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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 201, 232, 240, 242, and 249

[Release No. 34-94615; File No. S7-14-22]

RIN 3235-AK93

Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; withdrawal of proposed rules.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is proposing a set of rules ("Regulation SE") and forms under the Securities Exchange Act of 1934 ("SEA") that would create a regime for the registration and regulation of security-based swap execution facilities ("SBSEFs") and address other issues relating to security-based swap ("SBS") execution generally. One of the rules being proposed as part of Regulation SE would implement part of the Dodd-Frank Act, which is intended to mitigate conflicts of interest at SBSEFs and national securities exchanges that trade SBS ("SBS exchanges"). Other rules being proposed as part of Regulation SE would address the cross-border application of the SEA's trading venue registration requirements and the trade execution requirement for SBS. In addition, the Commission is proposing to amend an existing rule to exempt, from the SEA definition of "exchange," certain registered clearing agencies as well as registered SBSEFs that provide a market place only for SBS. The Commission also is proposing a new rule that, while affirming that an SBSEF would be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements. Finally, the Commission is proposing certain new rules and amendments to its Rules of Practice to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission. The Commission also is withdrawing all previously proposed rules regarding these subjects.

DATES: Comments should be received on or before June 10, 2022. As of May 11, 2022, the SEC is withdrawing or partially withdrawing the following previously proposed rules (see SUPPLEMENTARY INFORMATION for details): SEA Release No. 63825 (76 FR 10948, published on February 28, 2011); SEA Release No. 63107 (75 FR 65581, published on October 26, 2010); and SEA Release No. 69490 (78 FR 30968, published on May 23, 2013).

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/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. S7-14-22 on the subject line.

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 S7-14-22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. 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 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

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 Commission'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 email.

FOR FURTHER INFORMATION CONTACT: Michael Gaw, Assistant Director, at (202) 551-5602; David Liu, Special Counsel, at (312) 353-6265; Leah Mesfin, Special Counsel, at (202) 551-5655; Michou Nguyen, Special Counsel, at (202) 551-7768; Geoffrey Pemble, Special Counsel, at (202) 551-5628; or Mark Sater, Counsel, at (202) 551-4729; all of whom are in the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing new 17 CFR 242.800 through 242.835 to create a regime for the registration and regulation of SBSEFs and address other issues relating to SBS execution generally. Regulation SE would consist of 17 CFR 242.800 through 242.835 (proposed Rules 800 through 835). Key rules within Regulation SE would include Rule 803, which would establish a process for SBSEF registration; Rules 804 to 810, which would establish procedures for rule and product filings by SBSEFs; Rule 815, which would establish permissible execution methods for SBS that are subject to the SEA's trade execution requirement; Rule 816, which would set out a procedure for SBSEFs to make an SBS available to trade and establish certain exemptions from the trade execution requirement; Rules 818 to 831, which would implement the 14 Core Principles for SBSEFs set forth in section 3D(d) of the SEA; Rules 832 to 833, which would address cross-border matters; and Rule 834, which would impose requirements addressing conflicts of interest involving SBSEFs and SBS exchanges, as required by section 765 of the Dodd-Frank Act.

In addition to the rules described above, the Commission is also proposing 17 CFR 249.2001 (Form SBSEF), which is the form that an entity would use to register with the Commission as an SBSEF; 17 CFR 249.2002 (a submission cover sheet), which would be

required to accompany filings with the Commission made by SBSEFs for rule and rule amendments and for product listings; amendments to 17 CFR 232.405 (Rule 405 of Regulation S-T) to require various SBSEF filings to be provided in Inline eXtensible Business Reporting Language ("Inline XBRL"), a structured data language; amendments to 17 CFR 240.3a1-1 (Rule 3a1-1 under the SEA) to exempt from the SEA definition of "exchange" certain registered clearing agencies as well as registered SBSEFs that provide a market place only for SBS; 17 CFR 240.15a-12 (Rule 15a-12 under the SEA) that, while affirming that an SBSEF also would be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements; to sunset an existing exemption from the requirement to register as a clearing agency for an entity performing the functions of an SBSEF but that is not yet registered as such; and certain new rules and amendments to 17 CFR part 201 (the Commission's Rules of Practice) to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission.

The Commission also is withdrawing all previously proposed rules, rule amendments, and interpretations regarding these subjects in view of the length of time that has passed since they were issued and significant changes to the swap and SBS markets that have taken place during that time.

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I. Background

Section 3D of the SEA,[1] enacted as part of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[2] provides for the registration and regulation of SBSEFs. Section 3D(a)(1) provides that no person may operate a facility for the trading or processing of SBS, unless the facility is registered as an SBSEF or as a national securities exchange. Section 3D(d) enumerates 14 Core Principles with which SBSEFs must comply.[3] Section 3D(f) requires the Commission to prescribe rules governing the regulation of SBSEFs.

