



**8011-01p**

**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-87781]**

**Order Designating Certain Jurisdictions as “Listed Jurisdictions” for Purposes of Applying the Security-Based Swap Dealer De Minimis Exception of Rule 3a71-3(d) Under the Exchange Act to Certain Cross-Border Security-Based Swap Transactions**

**I. Introduction**

Rule 3a71-3 under the Securities Exchange Act of 1934 (the “Exchange Act”) in part addresses the cross-border application of the “security-based swap dealer” definition, including the cross-border application of the de minimis exception to that definition.<sup>1</sup> Under the rule, non-U.S. persons that engage in security-based swap dealing activity are required to count – against the thresholds associated with the de minimis exception – their dealing transactions with non-U.S. counterparties if those dealing transactions were “arranged, negotiated, or executed” using U.S. personnel.<sup>2</sup>

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<sup>1</sup> The term “security-based swap dealer” is defined in Exchange Act Section 3(a)(71) and further defined by Exchange Act Rules 3a71-1 through 3a71-5. Section 3(a)(71)(D) provides that the Securities and Exchange Commission (the “SEC” or the “Commission”) shall promulgate regulations to establish factors with respect to the making of any determination to exempt a security-based swap dealer that engages in a de minimis quantity of security-based swap dealing. Persons whose dealing activities exceed the de minimis thresholds set by the Commission will be required to register as security-based swap dealers.

Regulation of security-based swap dealers is a key component of the security-based swap market oversight that was granted to the Commission by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

<sup>2</sup> See Exchange Act Rule 3a71-3(b)(1)(iii)(C). The “arranged, negotiated, or executed” counting rule advances a number of important regulatory interests, in part by helping to protect against the potential that market participants would use booking practices to engage in an unregistered security-based swap dealing business in the United States. The use of those “arranged, negotiated, or executed” criteria further reflect the activity focus of the “security-based swap dealer” definition, as well as considerations regarding competitive disparities, market fragmentation and public transparency.

By separate action, the Commission has amended Rule 3a71-3 by adding new paragraph (d) to incorporate a conditional exception from the “arranged, negotiated, or executed” counting requirement.<sup>3</sup> That conditional exception is intended to address certain operational and market concerns that otherwise could arise were transactions to be counted against the applicable de minimis thresholds requirement solely because a transaction between two non-U.S. counterparties results from activity by U.S. personnel.<sup>4</sup> The Rule 3a71-3(d) exception is subject to a number of conditions designed to help protect the important interests that underpin the “arranged, negotiated, or executed” counting requirement. Those include, inter alia, the “listed jurisdiction” condition that is the subject of this Order.<sup>5</sup>

## **II. “Listed Jurisdiction” Condition to the Exception**

### **A. The “listed jurisdiction” condition**

To take advantage of the Rule 3a71-3(d) exception, the non-U.S. person must be subject to the margin and capital requirements of a “listed jurisdiction” when engaging in transactions subject to the exception from the “arranged, negotiated, or executed” counting requirement.<sup>6</sup>

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<sup>3</sup> See Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, Exchange Act Release No. 87780 (Dec. 18, 2019) (“Cross-Border Amendments Adopting Release”). That release also addressed a number of additional topics in connection with the cross-border application of security-based swap dealer requirements.

<sup>4</sup> Those included concerns that non-U.S. dealers would avoid using U.S. personnel, and potentially would relocate U.S. personnel, as well as concerns that application of the counting requirement would be burdensome and would result in market fragmentation and lower liquidity levels. The exception also addressed concerns that the counting requirement could lead financial groups to have to register multiple entities, and concerns regarding disparate approaches from those followed by the Commodity Futures Trading Commission. See Part II of the Cross-Border Amendments Adopting Release.

<sup>5</sup> See paragraph (d)(1) to Rule 3a71-3 for the conditions to the conditional exception.

