange Act specifically states that a repository is conditionally obligated to make information available to, among others, "each appropriate prudential regulator."[43] The proposed rules would specifically identify, as being eligible to access data, each of the entities encompassed within the statutory "prudential regulator" definition: the Board of Governors of the Federal Reserve System ("Board"), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation ("FDIC"), the Farm Credit Administration, and the Federal Housing Finance Agency.[44]

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41 See proposed Exchange Act rule 13n-4(b)(10).

42 See proposed Exchange Act rule 13n-4(b)(ii).

43 See Exchange Act section 13(n)(5)(G)(i), 15 U.S.C. 78m(n)(5)(G)(i).

44 See proposed Exchange Act rule 13n-4(b)(9)(i)-(v).

Exchange Act section 3(a)(74), 15 U.S.C. 78c(a)(74), defines "prudential regulator" by reference to the CEA. The CEA, in turn, defines "prudential regulator" to encompass: (a) the Board, (b) the Office of the Comptroller of the Currency, (c) the FDIC, (d) the Farm Credit Administration or (e) the Federal Housing Finance Agency – in each case with respect to swap dealers, major swap participants, security-based swap dealers or major security-based swap participants (cumulatively, "dealers" or "major participants") that fall within the regulator's authority. See CEA section 1a(39); 7 U.S.C. 1a(39).

For example, the definition provides that the Board is a prudential regulator with regard to, among others, certain dealers and major participants that are: state-chartered banks and agencies, foreign banks that do not operate insured branches, or members of bank holding companies. Also, for example,

Under this approach of specifically identifying each of those regulators, rather than generally referring to "appropriate prudential regulators," the ability of those regulators to access security-based swap data would not vary depending on whether entities regulated by the regulators are acting as security-based swap dealers, as major security-based swap participants, or in some other capacity.[45] For similar reasons, under this approach those regulators' access also would not vary depending on whether the regulator acts in a "prudential" capacity in connection with the information.[46]

The proposed rules also would include "any Federal Reserve Bank" among the entities conditionally eligible to access security-based swap data from repositories,[47] in accordance with the Exchange Act provision that extends data access to "any other person that the Commission determines to be appropriate."[48] Consistent with the standards the Commission expects to

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the definition provides that the Office of the Comptroller of the Currency is a prudential regulator with regard to, among others, certain dealers or major participants that are national banks, federally chartered branches or agencies of foreign banks or federal saving associations.

[45] This approach particularly addresses the fact that the statutory "prudential regulator" definition noted above specifically refers to those regulators in connection with dealers and major participants that fall within their authority. In the Commission's preliminary view the application of the data access provision should not vary depending on whether an entity regulated by the regulator is acting as a dealer or major participant, or in some other capacity. Such a reading would not further the purposes of Title VII, and the Dodd-Frank Act more generally, including facilitating regulator access to security-based swap information to help address the risks associated with those instruments. Accordingly, the proposed rule does not limit those regulators' access to security-based swap information based on the capacity in which a regulated entity is acting.

[46] Those regulators' ability to access security-based swap data accordingly would not be limited to situations in which they act in the capacity of a prudential supervisor. Thus, for example, the FDIC would conditionally be authorized to access security-based swap data from a repository in connection with all of its statutory capacities, including its prudential supervisory capacity as well as other capacities such as the FDIC's resolution authority pursuant to the Federal Deposit Insurance Act and the Orderly Liquidation Authority provisions of Title II of the Dodd-Frank Act.

[47] See proposed Exchange Act rule 13n-4(b)(9)(i).

[48] See Exchange Act section 13(n)(5)(G)(v), 15 U.S.C. 78m(n)(5)(G)(v). The CFTC has identified the Federal Reserve Banks as being "appropriate domestic regulators" that may access swap data from swap data repositories. See note 29 supra.

consider in connection with determining other entities to be authorized to access such data – including consideration of a relevant authority's interest in accessing security-based swap data based on its regulatory mandate, or legal responsibility or authority[49] – the Commission preliminarily believes that it is appropriate for the Federal Reserve Banks to be able to access such data. The Commission particularly understands that the Federal Reserve Banks occupy important oversight roles under delegated authority from the Board, including supervision of banks that are under the Board's authority, and gathering and analyzing information to inform the Federal Open Market Committee regarding financial conditions.[50] We further understand that the Federal Reserve Banks, as well as the Board, would use data from security-based swap data repositories to fulfill statutory responsibilities related to prudential supervision and financial stability.[51] The Commission accordingly believes preliminarily that the Federal Reserve Banks'

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49 See part II.A.3, infra.

50 Section 11(k) of the Federal Reserve Act grants the Board authority "to delegate, by published order or rule…any of its functions, other than those relating to rulemaking or pertaining to monetary and credit policies to…members or employees of the Board, or Federal Reserve banks." 12 U.S.C. 248(k). The Federal Reserve Banks carry out the Board's activities including the supervision, examination and regulation of financial institutions as directed by the Board and under its supervision. See the Board's Rules of Organization, sec. 3(j) FRRS 8-008 (providing that the Director of the Board's Division of Banking Supervision and Regulation "coordinates the System's supervision of banks and bank holding companies and oversees and evaluates the Reserve Banks' examination procedures"). The Board further has delegated extensive authority to the Reserve Banks with respect to numerous supervisory matters. See 12 CFR 265.11 (functions delegated by the Board to the Federal Reserve Banks).

51 We understand that the Board and the Federal Reserve Banks jointly would use the data in support of the prudential supervision of institutions under the Board's jurisdiction, such as state member banks, bank holding companies, and Edge Act corporations. See, e.g., section 9 of the Federal Reserve Act, 12 U.S.C. §§ 321-338a (supervision of state member banks); the Bank Holding Company Act, 12 U.S.C. §§ 1841-1852 (supervision of bank holding companies); the Edge Act, 12 U.S.C. §§ 610 et seq. (supervision of Edge Act corporations). We also understand that the Board and the Federal Reserve Banks would use the data in support of the implementation of monetary policy, such as through market surveillance and research. See, e.g., section 12A of the Federal Reserve Act, 12 U.S.C. § 263 (establishing the Federal Open Market Committee); and section 2A of the Federal Reserve Act, 12 U.S.C. § 225a (setting monetary policy objectives). In addition, we understand that the Board and the Federal Reserve Banks would use the data in fulfilling the Board's responsibilities with respect to assessing, monitoring and mitigating systemic risk, such as supervision of systemically important institutions. See,

access to security-based swap data held by repositories would appropriately fall within their regulatory mandate and legal responsibility or authority, and that the Federal Reserve Banks should conditionally have access to the security-based swap data.[52]

A Federal Reserve Bank's ability to access such data would be subject to conditions related to confidentiality and indemnification (as would the ability of any other entity that is identified by statute or determined by the Commission to access such data).[53]

2. FSOC, CFTC, Department of Justice and Office of Financial Research

The Exchange Act also states that FSOC, CFTC, and the Department of Justice may access security-based swap data.[54] The proposed rules accordingly would identify those entities as being conditionally authorized to access such data.[55]

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e.g., section 113 of the Dodd-Frank Act, 12 U.S.C. § 5323 (SIFIs); and section 807 of the Dodd-Frank Act, 12 U.S.C. § 5466 (designated FMUs).

[52] The Federal Reserve Banks' access to this information, like the access of the entities directly identified by the statute, would be subject to conditions related to confidentiality and indemnification as discussed below, including conditions to limit an authority's access to data by linking the scope of the exemption from the indemnification requirement to information that is related to persons or activities within an entity's regulatory mandate or its legal responsibility or authority, as specified in an MOU between the Commission and the entity. See parts II.C and III.C, infra.

In proposing to permit the Federal Reserve Banks to access security-based swap information pursuant to the data access provisions, the Commission preliminarily believes that the Federal Reserve Banks' access should not be limited to information regarding security-based swap transactions entered into by banks supervised by the Board, but should be available more generally with regard to security-based swap transaction data. This is consistent with the fact that Title VII does not limit the Board's access to data in such a way. This view also reflects the breadth of the Federal Reserve Banks' responsibilities regarding prudential supervision and financial stability, as addressed above.

[53] In this regard, the Commission notes that personnel of the Board and the Reserve Banks already are subject to a number of confidentiality requirements. See 18 U.S.C. 1905 (imposing criminal sanctions on U.S. government personnel who disclose non-public information except as provided by law), 18 U.S.C. 641 (imposing criminal sanctions on the unauthorized transfer of records), 5 CFR 2635.703 (Office of Government Ethics regulations prohibiting unauthorized disclosure of nonpublic information); see also Federal Reserve Bank Code of Conduct section 3.2 (requiring Reserve Bank employees to maintain the confidentiality of nonpublic information).

[54] See Exchange Act sections 13(n)(5)(G)(ii)-(iv), 15 U.S.C. 78m(n)(5)(G)(ii)-(iv).

[55] See proposed Exchange Act rule 13n-4(b)(9)(vi)-(viii).

The proposed rules further would make the Office of Financial Research ("OFR") conditionally eligible to access such data,[56] in accordance with the Exchange Act provision that that extends data access to "any other person that the Commission determines to be appropriate."

The Commission preliminarily believes that such access by the OFR is appropriate in light of the OFR's regulatory mandate and legal responsibility and authority.[57] The OFR was established by Title I of the Dodd-Frank Act to support FSOC and FSOC's member agencies by identifying, monitoring and assessing potential threats to financial stability thorough the collection and analysis of financial data gathered from across the public and private sectors.[58] In connection with this statutory mandate to monitor and assess potential threats to financial stability, the OFR's access to security-based swap transaction data may be expected to help assist it in examining the manner in which derivatives exposures and counterparty risks flow through

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[56] See proposed Exchange Act rule 13n-4(b)(9)(ix), (x).

[57] See proposed Exchange Act rule 13n-4(b)(9)(ix). We note that the CFTC has identified the OFR as being an "appropriate domestic regulator" that may access swap data from swap data repositories. See note 29, supra.

[58] See Dodd-Frank Act section 153(a) (identifying the purpose of the OFR as: (1) collecting data on behalf of FSOC and providing such data to FSOC and its member agencies; (2) standardizing the types and formats of data reported and collected; (3) performing applied research and essential long-term research; (4) developing tools for risk measurement and monitoring; (5) performing other related services; (6) making the results of the activities of the Office available to financial regulatory agencies; and (7) assisting those member agencies in determining the types and formats of data authorized by the Dodd-Frank Act to be collected by the member agencies); Dodd-Frank Act section 154(c) (requiring that OFR's Research and Analysis Center, on behalf of FSOC, develop and maintain independent analytical capabilities and computing resources to: (A) develop and maintain metrics and reporting systems for risks to U.S. financial stability; (B) monitor, investigate, and report on changes in systemwide risk levels and patterns to FSOC and Congress; (C) conduct, coordinate, and sponsor research to support and improve regulation of financial entities and markets; (D) evaluate and report on stress tests or other stability-related evaluations of financial entities overseen by FSOC member agencies; (E) maintain expertise in such areas as may be necessary to support specific requests for advice and assistance from financial regulators; (F) investigate disruptions and failures in the financial markets, report findings and make recommendations to FSOC based on those findings; (G) conduct studies and provide advice on the impact of policies related to systemic risk; and (H) promote best practices for financial risk management).

The OFR is also required to report annually to Congress its analysis of any threats to the financial stability of the United States. See Dodd-Frank Act section 154(d).

the financial system, and in otherwise assessing those risks. The Commission accordingly believes preliminarily that the OFR's access to security-based swap data held by repositories would appropriately fall within its regulatory mandate and legal responsibility and authority, and that the OFR should conditionally have access to the security-based swap data.[59]

As with the other entities that may access data pursuant to the data access provision, the OFR's ability to access such data would be subject to conditions related to confidentiality and indemnification.[60]

3. Future Commission determination of additional entities

The proposal also would require that repositories provide data to any other person that the Commission determines to be appropriate. The Commission anticipates that entities that may seek such access would likely include foreign financial supervisors (including foreign futures authorities), foreign central banks and foreign ministries.[61] One or more self-regulatory organizations also potentially may seek such access. The proposal further would provide that the Commission will make such determinations through the issuance of Commission orders, and that

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[59] As discussed below, the conditions to the proposed indemnification exemption would limit an entity's access to data by linking the scope of the exemption to information that related to persons or activities within an entity's regulatory mandate or legal responsibility or authority, as specified in an MOU between the Commission and the entity. See part III.C, infra

[60] As U.S. government personnel, OFR personnel are subject to the same general confidentiality requirements that are addressed above in the context of the Board and the Federal Reserve Banks. See note 53, supra. In addition, the OFR is required to keep data collected and maintained by the OFR data center secure and protected against unauthorized disclosure. See Dodd-Frank Act section 154(b)(3); see also 12 CFR 1600.1 (ethical conduct standards applicable to OFR employees, including post-employment restrictions linked to access to confidential information); 31 CFR 0.206 (Treasury Department prohibition on employees disclosing official information without proper authority).

[61] See proposed Exchange Act rule 13n-4(b)(9)(x).

such determinations may be conditional or unconditional.[62] A relevant authority would be able to request that the Commission make such a determination.

a. Determination factors and conditions

The Commission continues to expect that it would consider a variety of factors in connection with making such a determination, and that it may impose associated conditions in connection with the determination. The Commission expects to consider the factors discussed below, as well as any other factors the Commission determines to be relevant.[63]

In part, the Commission expects to consider whether there is an MOU or other arrangement[64] between the Commission and the relevant authority that is designed to protect the confidentiality of the security-based swap data provided to the authority.[65] The Commission also

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[62] See id. In those respects, the proposed rule would implement the corresponding statutory language, which provides the Commission with the authority to allow data access to "any other person that the Commission determines to be appropriate." See Exchange Act section 13(n)(5)(G)(v), 15 U.S.C. 78m(n)(5)(G)(v).

[63] The factors discussed below that may be expected to be relevant to a Commission's determination that a person is eligible to access security-based swap information pursuant the statutory data access provisions – including factors related to the presence of a confidentiality MOU and related to a person's regulatory mandate, or legal responsibility or authority – parallel certain of the conditions to the exemption from the indemnification requirement. See parts III.B, C, infra.

[64] The Cross-Border Proposing Release specifically referred to a "supervisory and enforcement MOU or other arrangement" in this context. See Cross-Border Proposing Release, 78 FR at 31047. The Commission is revising its proposed guidance to refer to MOUs and other arrangements generally – rather than "supervisory and enforcement" MOUs and arrangements – to allow the parties more flexibility in arriving at such confidentiality arrangements.

[65] Such an MOU or other arrangement may also satisfy the statutory requirement that a security-based swap data repository obtain a confidentiality agreement from the authority. See part II.B.1, infra (proposed Exchange Act rule 13n-4(b)(10)(i) would permit an agreement between the Commission and a relevant authority to satisfy the statutory condition that the repository obtain a confidentiality agreement from the authority).

Moreover, this MOU or other arrangement further may satisfy the proposed indemnification exemption's condition that there be an arrangement between the Commission and an entity regarding the confidentiality of the information provided. See part III.C, infra. To the extent that a relevant authority's needs access to additional information, the relevant authority may request that the Commission consider revising its determination order, and MOU or other arrangement, as applicable.

expects to consider whether information accessed by the applicable authority would be subject to robust confidentiality safeguards. The Commission believes that these factors are important given the proprietary and highly sensitive nature of the data maintained by the repository.[66]

In making a determination the Commission also may consider the relevant authority's interest in access to security-based swap data based on the relevant authority's regulatory mandate, or legal responsibility or authority. Limiting the amount of information accessed by an authority in this manner may help minimize the risk of unauthorized disclosure, misappropriation, or misuse of security-based swap data because each relevant authority will only have access to information within its regulatory mandate, or legal responsibility or authority.

Consistent with this factor, the Commission preliminarily expects that such determination orders typically would incorporate conditions that specify the scope of a relevant authority's access to data, and that limit this access in a manner that reflects the relevant authority's regulatory mandates or legal responsibility or authority.[67] Depending on the nature of the relevant authority's interest in the data, such conditions potentially could address factors such as the domicile of the counterparties to the security-based swap, and the domicile of the underlying

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66 See Exchange Act section 13(n)(5)(H)(i).

67 To appropriately limit a relevant authority's access to only security-based swap data that is consistent with the MOU between the Commission and the relevant authority, a repository may, for example, need to customize permissioning parameters to reflect each relevant authority's electronic access to security-based swap data. See generally note 103, infra (discussing access criteria currently used by DTCC in connection with current voluntary disclosure practices).

reference entity.[68] Focusing access to data in this way should help address one commenter's concerns regarding "unfettered access" to such proprietary data.[69]

The Commission further anticipates taking into account any other factors that are appropriate to the determination, including whether such a determination would be in the public interest. This consideration likely would include whether the relevant authority agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction.

b. Additional matters related to the determinations

The Commission contemplates taking various approaches in deciding whether to impose additional conditions in connection with its consideration of requests for determination orders. For example, the Commission may issue a determination order that is for a limited time. The Commission further may revoke a determination at any time. For example, the Commission may revoke a determination or request additional information from a relevant authority to support the continuation of the determination if for example a relevant authority fails to comply with the MOU, such as by failing to keep confidential security-based swap data provided to it by a repository. Even absent such a revocation, moreover, an authority's access to data pursuant to

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[68] See note 105, infra, and accompanying text (discussing application of those factors in the context of the indemnification exemption).

[69] See note 14, supra (comment voicing concerns about "unfettered access" to security-based swap information by regulators, including foreign financial supervisors, foreign central banks and foreign ministries, beyond their regulatory authority and mandate).