Section 765 of the Dodd-Frank Act directs the Commission to adopt rules to mitigate conflicts of interest with respect to clearing agencies that clear SBS ("SBS clearing agencies"), SBSEFs, and national securities exchanges that post or make available for trading SBS ("SBS exchanges"). In October 2010, the Commission published for comment proposed Regulation MC to implement section 765.[4]

In February 2011, the Commission published for comment: (1) proposed Regulation SBSEF that would govern the registration and regulation of SBSEFs, including rules to implement the 14 Core Principles and rules requiring SBSEFs to submit filings with the Commission to list SBS and to establish or amend rules; (2) proposed Form SBSEF for an entity to register with the Commission as an SBSEF; (3) a proposed interpretation of the definition of "security-based swap execution facility"; and (4) proposed exemptions for registered SBSEFs relating to their status also as "exchanges" and "brokers."[5] On May 23, 2013, the Commission

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1 15 U.S.C. 78c-4. In this release, the Commission is defining the Securities Exchange Act as the "SEA" to distinguish it from the Commodity Exchange Act ("CEA").

2 Pub. L. 111-203, H.R. 4173, section 763(c).

3 *See infra* section VIII (listing the Core Principles).

4 *Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Security-Based Swaps Under Regulation MC*, SEA Release No. 63107 (October 14, 2010), 75 FR 65882 (October 26, 2010) ("Regulation MC Proposal").

5 *Registration and Regulation of Security-Based Swap Execution Facilities*, SEA Release No. 63825 (February 2, 2011), 76 FR 10948 (February 28, 2011) ("2011 SBSEF Proposal").

issued a proposing release to address various cross-border aspects of its proposed Title VII rules[6]—which included a proposed rule on the application of Title VII's "trade execution requirement"[7] to cross-border SBS transactions and a proposed interpretation of when the SBSEF registration requirements would apply to a foreign venue that trades SBS (a "foreign SBS trading venue")[8]—and reopened the comment period for various proposed rulemaking releases and policy statements under Title VII, including the 2011 SBSEF Proposal.[9]

In view of the passage of time since these earlier proposals were issued and the significant market and regulatory developments affecting swaps and SBS over those years, the Commission is issuing this new proposal relating to the registration and regulation of SBSEFs and to SBS execution generally. Accordingly, the Regulation MC Proposal, the 2011 SBSEF Proposal, and the elements of the Cross-Border Proposing Release relating to the trade execution requirement and the registration status of foreign SBS trading venues are withdrawn. The proposed rules discussed below supersede all previous Commission proposals on these subjects.[10]

II. Relation to the SEF Market

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6 *Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, SEA Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) ("Cross-Border Proposing Release").

7 The "trade execution requirement" as used with respect to SBS refers to a provision mandated by Title VII and set forth in section 3C(h) of the SEA that requires a transaction involving an SBS that is subject to the clearing requirement of section 3C to be executed on a national securities exchange, a registered SBSEF, or an SBSEF that is exempt from registration under section 3D(e) of the SEA. *See infra* note 106 and accompanying text. A similar provision regarding swaps is set forth in section 2(h)(8) of the CEA.

8 *See id.*, 78 FR at 31053-58 (discussing potential exemptions for foreign SBS trading venues) and 31081-85 (discussing a proposed rule to address the application of the trade execution requirement to cross-border SBS transactions).

9 *Reopening of Comment Periods for Certain Proposed Rulemaking Releases and Policy Statements applicable to Security-Based Swaps*, SEA Release No. 69491 (May 1, 2013), 78 FR 30800 (May 23, 2013) ("Reopening of Comment Periods Release").

10 The Commission notes, however, that Rule 834 of proposed Regulation SE would implement section 765 only with respect to SBSEFs and SBS exchanges.

The economic baseline for establishing a registration and regulatory regime for SBSEFs and SBS execution generally has changed considerably since the Commission issued the 2011 SBSEF Proposal. In June 2013, the Commodity Futures Trading Commission ("CFTC") adopted rules (in 17 CFR chapter I) under Title VII of the Dodd-Frank Act for swap execution facilities ("SEFs").[11] The swap market has grown and matured within the framework established by the CFTC's rules. In 2018, the CFTC proposed to make fundamental changes to the SEF regulatory structure.[12] However, according to the CFTC, "[s]everal commenters expressed concern over the magnitude of changes" in the proposal.[13] In 2021, the CFTC ultimately declined to finalize the 2018 SEF Proposal and elected instead "to improve the SEF framework through targeted rulemakings that address distinct issues."[14] Accordingly, the CFTC withdrew the unadopted portions of its 2018 proposal.[15] Currently, the CFTC has no proposals outstanding to further amend its SEF rules.

Because of the close relationship between the swap and SBS markets, an analysis of swap trading on CFTC-registered SEFs offers insights into the potential development of SBS trading on SEC-registered SBSEFs.[16] Currently, there are 20 non-dormant entities registered with the

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[11] *See* CFTC, *Core Principles and Other Requirements for Swap Execution Facilities,* 78 FR 33476 (June 4, 2013) ("2013 CFTC Final SEF Rules Release"); CFTC, *Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act*, 78 FR 33606 (June 4, 2013) ("2013 CFTC Final MAT Rules" and, together with the 2013 CFTC Final SEF Rules Release, the "2013 CFTC SEF Rules").

[12] *See* CFTC, *Swap Execution Facilities and Trade Execution Requirement*, 83 FR 61946 (November 30, 2018) ("2018 SEF Proposal").

[13] CFTC, *Swap Execution Facilities and Trade Execution Requirement – Proposed rule; partial withdrawal,* 86 FR 9304, 9304 (February 12, 2021).

[14] *Id.*

[15] *See id.*, 86 FR at 9304-05.