<sup>6</sup> See paragraph (d)(1)(v) to Rule 3a71-3. The term “listed jurisdiction” is defined as “any jurisdiction that the Commission by order has designated as a listed jurisdiction” for purposes of the exception. See paragraph (a)(12) to Rule 3a71-3.

The Commission has explained that the “listed jurisdiction” condition is intended to deter dealers from attempting to use the exception to avoid Title VII “by simply booking their transactions to entities in jurisdictions that do not effectively require security-based swap dealers or comparable entities to meet certain financial responsibility standards.”<sup>7</sup> Otherwise, the exception could “provide a competitive advantage to non-U.S. persons that conduct security-based swap dealing activity in the United States without being subject to sufficient financial responsibility standards.”<sup>8</sup> The Commission also expressed the view that the “listed jurisdiction” condition is consistent with the view that applying capital and margin requirements to transactions between two non-U.S. persons that have been arranged, negotiated, or executed in the United States can help mitigate the potential for financial contagion to spread to U.S. market participants and to the U.S. financial system more generally.<sup>9</sup>

B. Designation of “listed jurisdictions”

The exception provides that the Commission conditionally or unconditionally may determine “listed jurisdictions” by order, in response to applications or upon the Commission’s own initiative.<sup>10</sup> The Commission by order, after notice and opportunity for comment, may modify or withdraw a listed jurisdiction determination if it determines that continued listed jurisdiction status no longer would be in the public interest based on a number of factors.<sup>11</sup>

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<sup>7</sup> See Part II.C.5.b of the Cross-Border Amendments Adopting Release.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> See paragraph (d)(2) to Rule 3a71-3. Applications may be made by a party or group of parties that potentially would seek to rely on the exception, or by any foreign financial regulatory authority or authorities supervising such a party or its security-based swap activities. See paragraph (d)(2)(i) to Rule 3a71-3. Exchange Act Rule 0-13 sets forth the procedures for filing “listed jurisdiction” applications.

<sup>11</sup> See paragraph (d)(2)(iii) to Rule 3a71-3. In light of the importance of the Commission being able to access information outside the United States regarding the transactions at issue, the determination to modify or withdraw listed jurisdiction status may be based on a jurisdiction’s

When evaluating a foreign jurisdiction’s potential status as a “listed jurisdiction,” the Commission may consider factors relevant for purposes of assessing whether such an order would be in the public interest. These may include the “[a]pplicable margin and capital requirements of the foreign financial regulatory system.”<sup>12</sup> These also may include the “effectiveness of the supervisory compliance program administered by, and the enforcement authority exercised by, the foreign financial regulatory authority in connection with such requirements, including the application of those requirements in connection with an entity’s cross-border business.”<sup>13</sup>

In adopting the exception, the Commission rejected a commenter view that all G-20 jurisdictions should be deemed to be “listed jurisdictions.”<sup>14</sup> While the Commission recognizes that reforms initiated by the G-20 can be relevant for assessing listed jurisdiction status, the implementation of capital and margin requirements, as well as associated supervision or enforcement practices, has the potential to vary significantly across G-20 jurisdictions. Also, many G-20 jurisdictions do not have substantial swap or security-based swap markets, and thus may not necessarily have the incentives or resources needed to promote the effective oversight of those markets.

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laws or regulations that have had the effect of preventing the Commission or its representatives on request to promptly access information or documents regarding the activities of the non-U.S. persons relying on the exception. See paragraph (d)(2)(iii)(B) to Rule 3a71-3. Withdrawal or modification further may be based on any other factor the Commission determines to be relevant. See paragraph (d)(2)(iii)(C) to Rule 3a71-3.

<sup>12</sup> See paragraph (d)(2)(ii)(A) to Rule 3a71-3. In addition, in assessing a jurisdiction’s applicable margin and capital requirements, the Commission would expect to consider whether the margin and capital requirements at issue would apply to entities who transact in security-based swaps and limit a designation accordingly. See Part II.C.5.b of the Cross-Border Amendments Adopting Release.