As discussed below, moreover, the availability of the proposed indemnification exemption would similarly be conditioned to reflect the recipient's regulatory mandates or legal responsibility or authority. See part III.C, infra. Accordingly, based on the expectation that persons who seek access pursuant to these provisions would rely on the indemnification exemption, there would be comparable limitations to access applicable to persons directly identified by Exchange Act sections 15(n)(5)(i) through (iv) (the "prudential regulators," FSOC, CFTC and Department of Justice) or added by the proposed rules (the Federal Reserve Banks and the OFR).

these provisions also would cease upon the termination of the MOU or other arrangement used to satisfy the confidentiality condition, or, as applicable, the indemnification exemption.[70]

The Commission preliminarily believes that the determination process described above represents a reasonable approach toward providing appropriate access to relevant authorities. Moreover, the Commission preliminarily believes that this process – particularly the link between access and the authority's interest in the information – appropriately builds upon existing voluntary frameworks, in accordance with one commenter's suggestion that the applicable framework incorporate other cooperative efforts with regard to access to information.[71]

The Commission expects that repositories will provide relevant authorities with access to security-based swap data in accordance with the determination orders, and the Commission generally does not expect to be involved in reviewing, signing-off on or otherwise approving relevant authorities' requests for security-based swap data from repositories that are made in

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[70] See parts II.B and III.B, C, supra.

[71] See DTCC comment (June 3, 2011) at 6-7 ("It is critical that the United States, the European Union and the other major global markets align their regulatory regimes to limit opportunities for market distorting arbitrage. The creation of a global credit default swap repository would not have occurred without the global regulatory cooperation achieved through the OTC Derivatives Regulators' Forum ('ODRF') and the OTC Derivatives Regulators Supervisors Group ('ODSG'). It is important that the global SDR framework incorporate their efforts, particularly the ODRF's guidelines on regulatory access to information stored in trade repositories for over-the-counter derivatives."); DTCC comment (Jan. 24, 2011) at 3 ("DTCC relies upon the direction provided by the OTC Derivatives Regulators' Forum ('ODRF'), whose membership includes the SEC and the Commodity Futures Trading Commission ('CFTC'). DTCC's Trade Information Warehouse (the 'Warehouse' or 'TIW') has followed the ODRF's guidance, recognizing that broad agreement among global regulators is difficult to achieve. DTCC is committed to complying with the policies adopted by the regulators and working with the Commission in this regard.").

In this regard, DTCC further has stated that it routinely provides U.S. regulators with credit default swap data related to overseas transactions entered into by non-U.S. persons on U.S. reference entities, and that it provides European regulators with data related to transactions in the U.S. by U.S. persons on European reference entities. See DTCC comment (Jan. 24, 2011) at 12; see also DTCC comment (June 3, 2011) at 7-8.

accordance with a determination order. Moreover, the Commission continues preliminarily to believe that it is not necessary to prescribe by rule specific processes to govern a repository's treatment of requests for access.[72]

Finally, the Commission notes that it may elect to apply these determination factors and consider applying protections similar to those in the data access provisions of Exchange Act sections 13(n)(5)(G) and (H) when designating authorities to receive direct access under section 13(n)(5)(D). Section 13(n)(5)(D) states that a repository must provide direct electronic access to the Commission "or any designee of the Commission, including another registered entity."[73] In practice, the Commission expects that security-based swap data repositories may satisfy their obligation to make available data pursuant to sections 13(n)(5)(G) and (H) by providing electronic access to appropriate authorities. To the extent a repository were to satisfy those requirements by some method other than electronic access, however, the Commission separately may consider whether to also designate particular authorities as being eligible for electronic access to the repository pursuant to section 13(n)(5)(D). In making such assessments under section 13(n)(5)(D), the Commission preliminarily believes that it may consider factors similar to the above determination factors, including the presence of confidentiality safeguards, and the authority's interest in the information based on its regulatory mandate or legal responsibility or authority.

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[72] See Cross-Border Proposing Release, 78 FR 31047-48. One commenter suggested that the Commission adopt an approach proposed by the CFTC, whereby a regulator requesting access to data first file a request for access and certify the statutory authority for the request and detail the basis for the request. See Managed Funds Association comment (Jan. 24, 2011) at 3-4. In contrast to that proposal, however, the final CFTC rules do not require relevant authorities to detail the basis for their requests, and do not require a swap data repository to provide access only if it is satisfied that the regulator is acting within the scope of its authority. See note 31, supra.

[73] 15 U.S.C. 78m(n)(5)(D).

4. Notification requirement

The proposal would implement the statutory notification requirement – which states that a repository must notify the Commission when an entity requests that the repository make available security-based swap data[74] – by requiring the repository to inform the Commission upon its receipt of the first request for data from a particular entity (which may include any request that the entity be provided ongoing online or electronic access to the data).[75] A repository must keep such notifications and any related requests confidential.[76]

The repository further would have to maintain records of all information related to the initial and all subsequent requests for data access requests from that entity, including records of all instances of online or electronic access, and records of all data provided in connection with such requests or access.[77] For these purposes, we believe that "all information related to" such

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[74] See Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G). As discussed below, see part IV, infra, the notification requirement does not apply to circumstances in which disclosures are made outside of the requirements of Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G), particularly when a dually regulated data repository makes disclosure pursuant to foreign law, or when the Commission provides security-based swap data to an entity.

[75] See proposed Exchange Act rule 13n-4(e). The rule does not require the repository to proactively inform the Commission of subsequent requests.

[76] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G), and proposed rule 13n-4(b)(9) both require that a repository must make data available "on a confidential basis." Failure by a repository to treat such notifications and requests as confidential could have adverse effects on the underlying basis for the requests. If, for example, a regulatory use of the data is improperly disclosed, such disclosure could signal a pending investigation or enforcement action, which could have detrimental effects.

[77] See proposed Exchange Act rule 13n-4(e).

We note that Exchange Act rule 13n-7(b)(1) requires security-based swap data repositories to maintain copies of "all documents and policies and procedures required by the Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts and other such records as shall be made or received by it in the course of its business as such." See also SDR Adopting Release, 80 FR at 14501 ("This rule includes all electronic documents and correspondence, such as data dictionaries, e-mails and instant messages, which should be furnished in their original electronic format."). Proposed Exchange Act rule 13n-4(e) identifies specific types of records that must be maintained in the specific context of access request to repositories.

requests would likely include, among other things: the identity of the requestor or person accessing the data; the date, time and substance of the request or access; and copies of all data reports or other aggregations of data provided in connection with the request or access.

In the Commission's preliminary view, the proposed notification requirement is designed to account for the way in which we believe entities are likely to access such data from repositories, by distinguishing steps that an entity takes to arrange access from subsequent electronic instructions and other means by which the recipient obtains data. By making relevant data available to the Commission in this manner, the proposed approach would place the Commission on notice that a recipient has the ability to access security-based swap data, and place the Commission in a position to examine such access as appropriate, while avoiding the inefficiencies that would accompany an approach whereby a repository must direct to the Commission information regarding each instance of access by each recipient. Moreover, the proposed approach would be consistent with the manner in which the Commission examines the records of regulated entities under the Commission's authority.

The Commission recognizes that one commenter opposed any requirement that the Commission receive notice of a recipient's initial request, on the grounds that such notice may cause other authorities to hesitate to make such requests.[78] While the Commission appreciates the commenter's concerns, the Commission preliminarily believes that it is necessary for the Commission to be informed of the initial request from a particular entity so that the Commission

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[78] See DTCC comment (Aug. 13, 2013) ("DTCC discourages the Commission from requiring a notification requirement upon initial request as suggested by the Cross-Border Proposal. Authorities will likely be hesitant to make such request to an SDR if it triggers a notice to another authority, particularly if such request is pursuant to an investigation. DTCC proposes that the Commission consider notification to be deemed satisfied if the request is made by an entity to the SDR pursuant to an established information sharing arrangement[.]").

may assess whether the initial conditions to data access (i.e., MOUs or other arrangements as needed to satisfy the confidentiality condition and the indemnification exemption[79]) have been met at the time the repository first is requested to provide the entity with information pursuant to the data access provisions, and, more generally, to facilitate the Commission's ongoing assessment of the repository's compliance with the data access provisions. The Commission also believes that commenter concerns that other regulators may be reluctant to place the Commission on notice of such initial requests are mitigated by the Commission's long history of cooperation with other authorities in supervisory and enforcement matters.[80]

5. Limitation to "security-based swap data"

Repositories that obtain security-based swap data may also obtain data regarding other types of financial instruments, such as swaps under the CFTC's jurisdiction. We do not read the data access provisions of Exchange Act sections 13(n)(5)(G) and (H) – which were added by Subtitle B of Title VII (which focused on the regulatory treatment of security-based swaps)[81] to the Exchange Act (which generally addresses the regulation of securities such as security-based swaps) – to require a repository to make available data that does not involve security-based swaps. The statutory confidentiality condition to the data access requirement further suggests

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79 See parts II.B and III.B, infra.

80 The Commission also recognizes that the same commenter stated that "regulators want direct electronic access to data in SDRs where that data is needed to fulfill regulatory responsibilities" rather than access "by request, with notice to another regulatory authority." See DTCC comment (Jan. 24, 2011) at 11-12. Data repositories in fact can provide direct electronic access to relevant authorities under the proposed interpretation. The proposed requirement that the repository inform the Commission when the relevant authority first requests access to security-based swap data maintained by the repository, and to retain records of subsequent access, is designed to facilitate such direct access.

81 See Dodd-Frank Act section 763(i) (addressing "public reporting and repositories for security-based swaps," including the addition of section 13(n), 15 U.S.C. 78m(n), to the Exchange Act to address security-based swap data repositories); see generally Subtitle B to Title VII of the Dodd-Frank Act, section 761 et seq. (addressing "Regulation of Security-Based Swap Markets").

that the data access provisions are intended to apply only to security-based swap data.[82] Accordingly, the proposed rules specifically address access to "security-based swap data" obtained by a security-based swap data repository.[83]

B. Confidentiality Condition

The Exchange Act provides that, prior to providing data, a repository "shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided."[84]

The proposed rule implementing this condition would require that, before a repository provides information pursuant to the data access provisions, "there shall be in effect an arrangement between the Commission and the entity (in the form of a memorandum of understanding or otherwise) to address the confidentiality of the security-based swap information

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[82] In particular, the confidentiality condition to the data access provisions specifically requires that the recipient entity abide by confidentiality requirements for "the information on security-based swap transactions that is provided," suggesting that the Exchange Act data access provisions are intended solely to address security-based swap data. See Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i).

Moreover, this approach is consistent with the CFTC's comparable rules, which apply only to swap data. See 17 CFR 49.17(d) and 49.18 (discussing regulators' access to swap data under the CEA).

[83] See proposed Exchange Act rule 13n-4(b)(9).

[84] See Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i).

Exchange Act section 24, 15 U.S.C. 78x, generally addresses disclosures of information by the Commission and its personnel. In relevant part it provides that the Commission may, "in its discretion and upon a showing that such information is needed," provide all records and other information "to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate." See Exchange Act section 24(c), 15 U.S.C 78x(c); see also Exchange Act rule 24c-1(b) (providing that the Commission may, upon "such assurances of confidentiality as the Commission deems appropriate," provide non-public information to persons such as domestic and foreign governments or their political subdivisions, authorities, agencies or instrumentalities, self-regulatory organizations and foreign financial authorities).

made available to the entity."[85] The proposed rule further would provide that this arrangement would be deemed to satisfy the statutory requirement that the repository receive a written confidentiality agreement from the entity.[86]

This proposed approach to implementing the confidentiality condition, in other words, would use an arrangement between the Commission and a regulator or other recipient entity to satisfy the statutory confidentiality condition. The approach would not necessitate the use of confidentiality agreements entered into by repositories.[87]

In the Commission's preliminary view, this approach reflects an appropriate way to satisfy the interests associated with the confidentiality condition, while facilitating the statutory data access provision's goal of promoting the flow of information to authorities. The approach further would build upon the Commission's experience in negotiating MOUs with other regulators in connection with enforcement and supervision, particularly the Commission's experience in connection with the development of provisions related to maintaining the confidentiality of information.

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85 See proposed Exchange Act rule13n-4(b)(10).

86 See Exchange Act section 13(n)(5)(H)(1). As discussed below, see part IV, infra, the confidentiality condition does not apply to circumstances in which disclosures are made outside of the requirements of Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G), particularly when a dually regulated data repository makes disclosure pursuant to foreign law, or when the Commission provides security-based swap data to an entity.

87 In this regard, the Commission notes that the statute does not require that the security-based swap data repository "agree" with the entity, "enter into" an agreement, or otherwise be a party to the confidentiality agreement. The statute merely states that the repository "receive" such an agreement. See Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i). Accordingly, we believe that, at a minimum, the statutory language is ambiguous as to whether the data repository must itself be a party to the confidentiality agreement. In light of this ambiguity, we have preliminarily determined to read the statute to permit the Commission to enter into confidentiality agreements with the entity, with the repository receiving the benefits of the agreement. Accordingly, the Commission believes that it is appropriate to view a security-based swap data repository as having received a confidentiality agreement when the entity enters into a confidentiality agreement with the Commission and that agreement runs to the benefit of the repository.

As a result, the approach would potentially obviate the need for each individual repository to negotiate and enter into dozens of confidentiality agreements. By building upon the Commission's experience and expertise in this area, moreover, the Commission expects that this approach also would help avoid the possibility of uneven and potentially inconsistent application of confidentiality protections across data repositories and recipient entities.

In proposing this approach, the Commission also is mindful that the statutory provision specifically references the "confidentiality requirements described in section 24" of the Exchange Act. In the Commission's preliminary view this statutory language articulates a standard which requires that there be adequate confidentiality assurances. Thus, the Commission preliminarily believes that the proposed provision, under which the Commission would negotiate and enter into agreements providing such confidentiality assurances, appropriately implements the statutory reference to section 24.

C. Request for Comment

The Commission requests comment regarding all aspects of these proposed rules regarding access to security-based swap data from repositories. Among other things, commenters particularly are invited to address the proposal that the confidentiality agreement requirement would be satisfied by an MOU or other agreement between the Commission and another entity. Commenters also are invited to address: the proposed limitation of the data access requirement to security-based swap data; the proposed provisions related to access by prudential regulators, the Federal Reserve Banks and the OFR; the criteria that the Commission should consider in evaluating whether to determine to permit additional entities to access data from repositories; whether the orders that make such determinations generally should encompass conditions that limit a relevant authority's access to information to reflect its regulatory mandate or legal responsibility or authority; whether the Commission should prescribe specific processes

to govern requests for such access; and whether the Commission should prescribe a process to govern a repository's treatment of requests for access.

In addition, commenters are invited to address the proposed rules implementing the notification requirement, including the proposed provisions regarding the maintenance of information related to data requests. In this regard, is there an alternative to requiring repositories to maintain copies of all data they provide in connection with the data access provisions that would still permit the Commission to assess the repository's ongoing compliance with those provisions? For example, are alternative approaches available such that the Commission should not require repositories to maintain actual copies of all reports or other aggregations of data provided pursuant to the data access provisions, such as if the repository instead implements policies and procedures sufficient to demonstrate a process for creating records that reflect the data provided, and the repository produces promptly copies of such records upon request by a representative of the Commission?[88] Would such an alternative approach reduce the burdens on repositories while still permitting the Commission to assess ongoing compliance?

Commenters further are invited to address whether the Commission should determine that other domestic authorities, such as one or more self-regulatory organizations, should be

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[88] For example, in adopting Exchange Act rule 17a-4(b)(13) to provide that broker-dealers must preserve certain written policies and procedures in connection with creditworthiness assessments, the Commission stated that although the rule does not require that a broker-dealer maintain a record of each such creditworthiness determination, a broker-dealer would need to be able to support each such determination, and that the broker-dealer may do so by either maintaining documentation of those determinations or by being in a position to "replicate the original credit risk determination using the same process, information, and inputs employed to make the original determination." See Exchange Act Release No. 71194 (Dec. 27, 2013), 79 FR 1522, 1528-29, 1550 (Jan. 8, 2014).

eligible to access security-based swap data pursuant to these provisions. If so, should the access of such self-regulatory organizations be limited in any particular respects?

III. Proposed Exemption from the Indemnification Requirement

A. Proposed Exemption

The Exchange Act also conditions the data access requirement on each recipient entity agreeing "to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to information provided under section 24."[89]

Pursuant to the Commission's authority under Exchange Act section 36,[90] the Commission is proposing a conditional exemption from that statutory indemnification requirement. This proposed exemption would be effective whenever the applicable conditions are met, in contrast with the earlier proposal, which would have conditionally exempted regulators and other authorities from the indemnification requirement only at the election of the data repository.[91]

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[89] Exchange Act section 13(n)(5)(H)(ii), 15 U.S.C. 78m(n)(5)(H)(ii). As discussed below, see part IV, infra, the statutory indemnification requirement would not always be triggered by the disclosure of security-based swap information.

In the event that the proposed exemption is unavailable, the Commission agrees with one commenter's view that "any indemnity should be limited in scope to minimize the potential reduction in value of registered SDRs to the regulatory community." See DTCC comment (Jan. 24, 2011) at 12. Consistent with that view, as stated in the Cross-Border Proposing Release, the Commission would not expect that an indemnification agreement would include a provision requiring a relevant authority to indemnify the repository from the repository's own wrongful or negligent acts. See Cross-Border Proposing Release, 78 FR at 31051 n.829.

[90] 15 U.S.C. 78mm (providing the Commission with general exemptive authority . . . "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors").

[91] To implement this approach, the Commission proposes in relevant part that the indemnification requirement conditionally "shall not be applicable" with regard to the repository's disclosure of security-based swap information. See proposed Exchange Act rule 13n-4(d)(1). The earlier proposal would have conditionally provided that a registered security-based swap data repository "is not required to comply"

This proposed exemption reflects the Commission's preliminary concern that requiring authorities to agree to provide indemnification could lead to negative consequences in practice. The Commission continues to understand that certain authorities may be legally prohibited or otherwise limited from agreeing to indemnify data repositories or the Commission for expenses arising in connection with the information received from a repository.[92]

As a result, application of the indemnification requirement may chill some requests by regulators or other authorities for access to security-based swap data, which would hinder those authorities' ability to address their own regulatory mandate or legal responsibility or authority.[93] The resulting lack of access also may impair coordination among regulators with regard to the

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with the indemnification requirement. See Cross-Border Proposing Release, 78 FR at 31209 (paragraph (d) of proposed rule 13n-4).