[16] The Commission bases its preliminary analysis on trading of credit derivatives. Other swap asset classes that trade on SEFs, such as interest rate swaps ("IRS") and foreign exchange swaps, have no analogs in the SBS market. While there are parallels between the equity swap and equity SBS markets, equity swap trading on SEFs appears to be minimal.

CFTC as SEFs.[17] In 2021, volume in index credit default swaps ("CDS") traded on CFTC-registered SEFs was distributed as follows: one SEF had the largest share of index CDS volume (in notional amount) at $8 trillion (69%); one SEF had the second largest share at $2.1 trillion (18%); and the remaining 13% of volume was shared among five other SEFs.[18] As discussed in section XIX below, only a small fraction of SBS trading occurs on platforms currently. Further, some trading occurs on platforms that do not include CFTC-registered SEFs.

Based on research from publicly available sources as well as discussions with CFTC-registered SEFs, the Commission understands that the SBS market—both on organized platforms that are potential SBSEF registrants and on a purely over-the-counter ("OTC") basis—is a small fraction of the overall swap market.[19] Furthermore, the single-name CDS market, which falls under SEC jurisdiction, is smaller than the index CDS market, which falls under CFTC jurisdiction.[20] Because the swap markets are larger than the SBS markets, the opportunities for revenue capture from swap execution are much larger than from SBS execution. In view of the SBS market's size relative to the swap market, the Commission is sensitive to the economic impact that its final rules for SBSEFs could have.

The entities that are most likely to register with the Commission as SBSEFs are those already registered with the CFTC as SEFs.[21] These entities have made substantial investments in systems, policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. To the extent that the Commission harmonizes its SBSEF rules with the CFTC's SEF rules, dually registered entities could utilize their existing systems, policies, and procedures to comply with the Commission's SBSEF rules, and SEF market participants would face no or

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17 *See* CFTC, Trading Organizations—Swap Execution Facilities (SEF), *https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities* (accessed on January 25, 2022).

18 *See infra* note 376 and accompanying text.

19 *See infra* note 371 and accompanying text.

20 *See id*.

21 *See infra* section XIX(B)(5).

only incremental changes to trade SBS as well as swaps on those facilities, and to comply with the Commission's rules regarding SBS trading. To the extent that the Commission establishes different or additive requirements, dually registered entities and their market participants might need to incur costs and burdens to modify their systems, policies, and procedures to comply with the SEC-specific rules. As indicated below, the Commission seeks comment on such costs and burdens in light of the CFTC's SEF rules.[22] Accordingly, as discussed below, the Commission is proposing to take the general approach of harmonizing closely with analogous CFTC SEF rules, except where differences in the SEC's statutory authority relative to the CFTC's statutory authority or differences in the SBS market relative to the swap market necessitate differences between the Commission's rules and the CFTC's, or where the Commission preliminarily believes that the benefits of deviating from the CFTC's rules would otherwise justify the burdens and costs associated with imposing different or additional requirements than the corresponding CFTC rule. Throughout this release, the Commission will seek comment on the accuracy of these assumptions. In particular, the Commission seeks comment on the following:

1. How many CFTC-registered SEFs do you believe will seek to register with the Commission as SBSEFs? Please explain.
2. Are there any entities that will seek to register with the Commission as SBSEFs but *not* register with the CFTC as SEFs? If so, please explain and estimate how many.

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[22] Consider the following example: § 37.1306(a) of the CFTC's rules (17 CFR 37.1306(a)), which is among the rules that implements CEA Core Principle 13 (Financial resources), requires a SEF to submit a financial report to the CFTC every quarter (*i.e.*, every three months). To implement the corresponding Core Principle under the SEA, the Commission could require an SBSEF to file only three financial reports per year, rather than four. All things being equal, filing three reports per year is less burdensome than filing four. But all things are not equal, because of the CFTC's rules. In this case, requiring new "off cycle" reporting by a dually registered SEF/SBSEF would likely be more burdensome than allowing the dually registered entity to make the same four filings, on the same cycle, with both the SEC and CFTC. As discussed later in this release, the Commission is proposing a rule closely modelled on § 37.1306(a) that would require the same type of financial report as the CFTC rule, and for that report to be filed quarterly. *See* proposed Rule 829(g).

3. For SEFs that will likely seek registration with the Commission as SBSEFs, please estimate the size of their swaps business versus the anticipated size of their SBS business, using any metric(s) that you believe would be illustrative (*e.g.*, number of products listed, trade count, aggregate notional size traded, number of counterparties trading swaps versus SBS, *etc.*).
4. Please provide any information or market data that you believe would be illustrative regarding current SBS trading activity on entities that are not likely to register with the Commission as SBSEFs, and thus would have to cease SBS trading upon the compliance date of the Commission's SBSEF rules. Do you believe that this activity would migrate to registered SBSEFs or would it migrate instead to the bilateral OTC market?
5. What types of products do you anticipate could be listed by registered SBSEFs (*e.g.*, CDS on individual corporate bonds, CDS on individual sovereign bonds, CDS on individual securitized bonds, swaps on securities options, swaps on narrow-based securities indexes, total return swaps on individual cash equities or crypto/digital asset securities, *etc.*)?