<sup>13</sup> See paragraph (d)(2)(ii)(B) to Rule 3a71-3.

<sup>14</sup> See Part II.C.5.b of the Cross-Border Amendments Adopting Release.

The Commission also distinguished the evaluation of “listed jurisdictions” from the Commission’s consideration of whether substituted compliance is appropriate in connection with foreign capital and margin requirements.<sup>15</sup> Although “listed jurisdiction” determinations may raise issues that are analogous to those that would accompany applications for substituted compliance, the determinations are made in materially distinct contexts. The Commission accordingly may reach different conclusions when considering substituted compliance than it does when considering listed jurisdiction status for the same jurisdiction.<sup>16</sup>

### **III. Designation of Specific “Listed Jurisdictions”**

For the reasons set forth below, the Commission has determined that it is in the public interest to designate the following jurisdictions as “listed jurisdictions” for purposes of the exception: Australia, Canada, France, Germany, Japan, Singapore, Switzerland, and the United Kingdom (the “Initial Listed Jurisdictions”).<sup>17</sup> Only non-U.S. persons that are subject to the

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<sup>15</sup> See Part II.C.5.b of the Cross-Border Amendments Adopting Release.

<sup>16</sup> For example, in designating a jurisdiction as a “listed jurisdiction” for purposes of the exception, the Commission would not assess whether the foreign margin and capital regime is comparable to the applicable requirements under the Exchange Act. Cf. Exchange Act Rule 3a71-6(a)(2)(i) (in a substituted compliance determination the requirements of the foreign regulatory system must be comparable). In addition, unlike the context of substituted compliance, the entities at issue would not be registered with the Commission.

<sup>17</sup> In proposing the conditional exception to the “arranged, negotiated, or executed” counting requirement, the Commission solicited comment regarding whether listed jurisdiction status would be appropriate for those jurisdictions, along with Hong Kong. See Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, Exchange Act Release No. 85823 (May 10, 2019), 84 FR 24206, 24226 (May 24, 2019) (“Cross-Border Proposing Release”). As noted above, one commenter suggested that all G-20 jurisdictions should be deemed to be listed jurisdictions – a view that the Commission does not share. See note 14, *supra*, and accompanying text. No other commenters directly addressed whether listed jurisdiction status was appropriate for any of the named jurisdictions. The Commission notes that The Hong Kong Monetary Authority has proposed heightened capital requirements to address the risks presented by non-centrally cleared derivatives that follow the G-20 recommendations but has not yet implemented those requirements. As such the Commission has not designated Hong Kong at this time. In accordance with Rule 3a71-3(d)(2)(i), the Commission will consider applications for orders for listed jurisdiction designation from a party or group of parties that would potentially seek to rely

margin and capital requirements applicable to entities that transact in security-based swaps of an Initial Listed Jurisdiction may rely on the listed jurisdiction designations that are the subject of this Order.

A. Implementation of financial responsibility reforms

The Commission's action in part reflects consideration of financial responsibility regulation in the Initial Limited Jurisdictions, as well as the steps that those jurisdictions have taken to implement financial responsibility reforms. To offset the greater risk to security-based swap dealers from non-cleared security-based swaps, the Dodd-Frank Act mandated financial responsibility reform through capital and margin requirements that would help ensure the safety and soundness of security-based swap dealers and be appropriate for the risk associated with non-cleared security-based swaps.<sup>18</sup> In 2009, the G-20 made recommendations for financial responsibility reforms intended in part to reduce systemic risk attributable to over-the-counter ("OTC") derivatives, including a recommendation that non-centrally cleared derivatives contracts should be subject to higher capital requirements.<sup>19</sup> As noted below, each of the Initial Listed Jurisdictions has adopted heightened capital requirements that address the risks presented by OTC derivatives.