[92] As stated in the Cross-Border Proposing Release, the Commission recognizes that certain domestic authorities, including some of those expressly identified in Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G), as a matter of law cannot provide an open-ended indemnification agreement. See Cross-Border Proposing Release, 78 FR at 31048-49 (particularly noting that the Antideficiency Act prohibits certain U.S. federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, apportionment, or certain administrative subdivisions of those funds, e.g., through an unlimited or unfunded indemnification).

[93] See DTCC cross-border comment (Aug. 21, 2013) at 6 ("The continued presence of the Indemnification Provision (even as modified by the exemption in the Cross-Border Proposal) may pose problems for Commission-regulated, U.S.-based SDRs and their ability to share information with third-party regulatory authorities. As a result, foreign regulators may seek to establish their own 'national' repositories to ensure access to the information they need, fragmenting the data among jurisdictions. Similarly, non-U.S. trade repositories may find themselves subject to similar reciprocal impediments to sharing information with the Commission or other U.S. regulatory agencies absent a confidentiality and indemnification agreement."); see also DTCC comment (Nov. 15, 2010) at 3 ("DTCC remains concerned that regulators are not likely to grant SDRs indemnification in exchange for access to the information and, accordingly, regulators may actually receive less aggregated market data. Such an outcome would result in a reduction of information accessible to regulators on a timely basis both domestically and internationally, which contravenes the purpose of SDRs and jeopardizes market stability."); Cleary Gottlieb comment (Sept. 20, 2011) at 31 ("[T]he indemnification requirement could be a significant impediment to effective regulatory coordination, since non-US regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions."); ESMA comment (Jan. 17, 2011) at 2 ("We believe that ensuring confidentiality is essential for exchanging information among regulators and such indemnification agreement undermines the key principle of trust according to which exchange of information should occur.").

oversight of market participants that engage in security-based swap transactions across national boundaries. For example, European Union ("EU") law provides that the ability of certain non-EU regulators to access data from EU repositories is conditioned on there being an international agreement that ensures that EU authorities have "immediate and continuous access to all of the information needed for the exercise of their duties."[94] As a result, application of the indemnification requirement without an exemption being available potentially could preclude EU authorities from accessing data from U.S. security-based swap data repositories. Under such circumstances, it is possible that EU authorities may be unwilling to permit the Commission and other U.S. regulators to access security-based swap data from EU repositories. The resulting concerns associated with a lack of regulatory access to security-based swap data are particularly significant given that data access allows relevant authorities to be in a better position to, among other things, monitor risk exposures of individual counterparties to swap and security-based swap transactions, monitor concentrations of risk exposures and evaluate risks to financial stability.[95]

Such a result associated with application of the indemnification requirement further may make substituted compliance unavailable in connection with security-based swap data reporting

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94 See EU regulation 648/2012 ("EMIR"), art. 75(2).

95 See Darrell Duffie, Ada Li, and Theo Lubke, Policy Perspectives of OTC Derivatives Market Infrastructure, Federal Reserve Bank of New York Staff Report No. 424, dated January 2010, as revised March 2010 (with data from repositories regulators can "explore the sizes and depths of the markets, as well as the nature of the products being traded. With this information, regulators are better able to identify and control risky market practices, and are better positioned to anticipate large market movements."); see also DTCC comment (June 3, 2011) at 5 (noting that a data repositories should be able to provide: (i) enforcement authorities with necessary trading information; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information on market-wide activity and aggregate gross and net open interest for publication; and (iv) real-time reporting from [security-based swap execution facilities] and bilateral counterparties and related dissemination).

requirements, given that under rules adopted by the Commission the availability of substituted compliance for those requirements is predicated in part on the Commission's ability to directly access data in foreign repositories.[96]

The Commission recognizes that indemnification may help support confidentiality safeguards by making a recipient liable for expenses that a repository or the Commission incurs in connection with breaches of confidentiality. Nonetheless, the countervailing considerations noted above indicate that indemnification – of either the repository or the Commission – should not be required so long as appropriate confidentiality protections are provided in other ways.

For these reasons the Commission preliminarily believes that it is necessary and appropriate in the public interest, and consistent with the protection of investors, that the indemnification requirement be subject to an exemption that applies whenever the applicable conditions are satisfied.[97]

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[96] See Regulation SBSR, rule 908(c) (2)(iii)(C), 17 CFR 242.908(c)(2)(iii)(C) (conditioning the availability of substituted compliance in part on the Commission having "direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction"); see also Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14564, 14661 (Mar.19, 2015) ("Regulation SBSR Adopting Release") ("granting substituted compliance without direct electronic access would not be consistent with the underlying premise of substituted compliance: That a comparable regulatory result is reached through compliance with foreign rules rather than with the corresponding U.S. rules.").

[97] The Commission is not incorporating a commenter's suggestion that there be "a safe harbor provision from liability for information shared pursuant to global information sharing agreements into the Indemnification Exemption for SDRs operating pursuant to information sharing arrangements, as defined in the Indemnification Exemption, or comparable to those published by the OTC Derivatives Regulators Forum ("ODRF") or CPSS-IOSCO." See DTCC cross-border comment (Aug. 21, 2013) at 7; see also DTCC comment (Jan. 24, 2011) at 3 (urging the Commission to aim for regulatory comity as reflected in ODRF and CPSS-IOSCO standards); DTCC comment (June 3, 2011) at 6-7 (urging that the global framework incorporate efforts of the ODRF and the OTC Derivatives Regulators Supervisors Group).

To the extent that the commenter suggests that there be a safe harbor from the indemnification requirement, the Commission preliminarily believes that this proposed exemption, which is more narrowly tailored than the commenter's suggestion, would sufficiently address a repository's need for certainty. The Commission further notes that a repository's statutory duty to maintain the privacy of the

B. Confidentiality Arrangement Condition

The proposal in part would condition the indemnification exemption upon there being in effect one or more arrangements (in the form of an MOU or otherwise) between the Commission and the entity that addresses the confidentiality of the security-based swap information provided and other matters as determined by the Commission.[98] The Commission preliminarily believes that such an MOU or other arrangement would address similar confidentiality interests that appear to be reflected by the statutory indemnification requirement, particularly given that the disclosure of confidential information inconsistent with such arrangements can lead to the termination of the arrangement and the loss of data access. Just as an indemnification agreement may be expected to incentivize the confidential treatment of information, such a confidentiality arrangement would help strengthen the authority's incentive to maintain the confidentiality of information.

The Commission anticipates that in determining whether to enter into such an MOU or other arrangement, it would consider, among other things, whether: (a) security-based swap information from a repository would help fulfill the relevant authority's regulatory mandate, or legal responsibility or authority; (b) the relevant authority provides such assurances of confidentiality as the Commission deems appropriate with respect to the security-based swap information provided to the authority; (c) the relevant authority is subject to statutory and/or regulatory confidentiality safeguards; (d) the relevant authority agrees to provide the

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information received is separate and distinct from its statutorily mandated duty to provide security-based swap data to relevant authorities when specific conditions are satisfied, and that the privacy of security-based swap data provided to relevant authorities was addressed by Congress through the confidentiality agreement requirement in Exchange Act section 13(n)(5)(H), 15 U.S.C. 78m(n)(5)(H).

98 See proposed Exchange Act rule 13n-4(d)(2)(ii).

Commission with reciprocal assistance in matters within the Commission's jurisdiction; and (e) an MOU or other arrangement would be in the public interest. These considerations are comparable to the criteria that the Commission anticipates considering as it determines whether an entity is eligible to access information pursuant to the data access provisions.[99] Accordingly, for regulators or other authorities whose access is subject to a determination order, the same confidentiality MOUs or other agreements that are needed to satisfy the indemnification exemption may also serve to satisfy those prerequisites to the determinations.[100]

C. Condition Regarding Regulatory Mandate or Legal Responsibility or Authority

The proposal further would condition the indemnification exemption on the requirement that the information relate to persons or activities within the recipient entity's regulatory mandate, or legal responsibility or authority.[101] This proposed condition should reduce the potential for disclosure of confidential information by limiting the quantity of information each recipient may access. This limitation on access also should help address commenter concerns regarding "unfettered access" to security-based swap data.[102] This approach of limiting the availability of data to reflect such considerations also has parallels to the approach that one commenter indicated that it follows on a voluntary basis for providing relevant authorities with access to certain credit default swap information.[103]

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99 See notes 64 through 69, supra, and accompanying text.

100 Those entities that are expressly identified in the statute or the implementing rules (and thus are not subject to the determination process) also would need to enter into a separate MOU or other agreement to satisfy the confidentiality agreement condition.

101 See proposed Exchange Act rule 13n-4(d)(1).

102 See note 14, supra.

103 See note 71, supra (DTCC statement that it routinely provides U.S. regulators with data related to overseas credit default swap transactions entered into by non-U.S. persons on U.S. reference entities, and

The proposal would implement this requirement by further conditioning the indemnification exemption by requiring that the MOU or other arrangement between the Commission and the entity accessing the data would specify the types of security-based swap information that would relate to the recipient entity's regulatory mandate, or legal responsibility or authority.[104] While the relevant factors for specifying which information is within an entity's regulatory mandate, or legal responsibility or authority for these purposes may vary depending on the relevant facts and circumstances, such factors potentially would include the location of a counterparty to the transaction and the location of the reference entity.[105] In this way, the MOU or other arrangement would help reduce uncertainty regarding how the associated condition to the indemnification exemption may apply to particular types of information requests, and would

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that it provides European regulators with data related to credit default swap transactions in the U.S. by U.S. persons on European reference entities).

104 See proposed Exchange Act rule 13n-4(d)(2)(ii).

105 As an example, in the event of a request for access by a foreign authority that is responsible for security-based swap market surveillance and enforcement – and subject to negotiation of such an MOU or other arrangement between the Commission and that authority – criteria indicative of data regarding a transaction being within the authority's regulatory mandate or legal responsibility or authority may include: (i) one or more of the counterparties to the transaction being domiciled or having a principal place of business in the foreign jurisdiction (including branches of entities that are domiciled or that have a principal place of business in that jurisdiction); (ii) one or more of the counterparties being a subsidiary of a person domiciled or having a principal place of business in the foreign jurisdiction; (iii) one or more of the counterparties being a fund or other collective investment vehicle with an adviser that is domiciled or that have a principal place of business in the foreign jurisdiction; (iv) one or more of the counterparties being registered with the authority as a dealer or in some other capacity; or (v) the reference entity for the security-based swap being domiciled or having a principal place of business in the foreign jurisdiction.

As another example, in the case of a foreign authority that is responsible for prudential regulation, criteria indicative of data regarding a transaction being within the entity's regulatory mandate or legal responsibility or authority may include one or more of the counterparties to the transaction being part of a consolidated organization that is supervised by the prudential authority, including all affiliates within that consolidated organization.

provide direction to repositories regarding which disclosures would be covered by the indemnification exemption.[106]

D. Request for Comment

The Commission requests comment on all aspects of the proposed exemption to the statutory indemnification requirement. Commenters particularly are invited to address whether the exemption's proposed scope would adequately address the concerns associated with implementing the indemnification requirement. Among other things, commenters are invited to address whether alternative approaches or other considerations more effectively reflect the access and confidentiality interests associated with the Dodd-Frank Act? Also, should additional conditions be incorporated into the exemption?

Commenters further are invited to address whether the proposal appropriately would make use of an MOU or other arrangement to provide sufficient guidance to a repository regarding an entity's regulatory mandate, or legal responsibility or authority in connection with a request for security-based swap data. In this respect, would the proposed approach provide a repository with an adequate degree of guidance regarding which disclosures of information may or may not be subject to protection? Are there particular criteria that would be useful for incorporating into the MOU or other arrangement to help delimit which information would fall within an entity's regulatory mandate, or legal responsibility or authority?

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[106] The Commission anticipates that data repositories would be able to rely on the guidance provided by such arrangements when assessing whether particular information would be subject to the indemnification exemption, thus permitting an authority to access that information without an indemnification agreement.

IV. Applicability of Exchange Act Data Access and Indemnification Provisions

The Exchange Act provisions addressed above – sections 13(n)(5)(G) and (H)[107] – establish one means by which certain regulators and other authorities may access security-based swap data from repositories. It is important to recognize, however, that those provisions do not exclusively govern the means by which such regulators or other authorities might access security-based swap data.

In particular, in the circumstances discussed below, regulators and other authorities in certain circumstances may access security-based swap data via authority that is independent of the above provisions. In those circumstances, the Commission preliminarily believes that the conditions associated with those data access provisions – particularly the provisions regarding indemnification, notification and confidentiality agreements – should not govern access arising from such independent authority.

A. Data Access Authorized by Foreign Law

The Commission continues to believe preliminarily, as discussed in the Cross-Border Proposing Release, that "the Indemnification Requirement does not apply when an SDR is registered with the Commission and is also registered or licensed with a foreign authority and that authority is obtaining security-based swap information directly from the SDR pursuant to that foreign authority's regulatory regime."[108] In those circumstances, the dually registered data repository would be subject to a data access obligation that is independent of the Exchange Act data access obligation, and the notification, confidentiality and indemnification conditions to the Exchange Act data access provision would not apply.

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107 15 U.S.C. 78m(n)(5)(G) and (H).

108 See Cross-Border Proposing Release, 78 FR at 31049 n.807.

B. Receipt of Information Directly from the Commission

The Exchange Act also provides that relevant authorities may obtain security-based swap data from the Commission, rather than directly from data repositories.[109]

First, Exchange Act section 21(a)(2)[110] states that, upon request of a foreign securities authority, the Commission may provide assistance in connection with an investigation the foreign securities authority is conducting to determine whether any person has violated, is violating or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces.[111] That section further provides that, as part of this assistance, the Commission in its discretion may conduct an investigation to collect information and evidence pertinent to the foreign securities authority's request for assistance.[112]

In addition, the Commission may share "nonpublic information in its possession" with, among others, any "federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government . . . [or] a foreign financial regulatory

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109 See Cross-Border Proposing Release, 78 FR at 31045.

110 15 U.S.C. 78u(a)(2).

111 Exchange Act section 3(a)(50), 15 U.S.C. 78c(a)(50), broadly defines "foreign securities authority" to include "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters."

112 Exchange Act section 21(a)(2), 15 U.S.C. 78u(a)(2), also states that the Commission may provide such assistance without regard to whether the facts stated in the request also would constitute a violation of U.S. law.

That section further states that when the Commission decides whether to provide such assistance to a foreign securities authority, the Commission shall consider whether the requesting authority has agreed to provide reciprocal assistance in securities matters to the United States, and whether compliance with the request would prejudice the public interest of the United States.

authority."[113] This authority is subject to the recipient providing "such assurances of confidentiality as the Commission deems appropriate."[114]

In the Commission's view, and consistent with Commission practice for many years, these sections provide the Commission with separate, additional authority to assist domestic and foreign authorities in certain circumstances, such as, for example, by providing security-based swap data directly to the authority. At those times, the authority would receive information not from the data repository, but instead from the Commission.

C. Request for Comment

The Commission requests comment on these preliminary interpretations regarding the scope of the data access requirement and conditions set forth in Exchange Act sections 13(n)(5)(G) and (H).

V. Paperwork Reduction Act

Certain provisions of the proposed rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[115] The SEC has submitted them to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is "Security-Based Swap Data Repository Data Access Requirements." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless

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113 See Exchange Act rule 24c-1(c) (implementing Exchange Act section 24(c), 15 U.S.C. 78x(c), which states that the Commission may, "in its discretion and upon a showing that such information is needed," provide records and other information "to such persons, both domestic and foreign, as the Commission by rule deems appropriate," subject to assurances of confidentiality).

114 See id.

115 44 U.S.C. 3501 et seq.

it displays a currently valid OMB control number. OMB has not yet assigned a control number to the new collection of information.

A. Summary of Collection of Information

The proposal would require security-based swap data repositories to make security-based swap data available to other parties, including certain government bodies. This data access obligation would be conditioned on confidentiality and indemnification requirements, and the indemnification requirement itself would be subject to a conditional exemption. The proposal further would require such repositories to create and maintain information regarding such data access.

B. Proposed Use of Information

The data access requirement and associated conditions would provide the regulators and other authorities that receive the relevant security-based swap data with tools to assist with the oversight of the security-based swap market and of dealers and other participants in the market, and to assist with the monitoring of risks associated with that market.

C. Respondents

The data access requirement will apply to every person required to be registered with the Commission as a security-based swap data repository – that is every U.S. person performing the functions of a security-based swap data repository, and to every non-U.S. person performing the functions of a security-based swap data repository within the United States absent an exemption.[116] Commission staff is aware of seven persons that have, to date, filed applications

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[116] As discussed above, see note 13, supra, the Commission has determined that a non-U.S. person that performs the functions of a security-based swap data repository within the United States is required to register with the Commission absent an exemption. The Commission also has adopted Exchange Act rule 13n-12 to provide an exemption from data repository requirements for certain non-U.S. persons.

for registration with the CFTC as swap data repositories, three of which have withdrawn their applications and four of which are provisionally registered with the CFTC. It is reasonable to estimate that a similar number of persons provisionally registered with the CFTC may seek to register with the Commission as security-based swap data repositories. Therefore, the Commission estimates, for PRA purposes, that ten persons might register with the Commission as security-based swap data repositories.[117]

The conditions to data access under these proposed rules further will affect all persons that may seek access to security-based swap data pursuant to these provisions. As discussed below, these may include up to 30 domestic entities.

D. Total Annual Reporting and Recordkeeping Burden

1. Data access generally

The data access provisions may implicate various types of PRA burdens and costs: (i) burdens and costs that regulators and other authorities incur in connection with negotiating MOUs or other arrangements with the Commission in connection with the data access provisions; (ii) burdens and costs that certain authorities that have not been determined by statute or Commission rule may incur in connection with requesting that the Commission grant them access to repository data;[118] (iii) burdens and costs associated with information technology systems that repositories develop in connection with providing data to regulators and other authorities; and (iv) burdens and costs associated with the requirement that repositories notify the

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[117] The Commission used the same estimate when adopting final rules to implement statutory provisions related to the registration process, duties and core principles applicable to security-based swap data repositories. See SDR Adopting Release, 80 FR at 14521.