In the remainder of this release, the Commission describes its proposed registration and regulation regime for SBSEFs and SBS execution generally, and seeks comment on all aspects of its proposal. You are invited in particular to provide data and analysis regarding the economic and Paperwork Reduction Act ("PRA") implications of this proposal. For example, the Commission seeks comment on the following:

6. If, in a particular area, the Commission were to harmonize closely with a CFTC rule, to what extent would this reduce, or perhaps eliminate entirely, any incremental costs or burdens on dually registered SEF/SBSEFs and their members?
7. Should the Commission impose any different or additive requirements? For example, are there any statutory or market differences that would create benefits from different or additive requirements? If the Commission imposes different or additive

requirements, what would be the impact on dually registered SEF/SBSEFs and their members?

8. Are there provisions of the CFTC's rules the Commission should *not* incorporate, even if the Commission were to opt for harmonization with the CFTC's rules in other areas? In other words, are there areas where *not* harmonizing with a CFTC rule would reduce burdens on SBSEFs and/or their members? If so, please explain, with particular regard to the economic impacts and/or PRA burdens.
9. Do you believe that the Commission should adopt different or additive requirements for SBSEFs, even if there is no analog to such provisions in the CFTC's SEF rules? If so, please explain, with particular regards to the economic impacts and/or PRA burdens. For example, do you believe that the SEC-specific provision *would impose* additional costs or burdens on SBSEFs and/or their members that are *nevertheless appropriate* in view of new and additional benefits? Or do you believe that an SEC-specific provision would be appropriate *because it would relieve costs or burdens* that are imposed on the swap business by a CFTC rule that is unnecessary or inappropriate in the SBS market?
10. If the Commission ultimately adopts SBSEF rules that are closely harmonized with the CFTC's SEF rules, do you believe this could result in ambiguities or potential conflicts between the SEC's SBSEF rules and the other SEC rules (pertaining, for example, to exchanges or alternative trading systems)? If so, please indicate where this might occur and suggest ways that the Commission could reduce these ambiguities or potential conflicts.

III. Approach to the Commission's Proposed Requirements Relating to Security-Based Swap Execution

Most of the rules proposed in this release are designed to implement provisions of section

3D of the SEA,[23] which is nearly identical to section 5h of the CEA.[24] As described in detail throughout this release, when the Commission is proposing a rule to implement a provision of section 3D of the SEA, that rule generally will harmonize as closely as practicable with the analogous CFTC rule, unless a reason exists to do otherwise.[25] Indeed, many of the rules proposed herein are adapted from the CFTC rules, with only minor changes to reflect differences in the Commission's statutory authority (*e.g.*, using the term "security-based swap" instead of "swap," cross-referencing provisions of the SEA rather than the CEA, *etc.*). The Commission seeks to minimize occasions where differences in the wording between an SEC and a CFTC rule leads affected persons to believe that there is a difference in policy outcome, where no difference in outcome is intended.

In cases where the Commission preliminarily believes that a reason exists for a proposed SEC rule to differ from an analogous CFTC rule, that reason is described and alternate rule language is proposed and explained. Here too, the Commission might be in general agreement with the policy behind the CFTC's rule, but it might not be practicable to closely track the CFTC rule language, for reasons that are specific to each instance and which will be discussed herein.

In proposing these rules, the Commission acknowledges that, in the abstract, there are a variety of ways of implementing a Core Principle or other policy goal where the benefits could justify the costs. Indeed, the Commission's 2011 SBSEF Proposal includes many such alternate ways that differ from the CFTC's current rules. But the CFTC's rules for SEF—and swap execution more generally—have significantly reshaped the swap market, and indirectly the SBS market. The fundamental principles of the CFTC's regulatory regime for SEFs and swap

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[23] 15 U.S.C 78c-4.

[24] 7 U.S.C. 7b-3.

[25] Other rules, however, are designed to address certain issues relating to SBSEFs that are specific to the SEA. These include proposed amendments to existing Rule 3a1-1 under the SEA, proposed new Rule 15a-12, and various proposed amendments to the Commission's Rules of Practice.

execution generally have established the existing environment, and any rules proposed by the SEC to implement the regulatory regime for SBSEFs and SBS execution more generally must be considered against the CFTC's regulatory regime. SEFs and swap market participants have invested significant resources in systems, policies, and procedures to comply with the CFTC's SEF rules. The Commission believes that the CFTC's rules are reasonably designed to implement section 5h of the CEA, which is nearly identical to section 3D of the SEA, and have been effective in practice in facilitating fair, transparent, and competitive trading on SEFs. By proposing similar rules for SEC-registered SBSEFs, the Commission seeks to obtain comparable regulatory benefits as the CFTC while minimizing costs imposed on SEF/SBSEFs and their members to the greatest extent practicable.

The Commission recognizes that an entity might elect to register as an SBSEF with the SEC but not as a SEF with the CFTC. In such case, an SEC-only registrant would not have any familiarity with the CFTC's rules and would not have made any investments in systems, policies, and procedures to comply with them. Nevertheless, because the Commission preliminarily believes that most if not all entities that will seek SBSEF registration with the SEC are or will also be registered as SEFs with the CFTC, such dual registrants would benefit from harmonized rules. Furthermore, if the Commission adopts these rules substantially as proposed, it likely would be unnecessary to establish and apply one set of rules for dual registrants and a different set for SEC-only SBSEFs.