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on the Rule 3a71-3(d) exception or by any foreign regulatory authority supervising such a party or its security-based swap activities.

On the basis of DTCC Derivatives Repository Limited Trade Information Warehouse ("TIW") transactions and positions data on single-name credit swaps, the Commission believes that entities currently transacting in security-based swaps in the Initial Listed Jurisdictions are highly likely to be engaged in security-based swap transactions that they would otherwise be required to count toward the de minimis thresholds. For this purpose, the analysis of the current state of the security-based swap market is based on data obtained from the TIW, especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2017.

<sup>18</sup> See Exchange Act Section 15F(e)(3).

<sup>19</sup> See G-20, Leaders Statement: Pittsburgh Summit (Sept. 24-25, 2009)("G-20 2009 Statement"), available at [www.g20.utoronto.ca/2009/2009communique0925.html](http://www.g20.utoronto.ca/2009/2009communique0925.html).

In 2011, the G-20 recommended that margin requirements on non-centrally cleared derivatives be added to the reforms.<sup>20</sup> As noted below, each of the Initial Listed Jurisdictions has implemented margin requirements that address the counterparty risks presented by these derivatives products. While recognizing that the capital and margin rules and regulations of the Initial Listed Jurisdictions are not the same as those of the Commission,<sup>21</sup> the Commission believes that those jurisdictions' rules and regulations apply sufficient financial responsibility requirements on the relevant entities to support designation as "listed jurisdictions."

#### 1. Australia

The Australian Prudential Regulation Authority ("APRA") has adopted capital requirements for "authorized deposit-taking institutions" designed to address the unique risks of OTC derivatives.<sup>22</sup> Further, the APRA has adopted margin requirements to address the counterparty risks of non-centrally cleared derivatives. To do this, among other things, APRA's

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<sup>20</sup> See G-20, Cannes Summit Final Declaration (Nov. 4, 2011), [available at www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html](http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html).

<sup>21</sup> Earlier this year, the Commission adopted capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants. See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872 (Aug. 22, 2019) ("Capital, Margin and Segregation Adopting Release"). The objective of the new capital requirements is to ensure that entities maintain sufficient liquid assets to satisfy liabilities promptly and to provide a cushion of liquid assets in excess of liabilities to cover potential market, credit and other risks. Capital, Margin and Segregation Adopting Release, 84 FR at 43947. The G-20 capital framework serves to improve the OTC derivatives market through higher capital requirements for non-centrally cleared contracts. See G-20 2009 Statement. Further, the Capital, Margin and Segregation Adopting Release adopted final margin rules for non-centrally cleared derivatives that address counterparty risks arising from these transactions. See Exchange Act Rule 18a-3; see also Capital, Margin and Segregation Adopting Release, 84 FR at 43910.

<sup>22</sup> Measures adopted by the APRA to address these risks include, among other things, the SA-CCR approach and capital requirements for bank exposures to central counterparties consistent with the G-20 framework. See APRA, Prudential Standard APS 180, Capital Adequacy: Standardized Approach to Credit Risk (July 2019).

margin regime incorporates variation and initial margin calculations and methodologies and additional risk mitigation requirements.<sup>23</sup>

## 2. Canada

Canada's Office of the Superintendent of the Financial Institutions ("OSFI") has adopted capital requirements for federally regulated financial institutions that reflect heightened capital for non-centrally cleared derivatives.<sup>24</sup> In addition, OSFI has adopted margin requirements that address the counterparty risks of non-centrally cleared derivatives and which, among other things, establish minimum standards for variation and initial margin and collateral requirements for non-centrally cleared derivative transactions undertaken by federally regulated financial institutions.<sup>25</sup>

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<sup>23</sup> The margin requirements adopted by the APRA are based on the Basel Committee on Banking Supervision ("BCBS") and International Organization of Securities Organizations ("IOSCO") standards on margining for non-centrally cleared derivatives. See APRA, Prudential Standard CPS 226, Margining and Risk Mitigation for Non-Centrally Cleared Derivatives (October 2019) ("CPS 226"). Consistent with the G-20 framework, the regulatory objectives of CPS 226 are to improve prudential safety, reduce systemic risk and promote central clearing. See CPS 226 Explanatory Statement, Page 4.