[118] These include MOUs and other arrangements in connection with: the determination of additional entities that may access security-based swap data (see part II.A.3, supra), the confidentiality condition (see part II.B.1, supra) and the indemnification exemption (see parts III.B.2, 3, supra).

Commission of requests for access to security-based swap data, including associated recordkeeping requirements.

a. MOUs

As discussed above, entities that access security-based swap data pursuant to these data access provisions would be required to enter into MOUs or other arrangements with the Commission to address the confidentiality condition and the indemnification exemption. In some cases, those entities also would enter into MOUs or other arrangements in connection with the Commission's determination of the entity as authorized to access such data (to the extent that the entity's access is already determined by statute or by the proposed rules). For purposes of the PRA requirements, the Commission estimates that up to 30 domestic entities potentially might enter into such MOUs or other arrangements, reflecting the nine entities specifically identified by statute or the proposed rules, and up to 21 additional domestic governmental entities or self-regulatory organizations that may seek access to such data. Based on the Commission's experience in negotiating similar MOUs that address regulatory cooperation, including confidentiality issues associated with regulatory cooperation, the Commission preliminarily believes that each regulator on average would expend 500 hours in negotiating such MOUs.[119]

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[119] It may be expected that the initial MOU or other arrangement that is entered into between the Commission and another regulator may take up to 1,000 hours for that regulator to negotiate. In practice, however, subsequent MOUs and other arrangements involving other recipient entities would be expected to require significantly less time on average, by making use of using the prior MOUs as a basis for negotiation. Based on these principles, the Commission preliminarily estimates that the average amount of time that domestic and foreign recipients of data would incur in connection with negotiating these arrangements would be 500 hours.

To the extent that each of those 30 domestic entities were to seek to access data pursuant to these provisions, and each of the applicable MOUs or other arrangements were to take 500 hours on average, the total burden would amount to 15,000 hours.

b. Requests for access

Separately, certain entities that are not identified by statute and/or the proposed rules may request that the Commission determine that they may access such security-based swap data. For those entities, in light of the relevant information that the Commission preliminarily would consider in connection with such determinations (apart from the MOU issues addressed above) – including information regarding how the entity would be expected to use the information, information regarding the entity's regulatory mandate or legal responsibility or authority, and information regarding reciprocal access – the Commission preliminarily estimates that each such entity would expend 40 hours in connection with such request. As noted above, the Commission estimates that 21 domestic entities not encompassed in the proposed rule may seek access to the data. Accordingly, to the extent that 21 domestic entities were to request access (apart from the nine entities identified by statute or the proposed rule), the Commission estimates a total burden of 840 hours for these entities to prepare and submit requests for access.

c. Systems costs

The Commission previously addressed the PRA costs associated with the Exchange Act's data access requirement in 2010, when the Commission initially proposed rules to implement those data access requirements in conjunction with other rules to implement the duties applicable to security-based swap data repositories. At that time, based on discussions with market participants, the Commission estimated that a series of proposed rules to implement duties applicable to security-based swap data repositories – including the proposed data access rules as well as other rules regarding repository duties (e.g., proposed rules requiring repositories to accept and maintain data received from third parties, to calculate and maintain position information, and to provide direct electronic access to the Commission and its designees) – together would result in an average one-time start-up burden per repository of 42,000 hours and

$10 million in information technology costs for establishing systems compliant with all of those requirements. The Commission further estimated the average per-repository ongoing annual costs of such systems to be 25,200 hours and $6 million.[120]

The Commission incorporated those same burden estimates earlier this year, when the Commission adopted final rules to implement the duties applicable to security-based swap data repositories, apart from the data access requirement.[121]

Subject to the connectivity issues addressed below, the Commission believes that the burden estimates associated with the 2010 proposed repository rules encompassed the costs and burdens associated with the proposed data access requirements in conjunction with other system-related requirements applicable to security-based swap dealers. To comply with those other system-related requirements – including in particular requirements that repositories provide direct electronic access to the Commission and its designees – we preliminarily believe that it is reasonable to expect that repositories may use the same systems as they would also use to comply with the data access requirements at issue here, particularly given that both types of access requirements would require repositories to provide security-based swap information to particular recipients subject to certain parameters.[122] As a result, subject to per-recipient

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120 See SDR Proposing Release, 75 FR at 77348-49. The Commission previously estimated, for PRA purposes, that ten persons may register with the Commission as security-based swap data repositories. See SDR Adopting Release, 80 FR at 14521, 14523. Based on the estimate of ten respondents, the Commission estimated total one-time costs of 420,000 hours and $10 million, and total annual ongoing systems costs of 252,000 and $60 million. See SDR Proposing Release, 75 FR at 77349.

121 See SDR Adopting Release, 80 FR at 14523. The Commission submitted the PRA burden associated with that release to OMB for approval, and the OMB has approved that collection of information.

122 The Commission also anticipates that repositories would use the same systems in connection with the Exchange Act data access requirements as they use in connection with the corresponding requirements under the CEA.

connectivity burdens addressed below, the Commission preliminarily believes that would be no additional burdens associated with information technology costs to implement the data access requirements of the proposed rule.

The Commission also recognizes, however, that once the relevant systems have been set up, repositories may be expected to incur addition incremental burdens and costs associated with setting up access to security-based swap data consistent with the recipient's regulatory mandate or legal responsibility or authority.[123] The Commission preliminarily believes that, for any particular recipient, security-based swap data repositories on average would incur a burden of 26 hours.[124] As discussed below, based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories,[125] the Commission preliminarily estimates that each repository would incur a one-time burden of 7,800 hours in connection with providing that connectivity.[126]

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[123] In addressing those burdens, the Commission expects that the MOUs or other arrangements that are used to satisfy the conditions of the indemnification exemption will set forth objective criteria that delimit the scope of a recipient's ability to access security-based swap data pursuant to the indemnification exemption. The Commission further expects that repositories would use those criteria to program their data systems to reflect the scope of the recipient's access to repository data. Absent such objective and programmable criteria, repositories would be expected to incur greater burdens to assess whether an authority's request satisfies the relevant conditions, particularly with regard to whether particular information relates to persons or activities within the entity's regulatory mandate or legal responsibility or authority.

[124] This estimate is based on the view that for each recipient requesting data, a repository would incur a 25 hour burden associated with programming or otherwise inputting the relevant parameters, encompassing 20 hours of programmer analyst time and five hours of senior programmer time. The estimate also encompasses one hour of attorney time in connection with each such recipient.

[125] See part VI.C.3.ii, infra.

[126] Across an estimated ten repositories, accordingly, the Commission estimates that repositories cumulatively would incur a one-time burden of 78,000 hours in connection with providing such connectivity.

d. Providing notification of requests, and associated records requirements

Under the proposed rules, repositories would be required to inform the Commission when they receive the first request for security-based swap data from a particular entity.[127] As discussed below, based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories, the Commission estimates that each repository would provide the Commission with actual notice approximately 300 times.[128] Moreover, based on the estimate that ten persons may register with the Commission as security-based swap data repository, the Commission estimates that repositories in the aggregate would provide the Commission with actual notice a total of 3,000 times. The Commission preliminarily estimates that each such notice would take no more than one-half hour to make on average, leading to a cumulative estimate of 1,500 hours associated with the notice requirement.

The proposed rule further requires that repositories must maintain records of all information related to the initial and all subsequent requests for data access, including records of all instances of online or electronic access, and records of all data provided in connection with such access.[129] The Commission estimates that there cumulatively may be 360,000 subsequent data requests or access per year across all security-based swap data repositories, for which repositories must maintain records as required by the proposed rule.[130] Based on its experience with recordkeeping costs associated with security-based swaps generally, the Commission preliminarily estimates that for each repository this requirement would create an initial burden of

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127 See proposed Exchange Act rule 13n-4(e) (further requiring the repository to maintain records of the initial and all subsequent requests).

128 See part VI.C.3.a.ii, infra.

129 See proposed Exchange Act rule 13n-4(e).

130 See part VI.C.3.a.ii, infra.

roughly 360 hours, and an annualized burden of roughly 280 hours and $40,000 in information technology costs.[131]

2. Confidentiality condition

The Commission preliminarily does not believe that the confidentiality provision of the proposal would be associated with collections of information that would result in a reporting or recordkeeping burden for security-based swap data repositories. This is because, under the proposal, the confidentiality condition would be satisfied by an MOU or other arrangement between the Commission and the recipient entity (i.e., another regulatory authority) addressing confidentiality. We preliminarily expect that in practice that the condition will be addressed by MOUs or other arrangements entered into by the Commission, and that repositories accordingly would not be involved in the drafting or negotiation of confidentiality agreements.

As discussed above, moreover, the confidentiality provision would be expected to impose burdens on authorities that seek to access data pursuant to these provisions, as a result of the need to negotiate confidentiality MOUs or other arrangements.[132]

E. Collection of Information is Mandatory

The conditional data access requirements of Exchange Act sections 13(n)(5)(G) and (H) and the underlying rules are mandatory for all security-based swap data repositories. The confidentiality condition is mandatory for all entities that seek access to data under those requirements. Also, the conditions to the indemnification exemption are mandatory to entities

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131 Across an estimated ten repositories, accordingly, the Commission preliminarily estimates that repositories cumulatively will incur an initial burden of roughly 3,600 hours in information technology costs, and an annualized burden of roughly 2,800 hours and $400,000 in information technology costs.

132 See part V.D.1.a, supra.

that seek to rely on the exemption, which the Commission believes will be all entities that seek data pursuant to these requirements.

F. Confidentiality

The Commission will make public requests for a determination that an authority is appropriate to conditionally access security-based swap data, as well as Commission determinations issued in response to such requests. The Commission preliminarily expects that it will make publicly available the MOUs or other arrangements with the Commission used to satisfy the confidentiality and indemnification conditions.

Initial notices of requests for access provided to the Commission by repositories will be kept confidential, subject to the provisions of applicable law. To the extent that the Commission obtains subsequent requests for access that would be required to be maintained by the repositories, the Commission also will keep those records confidential, subject to the provisions of applicable law.

G. Request for Comment

We request comment on our approach and the accuracy of the current estimates. Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission solicits comments to: (1) evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of burden of the collection of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are required to respond, including through the use of automated collection techniques or other forms of information technology.

In this regard, the Commission particularly requests comment regarding the systems-related costs associated with these data access requirements. Among other things, commenters are invited to address the burdens associated with establishing and programming systems to provide regulators and other authorities with connectivity to repository data systems, including whether such costs would be incremental to the systems-related costs associated with the existing rule requiring that repositories provide direct electronic access to the Commission and its designees, and whether such systems-related costs would encompass capacity-related elements linked to the total number of regulators and other authorities that access repositories pursuant to these data access provisions. Commenters also are invited to address the estimated burdens associated with the requirement that repositories maintain records in connection with the notification requirement.

The Commission further requests comment regarding the burdens associated with the negotiation of MOUs or other arrangements between the Commission and other authorities, including the average time required for those regulators to negotiate such MOUs or other arrangements, and whether those other authorities may incur costs to retain outside counsel in connection with such negotiations.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-_____. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-_____, and be submitted to the Securities

and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

VI. Economic Analysis

As discussed above, the Commission is proposing rules to implement data access requirements for relevant authorities other than the Commission that the Dodd-Frank Act imposes on security-based swap repositories, and to provide an exemption from the associated indemnification requirement. To carry out their regulatory mandate, or legal responsibility or authority, certain relevant entities other than the Commission may periodically need access to security-based swap data collected and maintained by SEC-registered security-based swap data repositories, and the proposed rules are intended to facilitate such access.

The Commission is sensitive to the economic effects of its rules, including the costs and benefits and the effects of its rules on efficiency, competition, and capital formation. Section 3(f)[133] of the Exchange Act requires the Commission, whenever it engages in rulemaking pursuant to the Exchange Act, to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2)[134] of the Exchange Act requires the Commission, when promulgating rules under the Exchange Act, to consider the impact such rules would have on competition. Exchange Act section 23(a)(2) also provides that the Commission shall not adopt any rule which

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133 15 U.S.C. 78c(f).

134 15 U.S.C. 78w(a)(2).

would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

A. Economic Considerations

1. Title VII Transparency Framework

The security-based swap market prior to the passage of the Dodd-Frank Act has been described as being opaque, in part because transaction-level data were not widely available to market participants or to regulators.[135] To increase the transparency of the over-the-counter derivatives market to both market participants and regulatory authorities, Title VII requires the Commission to undertake a number of rulemakings, including rules the Commission adopted earlier this year to address the registration process, duties and core principles applicable to security-based swap data repositories,[136] and to address regulatory reporting and public dissemination of security-based swap information.[137] Among other matters, those rules address market transparency by requiring security-based swap data repositories, absent an exemption, to collect and maintain accurate security-based swap transaction data, and address regulatory transparency by requiring security-based swap data repositories to provide the Commission with

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135 With respect to one type of security-based swap, credit default swaps ("CDSs"), the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," "authoritative information about the actual size of the [CDS] market is generally not available" and regulators currently are unable "to monitor activities across the market." Government Accountability Office, GAO-09-397T, Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps, at 2, 5, 27, (2009) available at: http://www.gao.gov/new.items/d09397t.pdf; see also Robert E. Litan, The Derivatives Dealers' Club and Derivatives Market Reform: A Guide for Policy Makers, Citizens and Other Interested Parties, Brookings Institution (Apr. 7, 2010), http://www.brookings.edu/~/media/research/files/papers/2010/4/07%20derivatives%20litan/0407_derivatives_litan.pdf; Michael Mackenzie, Era of an Opaque Swaps Market Ends, Financial Times, June 25, 2010, available at: http://www.ft.com/intl/cms/s/0/f49f635c-8081-11df-be5a-00144feabdc0.html#axzz3HLUjYNI7.

136 See SDR Adopting Release, note 13, supra.

137 See Regulation SBSR Adopting Release.

direct electronic access to such data.[138]

Consistent with the goal of increasing transparency to regulators, the data access provisions at issue here set forth a framework for security-based swap data repositories to provide access to security-based swap data to relevant authorities other than the Commission. The proposed rules would implement that framework for repositories to provide data access to other relevant entities in order to fulfill their regulatory mandate, or legal responsibility or authority.

2. Transparency In the Market For Security-Based Swaps

The proposed data access rules and indemnification exemption, in conjunction with the transparency-related requirements generally applicable to security-based swap data repositories, are designed to, among other things, make available to the Commission and other relevant authorities data that will provide a broad view of the security-based swap market and help monitor for pockets of risk and potential market abuses that might not otherwise be observed by those authorities.[139] Unlike most other securities transactions, security-based swaps involve ongoing financial obligations between counterparties during the life of transactions that typically span several years. Counterparties to a security-based swap rely on each other's creditworthiness and bear this credit risk and market risk until the security-based swap terminates or expires. This can lead to market instability when a large market participant, such as a security-based swap

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[138] See Exchange Act rule 13n-5 (requiring repositories to comply with data collection and data maintenance standards related to transaction and position data); Exchange Act rule 13n-4(b)(5) (requiring repositories to provide direct electronic access to the Commission and its designees).

[139] See, e.g., Exchange Act section 13(n)(5)(D), 15 U.S.C. 78m(n)(5)(D), and rule 13n-4(b)(5) (requiring SDRs to provide direct electronic access to the Commission). See also 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.").

dealer, major security-based swap market participant, or central counterparty ("CCP") becomes financially distressed. The default of a large market participant could introduce the potential for sequential counterparty failure; the resulting uncertainty could reduce the willingness of market participants to extend credit, and substantially reduce liquidity and valuations for particular types of financial instruments.[140]

A broad view of the security-based swap market, including information regarding aggregate market exposures to particular reference entities (or securities), positions taken by individual entities or groups, and data elements necessary to determine the market value of the transaction, may be expected to provide the Commission and other relevant authorities with a better understanding of the actual and potential risks in the market and promote better risk monitoring efforts. The information provided by security-based swap data repositories also may be expected to help the Commission and other relevant authorities investigate market manipulation, fraud and other market abuses.

3. Global Nature of the Security-Based Swap Market

As highlighted in more detail in the Economic Baseline below, the security-based swap market is a global market. Based on market data in the Depository Trust and Clearing Corporation's Trade Information Warehouse ("DTCC-TIW"), the Commission estimates that only 12 percent of the global transaction volume that involves either a U.S.-domiciled counterparty or a U.S-domiciled reference entity (as measured by gross notional) between 2008 and 2014 was between two U.S.-domiciled counterparties, compared to 48 percent entered into

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[140] See, e.g., Markus K. Brunnermeier and Lasse Heje Pedersen, Market Liquidity and Funding Liquidity, 22 Review of Financial Studies 2201 (2009); Denis Gromb and Dimitri Vayanos, A Model of Financial Market Liquidity Based on Intermediary Capital, 8 Journal of the European Economic Association 456 (2010).

between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 40 percent entered into between two foreign-domiciled counterparties.[141]

In light of the security-based swap market's global nature there is the possibility that regulatory data may be fragmented across jurisdictions, particularly because a large fraction of transaction volume includes at least one counterparty that is not a U.S. person[142] and the applicable U.S. regulatory reporting rules depend on the U.S. person status of the counterparties.[143] As discussed further below, fragmentation of data can increase the difficulty in consolidating and interpreting security-based swap market data from repositories, potentially reducing the general economic benefits derived from transparency of the security-based swap market to regulators. Absent a framework for the cross-border sharing of data reported pursuant to regulatory requirements in various jurisdictions, the relevant authorities responsible for monitoring the security-based swap market may not be able to access data consistent with their regulatory mandate, or legal responsibility or authority.

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[141] The data the Commission receives from the DTCC-TIW does not include transactions between two non-U.S. domiciled counterparties that reference a non-U.S. entity or security. This is approximately 19 percent of global transaction volume. See note 152, infra. Therefore, factoring in these transactions, approximately 10 percent of global transaction volume involves two U.S.-domiciled counterparties, 39 percent involve one U.S.-domiciled counterparty and one foreign counterparty, and 51 percent are between two foreign-domiciled counterparties.