Proposed Regulation SE follows the basic structure of part 37 of the CFTC's rules (17 CFR part 37). In the CFTC's rules, subpart A of part 37 (General Provisions) consists of §§ 37.1 to 37.12. Subparts B to P of part 37 implement the 15 Core Principles for SEFs set forth in the CEA and consist of §§ 37.100 *et seq*. to 37.1500 *et seq*. Proposed Rules 800 to 817 of Regulation SE are modelled on the "General Provisions" in subpart A, while proposed Rules 818 to 831 would implement the 14 Core Principles for SBSEFs set forth in the SEA. Proposed Rules 832 to 833 address cross-border matters that have no direct counterpart in the CFTC's

rules applicable to SEFs. Proposed Rule 834 is designed to implement section 765 of the Dodd-Frank Act, which requires the Commission to adopt rules addressing conflicts of interest involving SBSEFs and SBS exchanges, as well as to harmonize with certain of the CFTC's governance rules. Proposed Rule 835 is designed to facilitate reviews of final disciplinary actions, denials or conditioning of membership, and denials or limitations of access by SBSEFs. In addition, the Commission is proposing a new subpart V to part 249 of the Commission's rules,[26] entitled "Forms for use by security-based swap execution facilities," that would include proposed § 249.2001, setting forth Form SBSEF and its instructions, which would be used to register with the Commission as an SBSEF; and proposed § 249.2002, setting forth the submission cover sheet (with instructions) that would be required to accompany filings with the Commission made by SBSEFs for rule and rule amendments, product listings, and determinations to make an SBS available to trade.

Many parts of proposed Rules 800 to 817 are very similar in substance to §§ 37.1 to 37.12. Other parts of proposed Rules 800 to 817 are derived from CFTC rules that are referenced in subpart A of part 37 but located outside of part 37. For example, § 37.4 is a short rule entitled "Procedures for listing products and implementing rules." Section 37.4 does not itself lay out the specific filing procedures for new products and new rules, but directs a SEF, after it has registered with the CFTC, to make such filings pursuant to part 40 (Provisions common to registered entities[27]). Key rules in part 40 include §§ 40.2 (Listing products for trading by certification), 40.3 (Voluntary submission of new products for Commission review and approval), 40.5 (Voluntary submission of rules for Commission review and approval), and 40.6 (Self-certification of rules).

To promote oversight of the SBS market and to assess that SBSEFs continue to operate in a manner consistent with the SEA, the Commission preliminarily believes that it would be

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[26] Part 249 is entitled "Forms, Securities Exchange Act of 1934."

[27] "Registered entity" is defined under the CEA to include a SEF. *See* 7 U.S.C 1a(40).

appropriate to establish procedures whereby SBSEFs would submit filings to the Commission to list SBS products and to establish new rules, and that it would be appropriate to harmonize with the procedures that the CFTC applies to SEFs. These procedures are well articulated and well understood by SEFs, and appear to provide an effective process for establishing new rules and listing products. Therefore, the Commission is proposing Rules 804, 805, 806, and 807 that are closely modelled on relevant provisions of §§ 40.2, 40.3, 40.5, and 40.6, respectively. To implement such rules for SBSEFs and the SBS market, the Commission identifies only those parts of the CFTC rules that are most germane to the SBS market and adapts the wording accordingly.[28] In the detailed discussions of each of these proposed rules, the Commission seeks comment on whether its proposed rule is appropriately tailored for the SBS market, particularly for dually registered SEF/SBSEFs that would be complying with substantially similar filing procedures under CFTC rules, or whether the proposed rule incorporates a part of the CFTC rule that *is not* relevant to the SBS market or should have incorporated additional or different language that *is* more relevant.

Regulation SE includes proposed rules modelled on CFTC rules found in Parts 16, 36, 37, 40, 45, and elsewhere. In some cases, these disparate CFTC rules from outside part 37 that the Commission is proposing to adapt into Regulation SE use different terms than in part 37 for what appears to be the same concept. To promote uniformity within Regulation SE, the Commission is proposing certain definitions for use throughout the regulation—in a dedicated definitions rule, proposed Rule 802—that will sometimes require the replacement of a term used in the CFTC version of a rule with a different, newly defined term in the proposed SEC version.[29]

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[28] Various provisions of part 40 apply to entities other than SEFs or relate to trading of products other than swaps. *See*, *e.g.*, § 40.4 (Amendments to terms or conditions of enumerated agricultural products); § 40.11 (Review of event contracts based upon certain excluded commodities).

[29] For example, certain CFTC rules that the Commission is proposing to adapt into Regulation SE utilize the term "board of directors," while other CFTC rules use the term

Any such changes in defined terms are noted below. Proposed Rule 802 also includes terms derived from the SEA and certain SEC rules thereunder.

Part 37 of the CFTC's rules includes an appendix B, which sets out guidance and acceptable practices for demonstrating compliance with several of the rules that implement the Core Principles for SEFs. These provisions are, by their terms, non-binding.[30] The Commission preliminarily believes that all of the provisions of Regulation SE should be enforceable. Therefore, the Commission is proposing to adapt some of the guidance and acceptable practices found in appendix B as proposed rule text in Regulation SE. As a result, some of the rules proposed in Regulation SE are a blend of the CFTC rule text with language adapted from the guidance and/or acceptable practices. Instances where this occurs in a particular rule will be noted below. The Commission requests comment on its overall approach to incorporating relevant portions of the part 37 guidance and acceptable practices into Regulation SE, as well as comment on how they are adapted in specific rules.