<sup>24</sup> See Office of the Superintendent of Financial Institutions, Guideline: Capital Adequacy Requirements (October 2018) ("CAR Guideline"). OSFI's CAR Guideline provides a framework for assessing the capital adequacy of federally regulated institutions and includes, among other things, the implementation of the SA-CCR methodology consistent with the G-20 framework. The CAR Guideline is updated periodically to ensure that capital requirements continue to reflect underlying risks and developments in the financial industry. See CAR Guideline.

<sup>25</sup> See Office of the Superintendent of Financial Institutions, Guideline E-22: Margin Requirements for Non-centrally Cleared Derivatives (October 2016) ("Guideline E-22").

For the purposes of the OSFI Guidelines, federally regulated financial institutions refer to "banks, foreign bank branches, bank holding companies, trust and loan companies, cooperative credit associations, cooperative retail associations, life insurance companies, property and casualty insurance companies and insurance holding companies." See Footnote 1 of Guideline E-22. The provincial Canadian securities regulators have not yet adopted margin and collateral requirements for non-centrally cleared derivatives but continue to monitor international developments as they consider recommendations of the Canadian Securities Administrators based on the G-20 framework. See Canadian Securities Administrators Staff Notice 95-301 Margin and Collateral Requirements for Non-Centrally Cleared Derivatives (Aug. 22, 2019).

### 3. France/Germany/United Kingdom<sup>26</sup>

In 2012, the European Commission (“EC”) adopted the European Market Infrastructure Regulation (“EMIR”) in response to the G-20 leaders’ statements on reform of the OTC derivatives market. Pursuant to EMIR, the EC adopted and has since revised capital requirements for financial institutions which are intended to address the risks of the OTC derivatives market and that reflect heightened capital for non-centrally cleared derivatives.<sup>27</sup> In addition, the EC has issued margin standards which set forth risk mitigation techniques for non-centrally cleared derivatives, including variation and initial margin calculations and methodologies, with the objective of reducing counterparty credit risk and mitigating systematic risk.<sup>28</sup> The capital and margin standards are found in EC regulations which are directly applicable to all EU member states without any further implementing measures.

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<sup>26</sup> The United Kingdom has published its OTC derivatives regime that will come into force on the day it leaves the European Union (“EU”), which follows the existing body of applicable EU derivatives law. See Draft Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.

<sup>27</sup> Addressing the risks of non-centrally cleared derivatives, the EU capital requirements are more risk sensitive than previous methods and include, among other things, the SA-CCR, consistent with the BCBS-IOSCO standard. Regulation (EU) 2019/876 of the European Parliament and of the Council of May 20, 2019 Amending Regulation (EU) No. 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (“CRR2”). In addition, the EC issued a directive related to supervisory functions of the EU member states as they relate to CRR2. See Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU. A directive is a legal act of the European Union that requires member states to achieve a particular result without dictating the means of achieving that result. Directives are distinguished from regulations which are self-executing and do not require any implementing measures. As a regulation, CRR2 will be directly applicable to all EU member states without any implementing measures. The Commission notes that, while CRR2 has been adopted, it will not be in force until June 28, 2021; however, this date is consistent with the compliance dates of the applicable U.S. security-based swap market rules adopted under the Dodd-Frank Act. The related supervisory directive requires action by individual member states to implement.