[142] This statement is based on staff analysis of voluntary CDS transaction data reported to the DTCC-TIW, which includes self-reported counterparty domicile. See note 161, infra. The Commission notes that the DTCC-TIW entity domicile may not be completely consistent with the Commission's definition of "U.S. person" in all cases but preliminarily believes that these two characteristics have a high correlation.

[143] See Regulation SBSR rule 908(a) (generally requiring regulatory reporting and public dissemination when at least one direct or indirect counterparty is a U.S. person). Note that current voluntary reporting considers the self-reported domicile of the counterparty but the recently adopted SBSR rules consider the counterparty's status as a U.S. person.

4. Economic Purposes of the Rulemaking

The proposed data access requirements and indemnification exemption are designed to increase the quality and quantity of transaction and position information available to relevant authorities about the security-based swap market while helping to maintain the confidentiality of that information. The increased availability of security-based swap information may be expected to help relevant authorities act in accordance with their regulatory mandate, or legal responsibility or authority, and to respond to market developments.

Moreover, by facilitating access to security-based swap data for relevant authorities, including non-U.S. authorities designated by the Commission, the Commission anticipates an increased likelihood that the Commission itself will have commensurate access to security-based swap data stored in trade repositories located in foreign jurisdictions.[144] This may be particularly important in identifying transactions in which the Commission has a regulatory interest (e.g., transactions involving a U.S. reference entity or security) but may not have been reported to a registered security-based swap data repository due to the transactions occurring outside of the U.S. between two non-U.S. persons.[145] This should assist the Commission in fulfilling its

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144 As discussed above, for example, EU law conditions the ability of non-EU authorities to access data from EU repositories on EU authorities having "immediate and continuous" access to the information they need. See note 94, supra, and accompanying text.

Also, as discussed above, the Commission anticipates considering whether or not the relevant authority requesting access agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction when making a determination as to whether the requesting authority shall be granted access to security-based swap data held in registered SDRs. See part II.A.3(a) supra.

145 For example, it is possible to replicate the economic exposure of either a long or short position in a debt security that trades in U.S. markets by trading in U.S. treasury securities and credit default swaps that reference the debt security. Transactions between two non-U.S. persons on a U.S. reference entity supervised by the Commission or novations between two non-U.S. persons that reduce exposure to a U.S. registrant may provide information to the Commission about the market's views concerning the financial stability or creditworthiness of the registered entity.

regulatory mandate and legal responsibility and authority, including by facilitating the Commission's ability to detect and investigate market manipulation, fraud and other market abuses, by providing the Commission with greater access to security-based swap information than that provided under the current voluntary reporting regime.[146]

Such data access may be especially critical during times of market turmoil, by giving the Commission and other relevant authorities information to examine risk exposures incurred by individual entities or in connection with particular reference entities. Increasing the available data about the security-based swap market should further give the Commission and other relevant authorities better insight into how regulations are affecting or may affect the market, which may allow the Commission and other regulators to better craft regulations to achieve desired goals, and therefore increase regulatory effectiveness.

B. Baseline

To assess the economic impact of the proposed data access rules and indemnification exemption, the Commission is using as a baseline the security-based swap market as it exists today, including applicable rules that have already been adopted and excluding rules that have been proposed but not yet finalized. Thus we include in the baseline the rules that the Commission adopted earlier this year to govern the registration process, duties and core principles applicable to security-based swap data repositories, and to govern regulatory reporting and public dissemination of security-based swap transactions.

Because those rules were adopted only recently, there are not yet any registered swap data repositories, and the Commission does not yet have access to regulatory reporting data.

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146 See part VI.B, supra, for a description of the data the Commission receives from DTCC-TIW under the current voluntary reporting regime.

Hence, our characterization of the economic baseline, including the quantity and quality of security-based swap data available to the Commission and other relevant authorities and the extent to which data are fragmented, considers the anticipated effects of the final SDR rules and Regulation SBSR. The Commission acknowledges limitations in the degree to which it can quantitatively characterize the current state of the security-based swap market. As described in more detail below, because the available data on security-based swap transactions do not cover the entire market, the Commission has developed an understanding of market activity using a sample that includes only certain portions of the market.

1. Regulatory Transparency in the Security-Based Swap Market

There currently is no robust, widely accessible source of information about individual security-based swap transactions. In 2006, a group of major dealers expressed their commitment in support of DTCC's initiative to create a central trade industry warehouse for credit derivatives.[147] Moreover, in 2009, the leaders of the G20 – whose members include the United States, 18 other countries, and the European Union – called for global improvements in the functioning, transparency, and regulatory oversight of over-the-counter ("OTC") derivatives markets and agreed, among other things, that OTC derivatives contracts should be reported to trade repositories.[148] A single repository, the DTCC-TIW, makes the data reported to it under the voluntary reporting regime available to the Commission and other relevant authorities in accordance with the agreement between DTCC-TIW and the OTC Derivatives Regulatory

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147 See Letter to Timothy Geithner, President, Federal Reserve Bank of New York, Mar. 10, 2006, available at: http://www.newyorkfed.org/newsevents/news/markets/2006/industryletter2.pdf.

148 See G20 Leaders Statement from the 2009 Pittsburgh Summit, available at: http://www.g20.utoronto.ca/2009/2009communique0925.html.

Forum ("ODRF"), of which the Commission is a member.[149] Although many jurisdictions have implemented rules concerning reporting of security-based swaps to trade repositories,[150] the Commission understands that many market participants continue to report voluntarily to the DTCC-TIW.

The data that the Commission receives from DTCC-TIW do not encompass CDS transactions that both: (i) do not involve any U.S. counterparty, and (ii) are not based on a U.S. reference entity. [151] Based on a comparison of weekly transaction volume publicly disseminated by DTCC-TIW with data provided to the Commission under the voluntary arrangement, we estimate that the transaction data provided to the Commission covers approximately 77 percent of the global single-name credit default swap market.[152]

While DTCC-TIW generally provides detailed data on positions and transactions to regulators that are members of the ODRF, DTCC-TIW makes only summary information available to the public.[153]

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149 See note 71, supra.

150 See Eighth Progress Report on Implementation of OTC Derivatives Market Reforms (Nov. 2014), available at: http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf.

151 The Commission notes that the identification of entity domicile in the voluntary data reported to DTCC-TIW may not be consistent with the Commission's definition of "U.S. person" in all cases.

152 In 2014, DTCC-TIW reported on its website new trades in single-name CDSs with gross notional of $15.4 trillion. During the same period, data provided to the Commission by DTCC-TIW, which include only transactions with a U.S. counterparty or transactions written on a U.S. reference entity or security, included new trades with gross notional equaling $12.4 trillion, or 81% of the total reported by DTCC-TIW.

153 The DTCC-TIW publishes weekly transaction and position reports for single-name credit default swaps. In addition, ICE Clear Credit provides aggregated volumes of clearing activity, and large multilateral organizations periodically further report measures of market activity. For example, the Bank for International Settlements ("BIS") reports gross notional outstanding for single-name credit default swaps and equity forwards and swaps semiannually.

2. Current Security-Based Swap Market

The Commission's analysis of the current state of the security-based swap market is based on data obtained from DTCC-TIW, particularly data regarding the activity of market participants for single-name credit-default swaps from 2008 to 2014. While other repositories also may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for those products (or for other products that are security-based swaps). Although the definition of "security-based swap" is not limited to single-name credit-default swaps, the Commission believes that the single-name credit default swap data are sufficiently representative of the security-based swap market and therefore can directly inform the analysis of the state of the current security-based swap market.[154] The Commission believes that DTCC-TIW's data for single-name credit default swaps appear reasonably comprehensive because they include data on almost all single-name credit default swap transactions and market participants trading in single-name credit default swaps.[155]

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[154] According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of December 2014 was $2.50 trillion. The notional amount outstanding was approximately $9.04 trillion for single-name CDSs, approximately $6.75 trillion for multi-name index CDSs, and approximately $0.61 trillion for multi-name, non-index CDSs. See Bank of International Settlement, BIS Quarterly Review, Statistical Annex, Table 19 (June 2015), available at: http://www.bis.org/publ/qtrpdf/r_qt1506.htm. For purposes of this analysis, the Commission assumes that multi-name index CDSs are not narrow-based security index CDSs, and therefore do not fall within the definition of security-based swap. See Exchange Act section 3(a)(68)(A), 15 U.S.C. 78c(a)(68)(A); see also Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012). The Commission also assumes that instruments reported as equity forwards and swaps include instruments such as total return swaps on individual equities that fall with the definition of security-based swap. Based on these assumptions, single-name CDS appear to constitute roughly 80 percent of the security-based swap market. Although the BIS data reflects the global OTC derivatives market, and not only the U.S. market, the Commission is not aware of any reason to believe that these ratios differ significantly in the U.S. market.

[155] See ISDA, CDS Marketplace, Exposures & Activity, available at: http://www.isdacdsmarketplace.com/exposures_and_activity ("DTCC Deriv/SERV's Trade Information Warehouse is the only comprehensive trade repository and post-trade processing infrastructure for OTC

Based on this information, our analysis below indicates that the current security-based swap market: (i) is global in scope, and (ii) is concentrated among a small number of dealing entities. Although under the voluntary reporting regime discussed above there was a single repository, as various jurisdictions have implemented mandatory reporting rules in their jurisdictions the number of trade repositories holding security-based swap data has grown.[156]

a. Security-Based Swap Market Participants

A key characteristic of security-based swap activity is that it is concentrated among a relatively small number of entities that engage in dealing activities.[157] Based on the Commission's analysis of DTCC-TIW data, there were 1,879 entities engaged directly in trading credit default swaps between November 2006 and December 2014.[158] Table 1 below highlights that of these entities, there were 17, or approximately 0.9 percent, that were ISDA-recognized dealers.[159] ISDA-recognized dealers executed the vast majority of transactions (82.6 percent)

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credit derivatives in the world. Its Deriv/SERV matching and confirmation service electronically matches and confirms more than 98% of credit default swaps transactions globally.").

156 See, for example, the list of trade repositories registered by ESMA, available at: http://www.esma.europa.eu/content/List-registered-Trade-Repositories. As of May 28, 2015, there were six repositories registered by ESMA, all of which are authorized to receive data on credit derivatives.

157 See Exchange Act Release No.72472 (Jun. 25, 2014), 79 FR 47278, 47293 (Aug. 12, 2014) ("Cross-Border Definitions Adopting Release"). All data in this section cites updated data from that release and its accompanying discussion.

158 These 1,879transacting agents represent over 10,000 accounts representing principal risk holders. See Cross-Border Definitions Adopting Release, 79 FR at 47293-94 (discussing the number of transacting agents and accounts of principal risk holders).

As noted above, the data provided to the Commission by the DTCC-TIW only includes transactions that either include at least one U.S.-domiciled counterparty or reference a U.S. entity or security. Therefore, any entity that is not domiciled in the U.S., never trades with a U.S.-domiciled entity and never buys or sells protection on a U.S. reference entity or security would not be included in this analysis.

159 For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as a recognized dealer in any year during the relevant period. Dealers are only included in the ISDA-recognized dealer category during the calendar year in which they are so identified. The complete list of

measured by the number of counterparties (each transaction has two counterparties or transaction sides). Many of these dealers are regulated by entities other than, or in addition to, the Commission. In addition, thousands of other market participants appear as counterparties to security-based swap transactions, including, but not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and non-financial companies.

Table 1. The number of transacting agents in the single-name CDS market by counterparty type and the fraction of total trading activity, from November 2006 through December 2014, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment Advisers	1,419	75.5%	10.9%
- *SEC registered*	*572*	*30.4%*	*6.9%*
Banks	260	13.8%	5.0%
Pension Funds	29	1.5%	0.1%
Insurance Companies	38	2.0%	0.3%
ISDA-Recognized Dealers[160]	17	0.9%	82.6%
Other	116	6.2%	1.2%
Total	1,879	100%	100%

Although the security-based swap market is global in nature, approximately 60 percent of the transaction volume in the 2008-2014 period included at least one U.S.-domiciled entity (see

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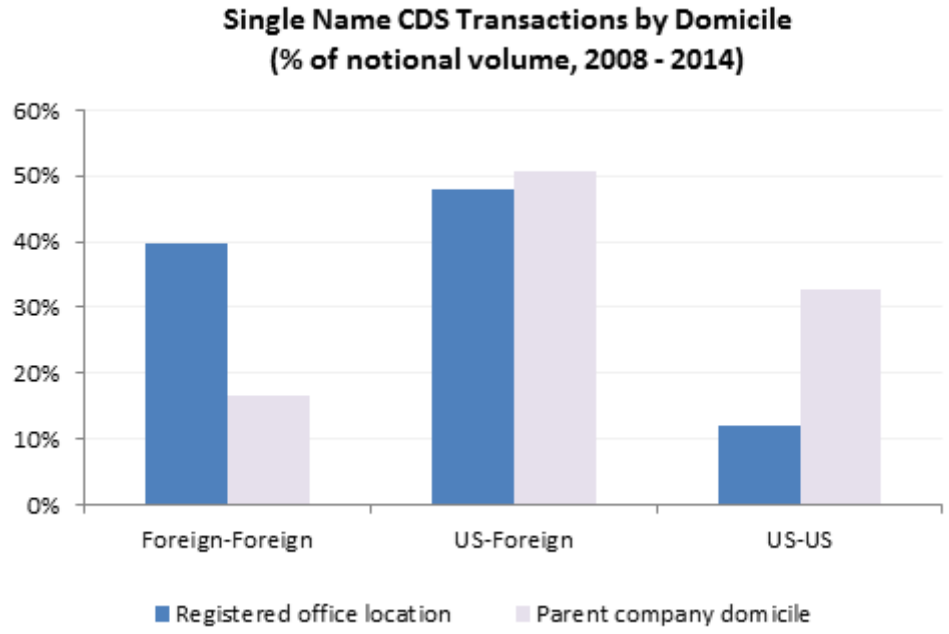
ISDA recognized dealers is: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo, and Nomura. See ISDA, Operations Benchmarking Surveys, available at: http://www2.isda.org/functional-areas/research/surveys/operations-benchmarking-surveys.

[160] For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo and Nomura. See, e.g., http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf.

Figure 1). Moreover, 48 percent of the single-name CDS transactions reflected in DTCC-TIW data that include at least one U.S.-domiciled counterparty or a U.S. reference entity or security were between U.S.-domiciled entities and foreign-domiciled counterparties.

Figure 1: The fraction of notional volume in North American corporate single-name CDSs between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2014.



The fraction of new accounts with transaction activity that are domiciled in the U.S. fell through the 2008-2014 period. Figure 2 below is a chart of: (1) the percentage of new accounts with a domicile in the United States,[161] (2) the percentage of new accounts with a domicile

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[161] The domicile classifications in DTCC-TIW are based on the market participants' own reporting and have not been verified by Commission staff. Prior to enactment of the Dodd-Frank Act, account holders did not formally report their domicile to DTCC-TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC-TIW has collected the registered office location of the account. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC-TIW do not assign a unique legal entity identifier to each separate entity. It is also possible that

outside the United States, and (3) the percentage of new accounts that are domiciled outside the United States but managed by a U.S. entity, foreign accounts that include new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity. Over time, a greater share of accounts entering the DTCC-TIW data either have had a foreign domicile or have had a foreign domicile while being managed by a U.S. person. The increase in foreign accounts may reflect an increase in participation by foreign accountholders, and the increase in foreign accounts managed by U.S. persons may reflect the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures and other factors. There are, however, alternative explanations for the shifts in new account domicile in Figure 2. Changes in the domicile of new accounts through time may reflect improvements in reporting by market participants to DTCC-TIW. Additionally, because the data include only accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties or transact in single-name CDSs with U.S. reference entities or securities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

We note that cross-border rules related to regulatory reporting and public dissemination of security-based swap transactions depend on, among other things, the U.S. person status of the counterparties.[162] The analyses behind Figures 1 and 2 show that the security-based swap market is global, with an increasing share of the market characterized by cross-border trade.

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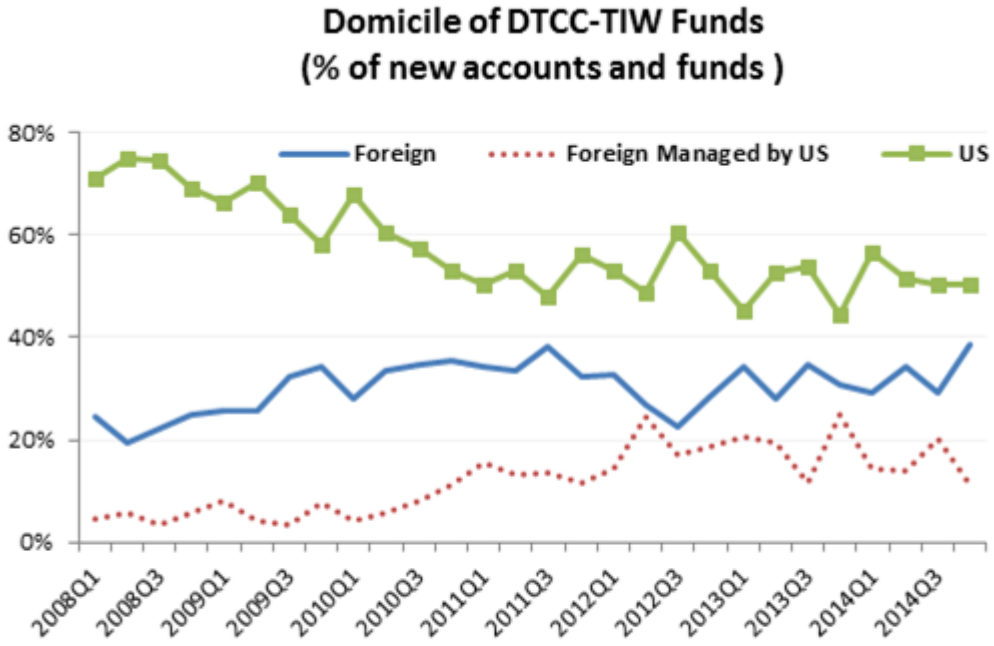
the domicile classifications may not correspond precisely to the definition of "U.S. person" under the rules defined in Exchange Act rule 3a71-3(a)(4), 17 CFR 240.3a71-3(a)(4). Notwithstanding these limitations, the Commission believes that the cross-border and foreign activity demonstrates the nature of the single-name CDS market.