In various places in the CFTC's SEF rules, the CFTC has delegated to its staff authority to perform various functions relating to SEFs on the CFTC's behalf. The Commission has not adapted any of these provisions into proposed Regulation SE and is not proposing any delegation-of-authority rules. The Commission may address delegations of its authority in the adopting release for Regulation SE.

Finally, in developing this proposal, the Commission has consulted and coordinated with

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"governing board." The Commission is proposing to use the term "governing board" throughout Regulation SE and to define that term in proposed Rule 802 as the board of directors of an SBSEF, or for an SBSEF whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors. This definition is closely modelled on the definition of "board of directors" found in § 37.1501(a) of the CFTC's rules.

30 *See* appendix B to part 37, introductory paragraph (1) ("The guidance for the core principle is illustrative only of the types of matters a swap execution facility may address, as applicable, and is not intended to be used as a mandatory checklist").

the CFTC and the prudential regulators,[31] in accordance with the consultation mandate of the Dodd-Frank Act.[32] The Commission also has consulted and coordinated with foreign regulatory authorities through Commission staff participation in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC derivatives markets.[33] Through these multilateral and bilateral discussions and the Commission staff's participation in various international task forces and working groups, the Commission has gathered information about foreign regulatory reform efforts and their effect on and relationship with the U.S. regulatory regime. The Commission has taken and will continue to take these discussions into consideration in developing rules, forms, and interpretations for implementing Title VII of the Dodd-Frank Act.

IV. Introductory provisions of Regulation SE

A. Rule 800—Scope

Proposed Rule 800 is based on § 37.1 of the CFTC's rules, which provides that part 37 applies to every SEF that is registered or applying to become registered as a SEF under section

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31 The term "prudential regulator" is defined in section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in section 3(a)(74) of the SEA, 15 U.S.C. 78c(a)(74).

32 Section 712(a)(2) of the Dodd-Frank Act provides in relevant part that the Commission shall "consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible." In addition, section 752(a) of the Dodd-Frank Act provides in relevant part that "[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps."

33 The Commission participates in a number of international bodies working on OTC derivatives reforms. For example, the Commission is a member of the International Organization of Securities Commissions ("IOSCO") and the Commission staff participates on IOSCO's Committee on Derivatives. In addition, the Commission is a member of the Regulatory Oversight Committee, which serves as the international standard-setter for data elements and identifiers used in the reporting of OTC derivatives transactions.

5h of the CEA. Section 37.1 further provides that the rule does not affect the eligibility of SEFs to operate under the provisions of part 38 or 49 of the CFTC's rules.

Proposed Rule 800 would provide that the provisions of Regulation SE would apply to every SBSEF that is registered or is applying to become registered as an SBSEF under section 3D of the SEA.

B. Rule 801—Applicable provisions

Proposed Rule 801 is based on § 37.2 of the CFTC's rules, which provides that a SEF shall comply with the requirements of part 37 and all other applicable CFTC regulations, including § 1.60 and part 9, and including any related definitions and cross-referenced sections. Proposed Rule 801 would require an SBSEF to comply with the requirements of Regulation SE and all other applicable Commission rules, including any related definitions and cross-referenced sections.

C. Rule 802—Definitions

Proposed Rule 802 would set forth definitions of terms that are used in multiple rules in proposed Regulation SE. The majority of such terms are adapted from a CFTC rule. Other terms are taken from section 3 of the SEA[34] or from a Commission rule under the SEA. Where appropriate, the definition is discussed below in the context of the proposed rule where it is used.

In particular, paragraph (w) of proposed Rule 802 which would define the term "security-based swap execution facility" by cross-referencing the definition of that term provided in section 3(a)(77) of the SEA,[35] but with one carve-out. An entity that is registered with the Commission as a clearing agency pursuant to section 17A of the SEA[36] and limits its SBSEF functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations would be exempt from the definition of "security-based swap execution facility."

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[34] 15 U.S.C. 78c.

[35] 15 U.S.C. 78c(a)(77).

[36] 15 U.S.C. 78q-1.

This provision would codify a series of exemptions granted by the Commission to SBS clearing agencies that operate "forced trading" sessions.[37] As part of the clearing and risk management process, an SBS clearing agency must establish an end-of-day valuation for any SBS in which any of its members has a cleared position and will calculate margin based on that variation. Certain SBS clearing agencies utilize a valuation mechanism whereby they require clearing members to submit indicative quotes for those SBS products, and can require them to trade as a way to promote accurate quote submissions. The precise means by which the clearing agency matches quotes from different clearing members could cause the clearing agency to fall within the SEA definition of "exchange." The Commission previously has found that it was necessary or appropriate in the public interest and consistent with the protection of investors to exempt clearing agencies that engage in this activity from the definition of "exchange."[38] The Commission is now proposing to codify this exemption with respect to the both exchange and SBSEF registration.