<sup>28</sup> Commission Delegated Regulation (EU) No. 2016/2251 of October 5, 2016 Supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC Derivatives, Central Counterparties and Trade Repositories with Regard to Regulatory

#### 4. Japan

The Japan Financial Services Agency (“JFSA”) has implemented specific financial responsibility reforms that include capital and margin requirements to address the risks of non-centrally cleared derivative products.<sup>29</sup> For example, the JFSA margin requirements include variation and initial margin calculations and methodologies that address the counterparty risks of non-centrally cleared derivatives.<sup>30</sup>

#### 5. Singapore

The Monetary Authority of Singapore (“MAS”) has adopted heightened capital requirements in response to the G-20 recommendations for non-centrally cleared derivatives.<sup>31</sup>

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Technical Standards for Risk-Mitigation Techniques for OTC Derivate Contracts Not Cleared by a Central Party (as corrected by Commission Delegated Regulation (EU) 2017/323 of January 20, 2017 and Regulation (EU) 2019/834 of May 20, 2019) (“RTS”). The RTS supplements the requirements of EMIR with more detailed direction with respect to margin requirements and, as a regulation, is directly applicable in all countries that are members of the EU. See RTS, Explanatory Memorandum at 3.

<sup>29</sup> See <https://www.fsa.go.jp/en/newsletter/weekly2018/287.html>. The JFSA capital rules include the standardized capital requirements consistent with the BCBS-IOSCO framework, although the JFSA has allowed certain interim capital requirements to remain in place as a transitional measure to address cross-border concerns. In addition, the JFSA promulgated margin requirements and guidelines under the Financial Instruments and Exchange Act, No. 25 of 1948.

<sup>30</sup> See Cabinet Office Ordinance on Financial Instruments Business (Cabinet Office Ordinance No. 52 of August 6, 2007), including supplementary provisions; Comprehensive Guideline for Supervision of Major Banks, etc., Comprehensive Guidelines for Supervision of Regional Financial Institutions, Comprehensive Guidelines for Supervision of Cooperate Financial Institutions, Comprehensive Guideline for Supervision of Financial Instruments Business Operators, etc., Comprehensive Guidelines for Supervision of Insurance Companies, and Comprehensive Guidelines for Supervision of Trust Companies, etc.; JFSA Public Notification No. 15 of March 31, 2016, JFSA Public Notification No. 16 of March 31, 2016, JFSA Public Notification No. 17 of March 31, 2016.

<sup>31</sup> For example, among other things, the MAS capital requirements incorporate the SA-CCR approach and capital requirements for bank exposures to central counterparties. MAS Notice 637 on Risk Based Capital Adequacy Requirements for Banks Incorporated in Singapore (14 September 2012)(last revised 10 June 2019). The MAS has provided a transitional period during which compliance with the new standards is voluntary.

Further, the MAS has implemented a margin regime including variation and initial margin standards and collateral requirements with regard to non-centrally cleared derivatives.<sup>32</sup>

## 6. Switzerland

As part of its financial responsibility rules reform, the Swiss Federal Council has implemented heightened capital requirements to address the risks of non-centrally cleared derivatives.<sup>33</sup> In addition, to reduce systemic risk, the Swiss Federation has adopted standards on margining and risk mitigation requirements to address the risks associated with non-centrally cleared derivatives which include variation and initial margin calculations and methodologies, along with other collateral requirements.<sup>34</sup>

### B. Supervisory or enforcement practices

This action further recognizes that, based upon the Commission's current experience with regulators and authorities in each of the Initial Listed Jurisdictions, including, for example, cooperative experiences in matters of supervision or enforcement with the securities and financial regulators in the Initial Listed Jurisdictions as well as joint participation in certain

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<sup>32</sup> See MAS Guidelines on Margin Requirements for Non-Centrally Cleared OTC Derivatives Contracts, Guideline No. SFA 15-G03, Issue Date: 6 December 2016 (last revised July 26, 2019 to exclude security-based swaps from the variation margin and initial margin requirements until February 29, 2020).