[162] See note 143, supra.

Figure 2: The percentage of (1) new accounts with a domicile in the United States (referred to below as "US"), (2) new accounts with a domicile outside the United States (referred to below as "Foreign"), and (3) new accounts outside the United States, but managed by a U.S. entity, new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity (collectively referred to below as "Foreign Managed by US").[163] Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2014.



b. Security-Based Swap Data Repositories

No security-based swap data repositories are currently registered with the Commission.

The Commission is aware of one entity in the market (i.e., the DTCC-TIW) that has been

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163 Following publication of the Warehouse Trust Guidance on CDS data access, TIW surveyed market participants, asking for the physical address associated with each of their accounts (i.e., where the account is organized as a legal entity). This is designated the registered office location by TIW. When an account does not report a registered office location, we have assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. This treatment assumes that the registered office location reflects the place of domicile for the fund or account.

accepting voluntary reports of single-name and index credit default swap transactions. In 2014, DTCC-TIW received approximately 4 million records of single-name credit default swap transactions, of which approximately 868,000 were price-forming transactions.[164]

The CFTC has provisionally registered four swap data repositories.[165] These swap data repositories are: BSDR LLC, Chicago Mercantile Exchange Inc., DTCC Data Repository LLC, and ICE Trade Vault, LLC. The Commission believes that these entities will likely register with the Commission as security-based swap data repositories and that other persons may seek to register with both the CFTC and the Commission as swap data repositories and security-based swap data repositories, respectively.[166]

Efforts to regulate the swap and security-based swap markets are underway not only in the United States, but also abroad. Consistent with the call of the G20 leaders for global improvements in the functioning, transparency and regulatory oversight of OTC derivatives markets,[167] substantial progress has been made in establishing the trade repository infrastructure to support the reporting of OTC derivatives transactions.[168] Currently, multiple trade repositories operate, or are undergoing approval processes to do so, in a number of different jurisdictions.[169]

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164 Price-forming credit default swap transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions and terminations of previously executed transactions. Transactions terminated or entered into in connection with a compression exercise, and expiration of contracts at maturity, are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades.

165 CFTC rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

166 For the purpose of estimating PRA related costs, the number of swap data repositories is estimated to be as high as ten. See part V.C, supra.

167 See note 148, supra, and accompanying text.

168 See Eighth Progress Report on Implementation of OTC Derivatives Market Reforms (Nov. 2014), available at: http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf.

169 Id.

Combined with the fact that the requirements for trade reporting differ across jurisdictions, the result is that security-based swap data is fragmented across many locations, stored in a variety of formats, and subject to many different rules for authorities' access. The data in these trade repositories accordingly will need to be aggregated in various ways if authorities are to obtain a comprehensive and accurate view of the global OTC derivatives markets.

C. Economic Costs and Benefits, Including Impact on Efficiency, Competition, and Capital Formation

As discussed above, the security-based swap market to date largely has developed as an opaque OTC market with limited dissemination of transaction-level price and volume information.[170] Accordingly, the Commission envisions that registered security-based swap data repositories, by storing the security-based swap transaction and position data required to be reported to them by market participants, will become an essential part of the infrastructure of the market in part by providing the data to relevant authorities in accordance with their regulatory mandate, or legal responsibility or authority.

In proposing these rules to implement the Exchange Act data access requirement and to provide a conditional exemption from the indemnification requirement, the Commission has attempted to balance different goals. On the one hand, the Commission preliminarily believes that the proposed rules will facilitate the sharing of information held by repositories with relevant authorities, which should assist those authorities in acting in accordance with their regulatory mandate, or legal responsibility or authority. At the same time, although regulatory access raises important issues regarding the confidentiality of the information, the Commission preliminarily

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[170] See part VI.B.1, supra (addressing limited information currently available to market participants and regulators).

believes that the proposed rules should appropriately reduce the risk of breaching the confidentiality of the data by providing for a reasonable assurance that confidentiality will be maintained before access is granted.

Additionally, we note that the magnitude of the costs and benefits of the proposed rules depend in part on the type of access granted to relevant authorities. Ongoing, unrestricted direct electronic access by relevant authorities may be most beneficial in terms of facilitating efficient access to data necessary for those authorities to act in accordance with their regulatory mandate, or legal responsibility or authority, but at the cost of increasing the risk of improper disclosure of confidential information. Restricting each relevant authority's access to only that data consistent with that authority's regulatory mandate, or legal responsibility or authority reduces the quantity of data that could become subject to improper disclosure. On the other hand, restricting a relevant authority's access to data may make it more difficult for it to effectively act in accordance with its regulatory mandate or legal responsibility or authority.

The potential economic effects stemming from the proposed rules can be grouped into several categories. In this section, we first discuss the general costs and benefits of the proposed rules, including the benefits of reducing data fragmentation, data duplication and enhancing regulatory oversight, as well as the risks associated with potential breaches of data confidentiality. Next, we discuss the effects of the rules on efficiency, competition and capital formation. Finally, we discuss specific costs and benefits linked to the proposed rules.

1. General Costs and Benefits

As discussed above, the proposed rules would implement the statutory provisions that require a security-based swap data repository to disclose information to certain relevant authorities, conditional upon the authority agreeing to keep the information confidential and to indemnify the repository and the Commission for any expenses arising from litigation relating to

the information provided. The proposal also would set forth a conditional exemption from the requirement that entities requesting data agree to provide indemnification. The exemption would be conditional on the requested information relating to a regulatory mandate and/or legal responsibility of the entity requesting the data, and on the entity entering into an MOU with the Commission addressing the confidentiality of the information provided and any other matters as determined by the Commission.

a. Anticipated benefits

The proposed rules should facilitate access to security-based swap transaction and position data by entities that require such information to fulfill their regulatory mandate or legal responsibility or authority. Market participants accordingly should benefit from relevant domestic authorities other than the Commission having access to the data necessary to fulfill their responsibilities. In particular, such access could help promote stability in the security-based swap market particularly during periods of market turmoil,[171] and thus could indirectly contribute to improved stability in related financial markets, including equity and bond markets.[172]

Moreover, as noted in part II.A(3)(a), the Commission anticipates, when making a determination concerning a relevant authority's access to security-based swap data, considering whether the relevant authority agrees to provide the Commission and other U.S. authorities with

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[171] SDR Adopting Release, 80 FR at 14531 ("Enhanced transparency could produce additional market-wide benefits by promoting stability in the [security-based swap] market, particularly during periods of market turmoil, and it should indirectly contribute to improved stability in related financial markets, including equity and bond markets.").

[172] See Darrell Duffie, Ada Li, and Theo Lubke, Policy Perspectives of OTC Derivatives Market Infrastructure, Federal Reserve Bank of New York Staff Report No. 424 (Jan. 2010, as revised Mar. 2010), note 95, supra ("Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds.").

reciprocal assistance in matters within their jurisdiction. Allowing access to security-based swap data held by registered security-based swap data repositories by non-U.S. authorities may be expected to help facilitate the Commission's own ability to access data held by repositories outside the United States.[173] Accordingly, to the extent the Commission obtains access, the proposed rules further may be expected to assist the Commission in fulfilling its regulatory responsibilities, including by detecting market manipulation, fraud and other market abuses by providing the Commission with greater access to global security-based swap information.[174]

The ability of other relevant authorities to access data held in trade repositories registered with the Commission, as well as the ability of the Commission to access data held in repositories registered with other regulators, may be especially crucial during times of market turmoil. Increased data sharing should provide the Commission and other relevant authorities more-complete information to monitor risk exposures taken by individual entities and exposures connected to particular reference entities, and should promote global stability through enhanced regulatory transparency. Security-based swap data repositories registered with the Commission are required to retain complete records of security-based swap transactions and maintain the

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173 See note 94, supra, and accompanying text.

174 See SDR Adopting Release, 80 FR at 14450 ("Requiring U.S. persons that perform the functions of an SDR to be operated in a manner consistent with the Title VII regulatory framework and subject to the Commission's oversight, among other things, helps ensure that relevant authorities are able to monitor the build-up and concentration of risk exposure in the [security-based swap] market, reduce operational risk in that market, and increase operational efficiency."); id. at 14529 ("In conjunction with Regulation SBSR, the SDR Rules should assist the Commission in fulfilling its regulatory mandates and legal responsibilities such as detecting market manipulation, fraud, and other market abuses by providing it with greater access to [security-based swap] information than that provided under the voluntary reporting regime."); see also DTCC comment (Nov. 15, 2010) at 1 ("A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.").

integrity of those records.[175] Based on discussions with other regulators, the Commission believes repositories registered with other authorities are likely to have comparable requirements. As a result, rules to facilitate regulatory access to those records in line with the recipient authorities' regulatory mandate, or legal responsibility or authority are designed to help position the Commission and other authorities to: detect market manipulation, fraud and other market abuses; monitor the financial responsibility and soundness of market participants; perform market surveillance and macroprudential supervision; resolve issues and positions after an institution fails; monitor compliance with relevant regulatory requirements; and respond to market turmoil.[176]

Additionally, improving the availability of data regarding the security-based swap market should give the Commission and other relevant authorities improved insight into how regulations are affecting, or may affect, the market. This may be expected to help increase regulatory

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[175] See SDR Adopting Release, 80 FR at 14531 ("The SDR Requirements [Exchange Act section 13(n) and the rules and regulations thereunder], including requirements that SDRs register with the Commission, retain complete records of [security-based swap] transactions, maintain the integrity and confidentiality of those records, and disseminate appropriate information to the public are intended to help ensure that the data held by SDRs is reliable and that the SDRs provide information that contributes to the transparency of the [security-based swap] market while protecting the confidentiality of information provided by market participants."); see also Exchange Act section 13(n)(5)(C), 15 U.S.C. 78m(n)(5)(c) (requiring SDRs to maintain security-based swap data)); Exchange Act rules 13n-5(b)(3) and (4) (requiring SDRs to establish, maintain, and enforce policies and procedures reasonably designed to ensure that transaction data and positions are accurate and to maintain the transaction data and positions for specified periods of time).

[176] See, e.g., SDR Proposing Release, 75 FR at 77307, 77356, corrected at 76 FR 79320 (stating that the "data maintained by an SDR may also assist regulators in (i) preventing market manipulation, fraud, and other market abuses; (ii) performing market surveillance, prudential supervision, and macroprudential (systemic risk) supervision; and (iii) resolving issues and positions after an institution fails," and further stating that "increased transparency on where exposure to risk reside in financial markets . . . will allow regulators to monitor and act before the risks become systemically relevant. Therefore, SDRs will help achieve systemic risk monitoring."); Cross-Border Proposing Release, 78 FR at 31186-31187 (discussing benefits of providing relevant foreign authorities with access to data maintained by SDRs).

effectiveness by allowing the Commission and other regulators to better craft regulation to achieve desired goals.

In addition, the Commission believes that providing relevant foreign authorities with access to data maintained by repositories may help reduce costs to market participants by reducing the potential for duplicative security-based swap transaction reporting requirements in multiple jurisdictions.[177] The Commission anticipates that relevant foreign authorities will likely impose their own reporting requirements on market participants within their jurisdictions.[178] Given the global nature of the security-based swap market and the large number of cross-border transactions, the Commission recognizes that it is likely that such transactions may be subject to the reporting requirements of at least two jurisdictions.[179] However, the Commission preliminarily believes that if relevant authorities are able to access security-based swap data in trade repositories outside their jurisdiction, such as repositories registered with the Commission, as needed, then relevant authorities may be more inclined to permit market participants involved in such transactions to fulfill their reporting requirements by reporting the transactions to a single

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177 Cf. Cleary Gottlieb comment (Sept. 20, 2011) at 31 (the indemnification requirement "could be a significant impediment to effective regulatory coordination, since non-U.S. regulators may establish parallel requirements for U.S. regulators to access swap data reported in their jurisdictions.").

178 For example, EU law requires that counterparties to derivatives contracts report the details of the contract to a trade repository, registered or recognized in accordance with EU law, no later than the working day following the conclusion, modification or termination of the contract. See EMIR art. 9; see also EC Delegated Regulation no. 148/2013 (regulatory technical standards implementing the reporting requirement).

179 For example, as noted above, market data regarding single-name CDS transactions involving U.S.-domiciled counterparties and/or U.S.-domiciled reference entities indicates that 13 percent of such transactions involve two U.S.-domiciled counterparties, while 48 percent involve a U.S.-domiciled counterparty and a foreign-domiciled counterparty. See note 141, supra, and accompanying text.

trade repository.[180] If market participants can report a transaction to a single trade repository rather than to separate trade repositories in each applicable jurisdiction, their compliance costs may be reduced. Similarly, to the extent that security-based swap data repositories provide additional ancillary services,[181] if market participants choose to make use of such services, they would likely find such services that make use of all of their data held in a single trade repository more useful than services that are applied only to a portion of that market participant's transactions. Ancillary services applied to only a portion of a participant's transactions could result if data were divided across multiple repositories as a result of regulations requiring participants to report data to separate trade repositories in each applicable jurisdiction.

b. Anticipated costs

The Commission believes that although there are benefits to security-based swap data repositories providing access to relevant authorities to data maintained by the repositories, such access will likely involve certain costs and potential risks. For example, the Commission expects that repositories will maintain data that are proprietary and highly sensitive[182] and that are

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180 For example, EU law anticipates the possibility that market participants may be able to satisfy their EU reporting obligations by reporting to a trade repository established in a third country, so long as that repository has been recognized by the European Securities and Markets Authority. See EMIR art. 77; see also Regulation SBSR, rule 908(c) (providing that to the extent that the Commission has issued a substituted compliance order/determination, compliance with Title VII regulatory reporting and public dissemination requirements may be satisfied by compliance with the comparable rules of a foreign jurisdiction).

181 According to one commenter, ancillary services "may include: asset servicing, confirmation, verification and affirmation facilities, collateral management, settlement, trade compression and netting services, valuation, pricing and reconciliation functionalities, position limits management, dispute resolution, counterparty identity verification and others." See MarkitSERV comment (Jan. 24, 2011) at 4 (comment in response to SDR Proposing Release).

182 As the Commission noted in the SDR Proposing Release, such data could include information about a market participant's trades or its trading strategy; it may also include non-public personal information. SDR Proposing Release, 75 FR at 77339.

subject to strict privacy requirements.[183] Extending access to such data to anyone, including relevant authorities, increases the risk that the confidentiality of the data maintained by repositories may not be preserved.[184] A relevant authority's inability to protect the confidentiality of data maintained by repositories could erode market participants' confidence in the integrity of the security-based swap market and increase the overall risks associated with trading.[185] As we discuss below, this may ultimately lead to reduced trading activity and liquidity in the market, hindering price discovery and impeding the capital formation process.[186]

To help mitigate these risks and potential costs to market participants, the Exchange Act and the proposed rules impose certain conditions on relevant authorities' access to data maintained by repositories.[187] In part, the Exchange Act and the proposed rules limit the authorities that may access data maintained by a security-based swap data repository to a specific list of domestic authorities and other persons, including foreign authorities, determined by the

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183 See Exchange Act section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F) (requiring an SDR to maintain the privacy of security-based swap transaction information); Exchange Act rules 13n-4(b)(8) and 13n-9 (implementing Exchange Act section 13(n)(5)(F)).

184 See, e.g., ESMA comment (Jam. 17, 2011) at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

185 For example, should it become generally known by market participants that a particular dealer had taken a large position in order to facilitate a trade by a customer and was likely to take offsetting positions to reduce its exposure, other market participants may take positions in advance of the dealer attempting to take its offsetting positions. This "front running" of the dealer's trades would likely raise its trading costs. Should the dealer believe that its market exposure may become public before it has the opportunity to hedge, the price quote offered to its customer to establish the original position would reflect the increased hedging cost.

186 See SDR Proposing Release, 75 FR at 77307 ("Failure to maintain privacy of [SDR data] could lead to market abuse and subsequent loss of liquidity.").

187 Exchange Act section 13(n)(5)(G) and (H), 15 U.S.C. 78m(n)(5)(G) and (H); see also Exchange Act rules 13n-4(b)(9) (implementing Exchange Act sections 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G)) and (b)(10) (implementing Exchange Act section 13(n)(5)(H), 15 U.S.C. 78m(n)(5)(H)).

Commission to be appropriate,[188] and further require that a repository notify the Commission when the repository receives an authority's initial request for data maintained by the repository.[189] Restricting access to security-based swap data available to relevant authorities should reduce the risk of unauthorized disclosure, misappropriation or misuse of security-based swap data because each relevant authority will only have access to information within its regulatory mandate, or legal responsibility or authority.

The proposed rules further require that, before a repository shares security-based swap information with a relevant authority, there must be an arrangement (in the form of a MOU or otherwise) between the Commission and the relevant authority that addresses the confidentiality of the security-based swap information provided, and under which the relevant authority agrees to indemnify the Commission and the repository for any expenses arising from litigation relating to the information provided.[190] While the proposal also conditionally exempts the relevant authority requesting data from the indemnification requirement, it does so only if the requested information relates to a regulatory mandate or legal responsibility or authority of the entity requesting the data, and there is in effect an arrangement between the Commission and such relevant authority that addresses the confidentiality of the information provided.[191] The arrangement should further reduce the likelihood of confidential trade or position data being inadvertently made public.

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188 As discussed above in part II.A.3(a), the Commission anticipates that such determinations may be conditioned, in part, by specifying the scope of a relevant authority's access to data, and may limit this access to reflect the relevant authority's regulatory mandate, or legal responsibility or authority.

189 See Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G); proposed Exchange Act rule 13n-4(b)(9).

190 See Exchange Act section 13(n)(5)(H), 15 U.S.C. 78m(n)(5)(H); proposed Exchange Act rule 13n-4(b)(10).

191 See proposed Exchange Act rule 13n-4(d).

Although the statutory indemnification requirement could provide a strong incentive for relevant authorities to take appropriate care in safeguarding data they might receive from a registered SDR, the Commission recognizes the significance of commenter concerns regarding the impact of requiring indemnification,[192] and understands that certain authorities may be unable to agree to indemnify a data repository and the Commission. Therefore, the Commission preliminarily believes that the indemnification requirement could frustrate the purposes of the statutory requirement that repositories make available data to relevant authorities. The Commission preliminarily believes that the proposed approach appropriately balances confidentiality concerns associated with regulatory access with the benefits accruing to security-based swap market participants from increased regulatory transparency.