The Commission preliminarily believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt a registered clearing agency

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[37] *See*, *e.g.*, *Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE U.S. Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments*, SEA Release No. 59527 (March 6, 2009), 74 FR 10791, 10796 (March 12, 2009) (providing, *inter alia*, an exemption from sections 5 and 6 of the SEA because "ICE Trust will periodically require ICE Trust Participants to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Trust Participants to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Trust Participant's best assessment of the value of each of its open positions in Cleared CDS on a daily basis, thereby reducing risk by allowing ICE Trust to impose appropriate margin requirements"); *Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments*, SEA Release No. 61164 (December 14, 2009), 74 FR 67258, 67262 (December 18, 2009) (providing, *inter alia*, an exemption from sections 5 and 6 of the SEA because, "[a]s part of the CDS clearing process, CME will periodically require CDS clearing members to trade at prices generated by their indicative settlement prices where those indicative settlement prices generate crossed bids and offers, pursuant to CME's price quality auction methodology").

[38] *See id.*

from the definition of "security-based swap execution facility" that utilizes a forced trading functionality for SBS. Such an entity would continue to be registered as a clearing agency and subject to the requirements of section 17A of the SEA. Furthermore, a registered clearing agency is a self-regulatory organization ("SRO"); therefore, all of its rules—including those governing the forced trading session—would have to be submitted to the Commission pursuant to section 19 of the SEA. The Commission preliminarily believes, therefore, that codification of the exemption from the definitions of "exchange" and "security-based swap execution facility" would preserve the *status quo* and eliminate a largely duplicative and unnecessary set of regulatory requirements. This exemption would cover only the forced-trading functionality of an SBS clearing agency; any other exchange or SBSEF activity in which a clearing agency might engage could subject the clearing agency to the SEA provisions and the Commission's rules thereunder applying to exchanges or SBSEFs.

The Commission seeks comment on the following:

11. Do you believe that any definitions in proposed Rule 802 should be revised or clarified? If so, please indicate which one(s) and provide any suggested revisions or clarifications.
12. Are there any terms used in proposed Regulation SE that are not defined in proposed Rule 802 but which you believe should be defined? If so, which term(s) and how would you define them?
13. Do you agree with the proposed definition of "security-based swap execution facility"? In particular, do you believe that registered clearing agencies that operate forced trading sessions for SBS should be exempted from the definition of "security-based swap execution facility" entirely? Or do you believe instead that such entities should fall within the definition of "security-based swap execution facility" but be exempted from some or all registration and regulatory requirements that otherwise would apply to SBSEFs? Why?

V. Registration of SBSEFs

Section 3D(a)(1) of the SEA[39] provides that no person may operate a facility for the trading or processing of SBS[40] unless the facility is registered as an SBSEF or as a national securities exchange. After issuing the 2011 SBSEF Proposal, the Commission granted temporary exemptions pursuant to section 36(a)(1) of the SEA[41] to entities that meet the definition of "security-based swap execution facility" from having to register with the Commission as an SBSEF or national securities exchange ("Temporary SBSEF Exemptions").[42] The Temporary SBSEF Exemptions will expire on the compliance date for the Commission's final SBSEF rules.[43]

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39 15 U.S.C. 78c-4(a)(1).

40 The term "security-based swap" is defined in section 3(a)(68) of the SEA, 15 U.S.C. 78c(a)(68), to include, among other things, a swap that is based on a single security or loan, including any interest therein or on the value thereof. A single security could include, for example, a cash equity, a crypto/digital asset security, or a security option.

41 15 U.S.C. 78mm(a)(1).

42 *See* SEA Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (temporarily exempting entities that meet the definition of "security-based swap execution facility" from the requirement to register with the Commission as an SBSEF) ("June 2011 Exemptive Order"); SEA Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) (temporarily exempting entities that meet the definition of "security-based swap execution facility" from exchange registration and other requirements of sections 5 and 6 of the SEA) ("July 2011 Exemptive Order"). An entity that meets the definition of "security-based swap execution facility" is required to register as an SBSEF under section 3D of the SEA or as an exchange under sections 5 and 6 of the SEA. But because the Commission has not yet adopted final rules relating to SBSEFs, such entities cannot yet register with the Commission as SBSEFs. The Temporary SBSEF Exemptions allow such entities to continue trading SBS without needing to register either as SBSEFs or national securities exchanges before the compliance date of the SBSEF registration rules.

43 *See* June 2011 Exemptive Order, 76 FR at 36293, 36306; July 2011 Exemptive Order, 76 FR at 39934, 39939. The July 2011 Exemptive Order also provided an exemption from the broker registration requirements of section 15(a)(1) of the SEA, 15 U.S.C. 78o(a)(1), and other requirements of the SEA and the Commission's rules thereunder that apply to a broker, solely in connection with broker activities involving SBS (the "Broker Exemptions"). The Broker Exemptions generally expired on October 6, 2021; however, because an entity that meets the definition of "security-based swap execution facility" also would also meet the definition of "broker" in section 3(a)(4) of the SEA, 15 U.S.C. 78c(a)(4), the Commission extended the Broker Exemptions solely for persons acting as an SBSEF until the expiration of the Temporary SBSEF Exemptions (*i.e.*, the compliance date for the Commission's final SBSEF rules). *See* SEA Release No. 87005 (September 19, 2019), 84 FR 68550, 68602 (December 16, 2019).