<sup>33</sup> The Swiss Federal Council included, among other things, the SA-CCR and capital requirements for bank exposures to central counterparties in its Capital Adequacy Ordinance applicable to banks and securities dealers. See Swiss Federal Council, 952.03 Ordinance concerning Capital Adequacy and Risk Diversification for Banks and Securities Dealers (status as of 9 April 2019). The transition period for implementation of the SA-CCR has been extended to January 1, 2020 or longer for smaller banks with no or insignificant derivatives positions.

<sup>34</sup> See Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (status as of 1 January 2019) and Ordinance on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (status as of 1 January 2019).

international organizations and bodies,<sup>35</sup> the Commission does not have reason to believe that the supervisory or enforcement practices in those jurisdictions would encourage market participants to restructure and book transactions into those jurisdictions to take advantage of a regulatory environment that as a practical matter does not require firms to comply with heightened capital requirements for OTC derivatives positions.<sup>36</sup>

C. Location of firms likely to engage in security-based swap dealing activity using personnel located in the United States

This action also accounts for the Commission’s understanding of which non-U.S. firms are most likely to transact in security-based swaps using personnel located in the United States in such volume that designation of that jurisdiction by the Commission as a listed jurisdiction is warranted. This analysis is relevant both with regard to whether the foreign jurisdiction has a security-based swaps market that demonstrates a need for designation as a listed jurisdiction, and with regard to whether the applicable regulators have an incentive to effectively oversee the market. In particular, based on available data, including the volume of single-name credit default swap transactions referencing U.S. underliers, the Commission believes that dealing entities in the Initial Listed Jurisdictions are highly likely to be engaged in security-based swap transactions that they would otherwise be required to count toward the de minimis thresholds.<sup>37</sup>

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<sup>35</sup> Staff of the Commission has worked, consulted and coordinated with foreign regulatory authorities from the Initial Listed Jurisdictions through participation in numerous bilateral and multilateral discussions addressing the regulation of OTC derivatives. In addition, the Commission’s staff has been able to gather information about foreign regulatory reform efforts through its participation in various international organizations including the Financial Stability Board (“FSB”), the BCBS, IOSCO, and committees, task forces and working groups thereof, such as the FSB’s Working Group on OTC Derivatives Regulation and IOSCO’s Working Group on Margining Requirements.

<sup>36</sup> The Commission notes that supervision and enforcement of the EU derivatives regulatory regime is conducted at the member state level and, therefore, in considering “listed jurisdiction” status, the Commission considered the status of derivatives market supervision and enforcement at the member state level.

<sup>37</sup> See note 17, supra.

More generally, the Commission also believes that the security-based swap markets in the Initial Listed Jurisdictions are sufficiently developed that, coupled with the initiatives the applicable foreign financial regulators have taken in response to the G-20 leaders' statements regarding regulation of OTC derivatives, designation as a listed jurisdiction would be in the public interest.

#### **IV. Conclusion**

For the reasons discussed above, the Commission concludes that it is in the public interest to designate the following jurisdictions as "listed jurisdictions" for purposes of the conditional exception, set forth in Exchange Act Rule 3a71-3(d), from having to count certain transactions involving U.S. activity against the thresholds associated with the security-based swap dealer de minimis exception. Accordingly,

IT IS HEREBY ORDERED, pursuant to Exchange Act Rule 3a71-3(a)(12) and 3a71-3(d)(2), that the following jurisdictions are designated as listed jurisdictions:

1. Australia;
2. Canada;<sup>38</sup>
3. France;
4. Germany;
5. Japan;
6. Singapore;
7. Switzerland; and
8. United Kingdom.

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<sup>38</sup> With respect to Canada's "listed jurisdiction" designation, only federally regulated financial institutions that are subject to the OSFI requirements may rely on the "listed jurisdiction" condition that is the subject of this Order.

By the Commission.

Dated: December 18, 2019.

**Vanessa A. Countryman,**

*Secretary.*

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