2. Effects on Efficiency, Competition and Capital Formation

The rules described in this proposal are intended to facilitate access for relevant authorities to data stored in SEC-registered repositories and therefore affect such repositories, but do not directly affect security-based swap market participants. As discussed below, access by relevant authorities to security-based swap data could indirectly affect market participants through the benefits that accrue from the relevant authorities' improved ability to fulfill their regulatory mandate or legal responsibility or authority as well as the potential impact of disclosure of confidential data. However, because the Commission preliminarily believes that its rules will condition access to security-based swap data on the agreement of the relevant authorities to protect the confidentiality of the data, the Commission expects these rules to have little effect on the structure or operations of the security-based swap market. Therefore, the

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192 See note 13, supra.

Commission preliminarily believes that effects of the proposed rules on efficiency, competition and capital formation will be small.[193] Nevertheless, there are some potential effects, particularly with respect to efficiency and capital formation, which flow from efficient collection and aggregation of security-based swap data. We describe these effects below.

In part VI.B of this release, the Commission describes the baseline used to evaluate the economic impact of the proposed rules, including the impact on efficiency, competition and capital formation. In particular, the Commission noted that the security-based swap data currently available from the DTCC-TIW is the result of a voluntary reporting system and access to that data is made consistent with guidelines published by the ODRF.

Under the voluntary reporting regime, CDS transaction data involving counterparties and reference entities from most jurisdictions is reported to a single entity, the DTCC-TIW. The DTCC-TIW, using the ODRF guidelines, then allows relevant authorities, including the Commission, to obtain data necessary to carry out their respective authorities and responsibilities with respect to OTC derivatives and the regulated entities that use derivatives.[194] As various regulators implement reporting rules within their jurisdictions, counterparties within those jurisdictions may or may not continue to report to the DTCC-TIW. As a result, the ability of the Commission and other relevant authorities to obtain the data required consistent with their regulatory mandate, or legal responsibility or authority, may require the ability to access data held in a trade repository outside of their own jurisdictions. That is, because the market is global and interconnected, effective regulatory monitoring of the security-based swap market may

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193 See part VI.C.1b above for a discussion of the potential impact on capital formation of inadequate data confidentiality protections. The Commission preliminarily believes that the proposed approach balances the need for data confidentiality and the need for regulatory transparency.

194 See note 149, supra.

require regulators to have access to information on the global market, particularly during times of market turmoil. The proposed data access rule amendments and indemnification exemption should facilitate access of relevant authorities other than the Commission to security-based swap data held in repositories, and may indirectly facilitate Commission access to data held by trade repositories registered with regulators other than the Commission. To the extent that the proposed data access rules and indemnification exemption facilitate the ability of repositories to collect security-based swap information involving counterparties across multiple jurisdictions, there may be benefits in terms of efficient collection and aggregation of security-based swap data.

To the extent that the proposed data access provisions and the indemnification exemption increase the quantity of transaction and position information available to regulatory authorities about the security-based swap market, the ability of the Commission and other relevant authorities to respond in an appropriate and timely manner to market developments could enhance investor protection through improved detection, and facilitating the investigation of fraud and other market abuses. Moreover, as noted above, we do not anticipate that the proposed rules would directly affect market participants, such enhancements in investor protections may decrease the risks and indirect costs of trading and could therefore encourage greater participation in the security-based swap market for a wider range of entities seeking to engage in a broad range of hedging and trading activities.[195] While we believe that increased participation is a possible outcome of the Commission's transparency initiatives, including these proposed

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[195] Indirect trading costs refer to costs other than direct transaction costs. Front running costs described above provide an example of indirect trading costs. In the context of investor protection, the risk of fraud represents a cost of trading in a market with few investor protections or safeguards.

rules, relative to the level of participation in this market if these initiatives were not undertaken, we preliminarily believe that the benefits that flow from improved detection, facilitating the investigation of fraud and other market abuses, and more-efficient data aggregation are the more direct benefits of the rules.

In addition, the improvement in the quantity of data available to regulatory authorities, including the Commission, should improve their ability to monitor concentrations of risk exposures and evaluate risks to financial stability and could promote the overall stability in the capital markets.[196]

Aside from the effects that the proposed data access rules may have on regulatory oversight and market participation, we expect the proposed rules potentially to affect how SDRs are structured. In particular, the proposed data access rules and indemnification exemption could reduce the potential for SDRs to be established along purely jurisdictional lines, with multiple repositories established in different countries or jurisdictions. That is, effective data sharing may reduce the need for repositories to be established along jurisdictional lines, reducing the likelihood that a single security-based swap transaction must be reported to multiple swap-data repositories. As noted previously by the Commission, due to high fixed costs and increasing economies of scale, the total cost of providing trade repository services to the market for security-based swaps may be lower if the total number of repositories is not increased due to a regulatory environment that results in trade repositories being established along jurisdictional lines.[197] To the extent that the proposed rules result in fewer repositories that potentially

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196 See note 95, supra.

197 See SDR Adopting Release, 80 FR at 14533 (discussion of high fixed costs and increasing economies of scale in the provision of security-based swap data repository services); see also SDR

compete across jurisdictional lines, cost savings realized by fewer repositories operating on a larger scale could result in reduced fees, with the subsequent cost to market participants to comply with reporting requirements being lower.[198]

Furthermore, multiple security-based swap data repositories with duplication of reporting requirements for cross-border transactions increase data fragmentation and data duplication, both of which increase the potential for difficulties in data aggregation. To the extent that the proposed data access rule amendments and indemnification exemption facilitate the establishment of SDRs that accept transactions from multiple jurisdictions, there may be benefits in terms of efficient collection and aggregation of security-based swap data. As discussed above, to the extent that the indemnification exemption allows relevant authorities to have better access to the data necessary to form a more complete picture of the security-based swap market – including information regarding risk exposures and asset valuations – the exemption should help the Commission and other relevant authorities perform their oversight functions in a more effective manner.

However, while reducing the likelihood of having multiple SDRs established along jurisdictional lines would resolve many of the challenges involved in aggregating security-based swap data, there may be costs associated with having fewer repositories. In particular, the existence of multiple repositories may reduce operational risks, such as the risk that a

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Adopting Release, 80 FR at 14479 (discussion of rule 13n-4(c)(1)(i), which requires each SDR to ensure that any dues, fees or other charges that it imposes, and any discounts or rebates that it offers, are fair and reasonable and not unreasonably discriminatory; particularly noting that "[o]ne factor that the Commission has taken into consideration to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the cost incurred to provide the service").

[198] Alternatively, fewer repositories could result in those few repositories having the ability to take advantage of the reduced level of competition to charge higher prices.

catastrophic event or the failure of a repository leaves no registered repositories to which transactions can be reported, impeding the ability of the Commission and relevant authorities to obtain information about the security-based swap market.

Finally, as we noted above, a relevant authority's inability to protect the privacy of data maintained by repositories could erode market participants' confidence in the integrity of the security-based swap market. More specifically, confidentiality breaches, including the risk that trading strategies may no longer be anonymous due to a breach, may increase the overall risks associated with trading or decrease the profits realized by certain traders. Increased risks or decreased profits may reduce incentives to participate in the security-based swap markets, which may lead to reduced trading activity and liquidity in the market. Depending on the extent of confidentiality breaches, as well as the extent to which such breaches lead to market exits, disclosures of confidential information could hinder price discovery and impede the capital formation process.[199]

3. Additional Costs and Benefits of Specific Rules

Apart from the general costs and benefits associated with the structure of the Exchange Act data access provisions and proposed implementing rules, certain discrete aspects of the proposed rules and related interpretation raise additional issues related to economic costs and benefits.

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[199] See SDR Proposing Release, 75 FR at 77307 ("Failure to maintain privacy of [SDR data] could lead to market abuse and subsequent loss of liquidity.").

a. Benefits

i. Determination of recipient authorities

The Commission is proposing an approach to determining whether an authority, other than those expressly identified in the Exchange Act and the implementing rules,[200] should be provided access to data maintained by SDRs. The Commission believes that this proposed approach has the benefit of appropriately limiting relevant authorities' access to data maintained by repositories to protect the confidentiality of the data.[201] The Commission expects that relevant authorities from a number of jurisdictions may seek to obtain a determination by the Commission that they may appropriately have access to repository data. Each of these jurisdictions may have a distinct approach to supervision, regulation or oversight of its financial markets or market participants and to the protection of proprietary and other confidential information. The Commission believes that the proposed factors – which among other things would consider whether an authority has an interest in access to security-based swap data based on the relevant authority's regulatory mandate or legal responsibility or authority, whether there is an MOU or other arrangement between the Commission and the relevant authority that addresses the confidentiality of the security-based swap data provided to the authority, and whether information accessed by the applicable authority would be subject to robust confidentiality safeguards[202] – appropriately condition an authority's ability to access data on the confidentiality protections the authority will afford that data. This focus further would be strengthened by the Commission's ability to revoke its determination where necessary,

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200 See part II.A for a discussion of specific authorities included in the implementing rules.

201 See ESMA comment (Jan. 17, 2011) at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

202 See part II.A.3.a, supra.

including, for example, if a relevant authority fails to keep such data confidential.[203] This approach should increase market participants' confidence that their confidential trade data will be protected, reducing perceived risks of transacting in security-based swaps.

The Commission also believes that its proposed approach in determining the appropriate relevant authorities would reduce the potential for fragmentation and duplication of security-based swap data among trade repositories by facilitating mutual access to the data. Narrower approaches such as allowing regulatory access to security-based swap data only to those entities specifically identified in the Exchange Act[204] may increase fragmentation and duplication, and hence increase the difficulty in consolidating and interpreting security-based swap market data from repositories, potentially reducing the general economic benefits discussed above.

Furthermore, the Commission believes that its proposed approach in conditioning access to security-based swap data held in SDRs by requiring there to be in effect an arrangement between the Commission and the authority in the form of a MOU would promote the intended benefits of access by relevant authorities to data maintained by SDRs. Under the proposed approach, rather than requiring regulatory authorities to negotiate confidentiality agreements with multiple SDRs, a single MOU between the Commission and the relevant authority can serve as the confidentiality agreement that will satisfy the requirement for a written agreement stating that the relevant authority will abide by the confidentiality requirements described in section 24 of the Exchange Act relating to the security-based swap data. The Commission routinely negotiates MOUs or other arrangements with relevant authorities to secure mutual assistance or

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203 See part II.A.4, supra.

204 See Exchange Act section 3(a)(74), 15 U.S.C. 78c(a)(74).

for other purposes, and the Commission preliminarily believes that the proposed approach is generally consistent with this practice.

The Commission further preliminarily believes that negotiating a single such agreement with the Commission will be less costly for the authority requesting data than negotiating directly with each registered SDR and eliminate the need for each SDR to negotiate as many as 200 confidentiality agreements with requesting authorities. This approach would also avoid the difficulties that may be expected to accompany an approach that requires SDRs to enter into confidentiality agreements – particularly questions regarding the parameters of an adequate confidentiality agreement, and the presence of uneven and potentially inconsistent confidentiality protections across SDRs and recipient entities.

ii. Notification requirement

The Commission is proposing an approach by which SDRs may satisfy the notification requirement by notifying the Commission upon the initial request for security-based swap data by a relevant authority and maintaining records of the initial request and all subsequent requests.[205] The Commission estimates that approximately 300 relevant authorities may make requests for data from security-based swap data repositories.[206] Based on the Commission's

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205 See proposed Exchange Act rule 13n-4(e).

206 See proposed Exchange Act rule 13n-4(b)(9)(i)-(v) for a list of prudential regulators that may request data maintained by SDRs from SDRs. The Exchange Act also states that FSOC, the CFTC, and the Department of Justice may access security-based swap data. See parts II.A.1, 2, supra. The Commission also expects that certain self-regulatory organizations and registered futures associations may request security-based swap data from repositories. Therefore, the Commission estimates that up to approximately 30 relevant authorities in the United States may seek to access security-based swap data from repositories. The Commission preliminarily believes that most requests will come from authorities in G20 countries, and estimates that each of the G20 countries will also have no more and likely fewer than 30 relevant authorities that may request data from SDRs. Certain authorities from outside the G20 also may request data. Accounting for all of those entities, the Commission estimates that there will

experience in making requests for security-based swap data from trade repositories, the Commission estimates that each relevant authority will access security-based swap data held in SDRs using electronic access. Such access may be to satisfy a narrow request concerning a specific counterparty or reference entity or security, to create a summary statistic of trading activity or outstanding notional, or to satisfy a large request for detailed transaction and position data. Requests may occur as seldom as once per month if the relevant authority is downloading all data to which it has access in order to analyze it on its own systems, or may occur 100 or more times per month if multiple staff of the relevant authority are making specific electronic requests concerning particular counterparties or reference entities and associated positions or transactions. Therefore, under the Commission's proposed approach to notification requirement compliance, the Commission estimates based on staff experience that each repository would provide the Commission with actual notice as many as 300 times, and that repositories cumulatively would maintain records of as many as 360,000 subsequent data requests per year.[207] The proposed rule would be expected to permit repositories to respond to requests for data by relevant authorities more promptly and at lower cost than if notification was required for each request for data access, while helping to preserve the Commission's ability to monitor whether the repository provides data to each relevant entity consistent with the applicable conditions.

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likely be a total of no more than 300 relevant domestic and foreign authorities that may request security-based swap data from repositories.

[207] The annual estimate of 360,000 is calculated based on 300 recipient entities each making 100 requests per month cumulatively across all repositories. The estimate of 100 requests per authority is based on staff experience with similar data requests in other contexts.

The Commission's proposed rule would also simplify relevant authorities' direct access to security-based swap data needed in connection with their regulatory mandate or legal responsibility or authority, because repositories would not be required to provide the Commission with actual notice of every request prior to providing access to the requesting relevant authority.

iii. Use of confidentiality agreements between the Commission and recipient authorities

The proposed rules in part would condition regulatory access on there being an arrangement between the Commission and the recipient entity, in the form of an MOU or otherwise, addressing the confidentiality of the security-based swap information made available to the recipient. The proposed rules add that those arrangements shall be deemed to satisfy the statutory requirement for a written confidentiality agreement.[208]

As discussed above, the Commission preliminarily believes that this approach reflects an appropriate way to satisfy the interests associated with the confidentiality condition. The benefits associated with this approach include obviating the need for repositories to negotiate and enter into multiple confidentiality agreements, avoiding difficulties regarding the parameters of an adequate confidentiality agreement, and avoiding uneven and potentially inconsistent confidentiality protections. The proposed approach also would build upon the Commission's experience in negotiating such agreements.[209]

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208 See proposed Exchange Act rule 13n-4(10)(i).

209 See part II.B.1, supra.

iv. Indemnification exemption

The Commission also is proposing a conditional indemnification exemption, recognizing that application of the indemnification requirement could prevent some relevant domestic and foreign authorities from obtaining security-based swap information from repositories, because they cannot provide an indemnification agreement.[210] Effectively prohibiting some authorities other than the Commission from obtaining access to security-based swap data maintained by repositories potentially would greatly reduce the market transparency to regulators provided by Title VII.[211] Moreover, although relevant authorities could obtain security-based swap data from the Commission,[212] repositories are likely to have systems in place and expertise that allows them to provide such data to relevant authorities quickly, and economic incentives to minimize their own cost of providing data.

The Commission also preliminarily believes that the absence of an exemption to the indemnification requirement could increase the likelihood that foreign authorities would require duplicate reporting of cross-border transactions to repositories within the foreign jurisdiction. To the extent that relevant foreign authorities are effectively restricted in obtaining data maintained by SEC-registered repositories, the Commission's own ability to access security-based swap data may similarly be restricted.[213] More generally, the resulting restrictions on regulatory access may likely lead to duplication and fragmentation of security-based swap data among trade

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210 See part III.A, supra.

211 See Proposing Release, 75 FR at 77307 (describing expected benefits of SDRs, including the market transparency benefits of access by regulators); id. at 77356 ("The ability of the Commission and other regulators to monitor risk and detect fraudulent activity depends on having access to market data."); see also part VI.B.1 of this release discussing transparency in the security-based swap market.

212 See part IV.B, supra (discussing information sharing under Exchange Act sections 21 and 24); see also Proposing Release, 75 FR at 77319.

213 See note 94, supra, and accompanying text.

repositories in multiple jurisdictions, which may increase other costs that relevant authorities may incur, including, for example, the difficulty of aggregating data across multiple repositories.[214]

The Commission preliminarily believes that the proposed indemnification exemption further would be beneficial by mitigating the risks associated with permitting relevant authorities to obtain access to data maintained by repositories. The exemption would be available only for requests that are consistent with each requesting authority's regulatory mandate, or legal responsibility or authority. The Commission preliminarily believes that these conditions would significantly reduce the confidentiality concerns relating to relevant authorities' access to data maintained by repositories.[215] Limiting an authority's access to data to that relating to its mandate, or legal responsibility or authority would reduce the opportunity for improper disclosure of the data in part because such limits reduce the quantity of data that is subject to potential improper disclosure, and because an authority is likely to be familiar with the need to maintain the confidentiality of data that relates to its mandate or legal responsibility or authority. Further, the Commission will have an opportunity to evaluate the confidentiality protections provided by the relevant authority in the context of negotiations of an MOU or other arrangement.[216] Should the Commission believe the relevant authority has failed to comply with

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[214] See Proposing Release, 75 FR at 77358. The costs associated with aggregating the data of multiple repositories would likely be significantly higher under the circumstances described here, as different jurisdictions might impose different requirements regarding how data is to be reported and maintained.

[215] See, e.g., ESMA comment (Jan. 17, 2011) at 2 (noting that relevant authorities must ensure the confidentiality of security-based swap data provided to them).

[216] For the indemnification exemption to apply to the requests of a particular requesting authority, the authority would be required to enter into an MOU or other arrangement with the Commission, which would enable the Commission to determine, prior to operation of the indemnification exemption, that the authority has a regulatory mandate, or legal responsibility or authority to access data maintained by

the confidentiality provisions of the MOU, it may terminate access by revoking a determination by the Commission that the relevant entity was appropriate, or by terminating the MOU or other arrangement used to satisfy the confidentiality condition, or, as applicable, the indemnification exemption.[217]

b. Costs

The Commission recognizes that the proposed approach to providing access to relevant authorities other than the Commission to security-based swap data held in repositories has the potential to involve certain costs and risks.

The relevant authorities requesting securities-based swap data would incur some costs in seeking a Commission order deeming the authority appropriate to receive security-based swap data. These costs would include the negotiation of an MOU to address the confidentiality of the security-based swap information it seeks to obtain and providing information to justify that the security-based swap data relates to the entity's regulatory mandate or legal responsibility or authority. As discussed above, the Commission estimates that up to 300 entities potentially might enter into such MOUs or other arrangements.[218] Based on the Commission staff's experience in negotiating MOUs that address regulatory cooperation, the Commission preliminarily estimates the cost to each relevant authority requesting data associated with

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SDRs, that the authority agrees to protect the confidentiality of any security-based swap information provided to it and that the authority will provide reciprocal assistance in securities matters within the Commission's jurisdiction. See part III, supra (discussing the proposed indemnification exemption).

217 See part II.A.3, supra.

218 See part VI.C.3.a.ii, supra.

negotiating such an arrangement of approximately $205,000 per entity for a total of $61,500,000.[219]

In addition, authorities that are not specified by the proposed rule may request that that the Commission determine them to be appropriate to receive access to such security-based swap data. Given the relevant information that the Commission preliminarily would consider in connection with such designations (apart from the MOU issues addressed above) – including information regarding how the authority would be expected to use the information, information regarding the authority's regulatory mandate or legal responsibility or authority, and information regarding reciprocal access – the Commission preliminarily estimates the cost associated with such a request to be approximately $15,200 per requesting entity for a total of $4,560,000.[220]

Security-based swap data repositories would incur some costs to verify that an entity requesting data entered into the requisite agreements concerning confidentiality with the Commission, and that the entity either has agreed to indemnify the Commission and the repository, or that the indemnification exemption applies. The Commission generally expects

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[219] These figures are based on 300 entities each requiring 500 personnel hours on average to negotiate an MOU. See part V.D.1.a, supra. The cost per entity is 400 hours x attorney at $380 per hour + 100 hours x deputy general counsel at $530 per hour = $205,000, or a total of $61,500,000. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for a 1800-hour year-week and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[220] These figures are based on roughly 300 entities (noting that certain entities designated by statute or rule would not need to prepare such requests) requiring 40 personnel hours to prepare a request for access. See part V.D.1.b, supra. The cost per entity is 40 hours x attorney at $380 per hour = $15,200, or a total of $4,560.000. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for a 1800-hour year-week and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

that such verification costs would be minimal because information regarding such Commission arrangements would generally be readily available.[221]

To the extent that the security-based swap data repository provides the requested data through direct electronic means, the repository may incur some cost in providing the requesting authority access to the system that provides such access and setting data permissions to allow access only to the information that relates to the authority's regulatory mandate, or legal responsibility or authority. The Commission preliminarily believes most of the costs associated with providing such access would be the fixed costs incurred in designing and building the systems to provide the direct electronic access required by the recently adopted SDR rules.[222] The Commission preliminarily believes the marginal cost of providing access to an additional relevant authority and setting the associated permissions is approximately $6,295.[223] Based on an estimated 300 entities requesting access to each of ten registered SDRs, we estimate the total cost of connecting entities to SDRs to be approximately $18,885,000.

The Commission further recognizes that the conditions in the proposed indemnification exemption would not necessarily provide repositories and the Commission with the same level of

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[221] As a general matter, the Commission provides a list of MOUs and other arrangements on its public website, which are available at: http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

[222] See SDR Adopting Release, 80 FR at 14523 (estimating the aggregate one-time systems costs for ten respondents to be 420,000 hours and $10 million, and estimating the aggregate ongoing systems costs as being 252,000 hours and $60 million); see also part IV.D.1.c, supra.

[223] This figure is based on the view that, for each recipient requesting data, a repository would incur an 25 hour burden associated with programming or otherwise inputting the relevant parameters, encompassing 20 hours of programmer analyst time and five hours of senior programmer time. The estimate also encompasses one hour of attorney time in connection with each such recipient. See part V.D.1.c, supra. The cost per entity is 20 hours x programmer analyst at $220 per hour + 5 hours x senior programmer at $303 per hour + 1 hour x attorney at $380 per hour = $6,295, We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for a 1800-hour year-week and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

confidentiality-related protection that an indemnification agreement would provide (i.e., coverage for any expenses arising from litigation relating to information provided to a relevant authority). The Commission preliminarily believes, however, that the conditions in the proposed indemnification exemption, related to the need for a confidentiality arrangement and requiring that the information provided relate to a regulatory mandate, or legal responsibility or authority of the recipient entity, would provide appropriate protection of the confidentiality of data maintained by SDRs, albeit one that is different from the protection provided by an indemnification agreement that addresses potential costs of litigation associated with the data provided to it by the SDR.

In addition, under the Commission's proposed notification compliance rule, SDRs would be required to notify the Commission of the initial request for data but would not have to inform the Commission of all relevant authorities' requests for data prior to a SDR fulfilling such requests. Based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories, the Commission estimates that a repository would provide the Commission with actual notice approximately 300 times.[224] Moreover, based on the estimate that ten persons may register with the Commission as SDRs,[225] this suggests that repositories in the aggregate would provide the Commission with actual notice up to a total of 3,000 times. The Commission preliminarily estimates that the total of providing such notice to be $57,000 per SDR for a total of $570,000.[226]

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224 See part VI.C.3.ii, supra.

225 See note 117, supra, and accompanying text

226 These figures are based each of ten SDRs providing notice for each of 300 requesting entities. See part V.D.1.d, supra. The cost per SDR is 300 requesting entities x 0.5 hours x attorney at $380 per hour = $57,000, or a total of $570,000. We use salary figures from SIFMA's Management &

Pursuant to rule, SDRs would be required to maintain records of subsequent requests.[227] Not receiving actual notice of all requests may impact the Commission's ability to track such requests, but the Commission preliminarily believes that the benefits of receiving actual notice of each request would not justify the additional costs that repositories would incur in providing such notices and the potential delay in relevant authorities receiving data that they need to fulfill their regulatory mandate, or legal responsibility or authority. At the same time, providing notice of initial requests will help to preserve the Commission's ability to monitor whether the repository provides data to each relevant entity consistent with the applicable conditions. As discussed above, the Commission preliminarily estimates that the average initial paperwork burden associated with maintaining certain records related to data requests or access would be roughly 360 hours, and that the annualized burden would be roughly 280 hours and $120,000 for each repository.[228] Assuming a maximum of ten security-based swap data repositories, the estimated aggregate one-time dollar cost would be roughly $1 million,[229] and the estimated aggregate annualized dollar cost would be roughly $1.2 million.[230]

Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for a 1800-hour year-week and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

227 See part V.D.1.d, supra. As noted above, existing rules require SDRs to maintain copies of all documents they make or receive in their course of business, including electronic documents. See note 77, supra.

228 See part V.D.1.d, supra.

229 The Commission preliminarily anticipates that a repository would assign the associated responsibilities primarily to a compliance manager and a senior systems analyst. The total estimated dollar cost would be roughly $100,000 per repository, reflecting the cost of a compliance manager at $283 per hour for 300 hours, and a senior systems analyst at $260 per hour for 60 hours. Across the estimated ten repositories, this would amount to roughly $1 million.

230 The Commission preliminarily anticipates that a repository would assign the associated responsibilities primarily to a compliance manager. The total estimated dollar cost would be roughly $120,000 per repository, reflecting $40,000 annualized information technology costs, as well as a

D. Alternatives

The Commission considered a number of alternative approaches to implementing the Exchange Act data access provisions, including the indemnification requirement, but, for the reasons discussed below, is not proposing them.

1. No indemnification exemption

The Commission considered not proposing any exemptive relief from the indemnification requirement. As discussed above, application of the indemnification requirement may prevent some relevant authorities from accessing security-based swap data directly from repositories registered with the Commission.[231] Although relevant authorities could obtain such data from the Commission,[232] that alternative would be expected to be associated with delays and higher costs, particularly during periods of market stress and particularly since repositories are likely to have expertise in providing such data to relevant authorities and economic incentives for doing so efficiently.[233]

To the extent that relevant foreign authorities are effectively restricted in obtaining data maintained by SEC-registered repositories, the Commission's own ability to access security-based swap data may similarly be restricted.[234] More generally, the resulting restrictions on regulatory access may likely lead to duplication and fragmentation of security-based swap data

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compliance manager at $283 per hour for 280 hours. Across the estimated ten repositories, this would amount to roughly $1.2 million.

231 See, e.g., DTCC comment (Nov. 15, 2010) at 3 (discussing how the indemnification requirement would result in the reduction of information accessible to regulators on a timely basis and would greatly diminish regulators' ability to carry out oversight functions).

232 See part IV.B, supra, discussing information sharing under Exchange Act sections 21 and 24; see also SDR Proposing Release, 75 FR at 77319.

233 See part VI.C.3.a.iv, supra.

234 See note 94, supra, and accompanying text.

among trade repositories in multiple jurisdictions, which may increase other costs that relevant authorities may incur, including, for example, the difficulty of aggregating data across multiple repositories.[235]

2. Repository option to waive indemnification

The Commission also considered whether to adopt the approach set forth in the Cross-Border Proposing Release, to allow the SDR the option to waive the indemnification requirement.[236] As discussed above, however, the Commission preliminarily believes that the proposed approach would more effectively address the relevant concerns associated with implementing the indemnification provision.[237] Also, requiring each repository to elect whether to waive the indemnification requirement for each requesting entity would likely impose additional costs on repositories and may result in inconsistent treatment of data requests across repositories.

3. Additional conditions to indemnification requirement or proposed indemnification exemption

The Commission also considered whether to prescribe additional conditions or limitations to the indemnification requirement or the proposed indemnification exemption. In part, the Commission considered one commenter's suggestion that the Commission provide model indemnification language in connection with the indemnification requirement, but concluded preliminarily that the benefits of such model language are largely mitigated by an indemnification exemption that would condition the indemnification exemption upon there being in effect one or more arrangements (in the form of an MOU or otherwise) between the

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235 See note 214, supra

236 See note 91, supra, and accompanying text.

237 See part III.A, supra.

Commission and the entity that addresses the confidentiality of the security-based swap information provided and other matters as determined by the Commission.[238]

4. Use of confidentiality arrangements directly between repositories and recipients

The Commission considered the alternative approach of permitting confidentiality agreement between SDRs and the recipient of the information to satisfy the confidentiality condition to the data access requirement. The Commission preliminarily believes, however, that the proposed approach, which would make use of confidentiality arrangements between the Commission and the recipients of the data, would avoid difficulties such as questions regarding the parameters of the confidentiality agreement, and the presence of uneven and inconsistent confidentiality protections.[239] This also would avoid the need for SDRs to potentially negotiate and enter into dozens of confidentiality agreements, instead such costs would be borne by the Commission.

6. Notice of individual requests for data access

Finally, the Commission considered requiring repositories to provide notice to the Commission of all requests for data prior to repositories fulfilling such requests, rather than the proposed approach of requiring such notice only of the first request from a particular recipient, with the repository maintaining records of all subsequent requests.[240] The Commission preliminarily believes that the benefits of receiving actual notice for each and every request would not justify the additional costs that would be imposed on repositories to provide such

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238 See note 98, supra.

239 See part II.B.1, supra.

240 See part II.A.4, supra.

notice, and providing notice of subsequent requests may not be feasible if data is provided by direct electronic access.

E. Comments on the Economic Analysis

The Commission requests comment on all aspects of this economic analysis. Commenters particularly are requested to address whether there are other costs or benefits – not addressed above – that the Commission should take into account when adopting final rules. Commenters also are requested to address whether the Commission has appropriately weighed the costs and benefits of the potential alternative approaches addressed above, and whether there are other potential alternative approaches that the Commission should assess.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA")[241] the Commission must advise OMB whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rules and amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

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[241] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

VIII. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 ("RFA")[242] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rules on "small entities." Section 605(b) of the RFA[243] provides that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 605(b), the Commission hereby certifies that the proposed rules would not, if adopted, have a significant economic impact on a substantial number of small entities. In developing these proposed rules, the Commission has considered their potential impact on small entities. For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[244] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[245] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in

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242 5 U.S.C. 603(a).

243 5 U.S.C. 605(b).

244 See 17 CFR 240.0-10(a).

245 17 CFR 240.17a-5(d).

business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[246]

In initially proposing rules regarding the registration process, duties and core principles applicable to SDRs, the Commission stated that it preliminarily did not believe that any persons that would register as repositories would be considered small entities.[247] The Commission further stated that it preliminarily believed that most, if not all, SDRs would be part of large business entities with assets in excess of $5 million and total capital in excess of $500,000, and, as a result, the Commission certified that the proposed rules would not have a significant impact on a substantial number of small entities and requested comments on this certification. [248] The Commission reiterated that conclusion earlier this year in adopting final rules generally addressing repository registration, duties and core principles.[249]

The Commission continues to hold the view that any persons that would register as SDRs would not be considered small entities. Accordingly, the Commission certifies that the proposed rules – related to regulatory access to data held by SDRs and providing a conditional exemption from the associated indemnification requirement – would not have a significant economic impact

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246 See 17 CFR 240.0-10(c).

For purposes of the Regulatory Flexibility Act, the definition of "small entity" also encompasses "small governmental jurisdictions," which in relevant part means governments of locales with a population of less than fifty thousand. 5 U.S.C. 601(5), (6). Although the Commission anticipates that this proposal may be expected to have an economic impact on various governmental entities that access data pursuant to Dodd-Frank's data access provisions, the Commission does not anticipate that any of those governmental entities would be small entities.

247 See 75 FR at 77365.

248 See id. (basing the conclusions on review of public sources of financial information about the current repositories that are providing services in the OTC derivatives market).

249 See SDR Adopting Release, 80 FR at 14549 (noting that the Commission did not receive any comments that specifically addressed whether the applicable rules would have a significant economic impact on small entities).

on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed rules could have an effect on small entities that has not been considered. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

Statutory Basis and Text of Proposed Rules

Pursuant to the Exchange Act, and particularly sections 3(b), 13(n), 23(a) and 36 thereof, 15 U.S.C. 78c(b), 78m(n), 78w(a) and 78mm, the Commission is proposing to amend rule 13n-4 by adding paragraphs (b)(9), (b)(10), (d) and (e) to that rule.

List of Subjects in 17 CFR Part 240

Confidential business information, Reporting and recordkeeping requirements, Securities

Text of Proposed Rules

For the reasons stated in the preamble, the Commission is proposing to amend Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

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2. In § 240.13n-4, amend paragraph (b)(8) by removing the word “and” at the end of the paragraph and adding paragraphs (b)(9), (b)(10), (d), and (e).

The additions read as follows:

§ 240.13n–4 Duties and core principles of security-based swap data repository.

* * * * *

(b) * * *

(9) On a confidential basis, pursuant to section 24 of the Act (15 U.S.C. 78x), upon request, and after notifying the Commission of the request in a manner consistent with paragraph (e) of this section, make available security-based swap data obtained by the security-based swap data repository, including individual counterparty trade and position data, to the following:

(i) The Board of Governors of the Federal Reserve System and any Federal Reserve Bank;

(ii) The Office of the Comptroller of the Currency;

(iii) The Federal Deposit Insurance Corporation;

(iv) The Farm Credit Administration;

(v) The Federal Housing Finance Agency;

(vi) The Financial Stability Oversight Council;

(vii) The Commodity Futures Trading Commission;

(viii) The Department of Justice;

(ix) The Office of Financial Research;

and

(x) Any other person that the Commission determines to be appropriate, conditionally or unconditionally, by order, including, but not limited to –

(A) Foreign financial supervisors (including foreign futures authorities);

(B) Foreign central banks; and

(C) Foreign ministries;

(10) Before sharing information with any entity described in paragraph (b)(9) of this section, there shall be in effect an arrangement between the Commission and the entity (in the form of a memorandum of understanding or otherwise) to address the confidentiality of the security-based swap information made available to the entity; this arrangement shall be deemed to satisfy the requirement, set forth in section 13(n)(5)(H)(i) of the Act (15 U.S.C. 78m(n)(5)(H)(i)), that the security-based swap data repository receive a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in section 24 of the Act (15 U.S.C. 78x) relating to the information on security-based swap transactions that is provided; and

* * * * *

(d) Exemption from the indemnification requirement. The indemnification requirement set forth in section 13(n)(5)(H)(ii) of the Act (15 U.S.C. 78m(n)(5)(H)(ii)) shall not be applicable to an entity described in paragraph (b)(9) of this section with respect to disclosure of security-based swap information by the security-based swap data repository to such entity if:

(1) Such information relates to persons or activities within the entity's regulatory mandate, or legal responsibility or authority; and

(2) There is in effect one or more arrangements (in the form of memoranda of understanding or otherwise) between the Commission and such entity that:

(i) Address the confidentiality of the security-based swap information provided and any other matters as determined by the Commission; and

(ii) Specify the types of security-based swap information that would relate to persons or activities within the entity's regulatory mandate, legal responsibility or authority for purposes of paragraph (d)(1) of this section.

(e) Notification requirement compliance. To satisfy the notification requirement of the data access provisions of paragraph (b)(9) of this section, a security-based swap data repository shall inform the Commission upon its receipt of the first request for security-based swap data from a particular entity (which may include any request to be provided ongoing online or electronic access to the data), and the repository shall maintain records of all information related to the initial and all subsequent requests for data access from that entity, including records of all instances of online or electronic access, and records of all data provided in connection with such requests or access.

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By the Commission.

Brent J. Fields
Secretary

Date: September 4, 2015

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