A. Rule 803—Requirements and procedures for registration

Rule 803 of Regulation SE is closely modelled on § 37.3 of the CFTC's rules and would set forth a process for registration with the Commission as an SBSEF.

Section 37.3(a)(1) provides that any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform shall register the facility as a swap execution facility under this part or as a designated contract market ("DCM") under part 38 of this chapter. Paragraph (a)(1) of proposed Rule 803 would track the language of § 37.3(a)(1) closely, except that a person meeting these criteria would be directed to register the facility under relevant provisions of the SEA rather than the CEA (*i.e.*, to register as an SBSEF under proposed Rule 803 or as a national securities exchange pursuant to section 6 of the SEA).

A person that registers with the Commission as a national securities exchange pursuant to section 6 of the SEA does not fall within the statutory definition of "security-based swap execution facility"[44] and thus would not need to register as an SBSEF under proposed Rule 803. Furthermore, as discussed below,[45] a person that registers as an SBSEF under proposed Rule 803 and provides a market place for no securities other than SBS would be exempt from the definition of "exchange"[46] and would not need to register as such pursuant to section 6 of the SEA. The SEA definitions of "exchange" and "security-based swap execution facility" overlap

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44 *See* section 3(a)(77) of the SEA, 15 U.S.C. 78c(a)(77) (defining "security-based swap execution facility" as "a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that . . . *is not a national securities exchange*" (emphasis added).

45 *See infra* section XII (discussing proposed paragraph (a)(4) of SEA Rule 3a1-1).

46 15 U.S.C. 78c(a)(1) (defining "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange").

substantially. The Commission preliminarily believes that it is appropriate to subject a trading venue for SBS to only one regulatory regime. Thus, under proposed Regulation SE, if a trading venue for SBS elects to register as a national securities exchange, it would not fall within the statutory definition of "security-based swap execution facility" and would not have to register as an SBSEF.[47] If a trading venue for SBS elects to register as an SBSEF under proposed Rule 803 and provides a market place for no securities other than SBS, it would not—pursuant to a proposed amendment to Rule 3a1-1—fall within the statutory definition of "exchange" and would not have to register as an exchange.

Section 37.3(a)(2) of the CFTC's rules sets out the minimum trading functionality that must be offered by a SEF. A SEF must, at a minimum, offer an "order book." Section 37.3(a)(3) defines "order book" to mean an electronic trading facility, as that term is defined in section 1a(16) of the CEA; a trading facility, as that term is defined in section 1a(51) of the CEA; or a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.

Paragraph (a)(2) of proposed Rule 803, like § 37.3(a)(2), would require an SBSEF, at a minimum, to offer an order book. The Commission is proposing, like § 37.3(a)(3), to define "order book" in Rule 802 to mean an electronic trading facility, a trading facility, or a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers. Section 37.3(a)(3) defines "trading facility" and "electronic trading facility" by cross-referencing definitions of those terms in the CEA. Rather than cross-referencing the CEA, the Commission is proposing instead to adapt the

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[47] However, a national securities exchange could elect to operate an SBSEF and separately register that SBSEF with the Commission. *See* section 3D(c) of the SEA, 15 U.S.C. 78c-4(c); proposed Rule 814.

CEA definitions of those terms directly into Rule 802.[48] The Commission preliminarily believes that it should harmonize as closely as possible with the CFTC on foundational terms such as "trading facility," "electronic trading facility," and "order book" because the CFTC's reliance on these terms over several years has created understanding of what type of functionality a SEF must offer. The Commission seeks to avoid a scenario where differences with the CFTC regarding these key definitions results in an entity's functionality being allowed under one agency's regime but disallowed under the other's.

Under § 37.3(a)(4), a SEF is not required to provide an order book for certain package transactions, although the SEF must provide an order book for a Required Transaction[49] when such Required Transaction is not executed as part of a package transaction. Paragraph (a)(3) of proposed Rule 803 is closely modelled on § 37.3(a)(4) and would provide a narrow exception to allow an SBSEF not to offer an order book for the SBS component(s) of a package transaction that contains a mix of products that both are and are not subject to the trade execution requirement.

Paragraph (b) of proposed Rule 803 is closely modelled on § 37.3(b) and would set out procedures for full registration of an SBSEF. Paragraph (b)(1), like § 37.3(b)(1), would provide that an applicant requesting registration must:

(i) File electronically a complete Form SBSEF or any successor forms, and all information and documentation described in such forms with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T; and

(ii) Provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application.

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48 *See* proposed Rule 802.

49 As discussed below in section VII(E), the Commission is proposing to incorporate into Regulation SE the concepts of "Required Transaction" and "Permitted Transaction" in a manner closely modelled on the CFTC's use of those terms. A Required Transaction would be a transaction involving an SBS that is subject to the trade execution requirement.

Paragraph (b)(2) of proposed Rule 803, like § 37.3(b)(2), would provide that an applicant requesting registration as an SBSEF must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to Rule 24b-2 under the SEA.[50] Paragraph (b)(2) also would provide that, as set forth in proposed Rule 808, certain information provided in an application shall be made publicly available.

Paragraph (b)(3) of proposed Rule 803 would address amendments to the SBSEF registration application. Like § 37.3(b)(3), proposed Rule 803(b)(3) would provide that an applicant amending a pending application or requesting an amendment to an order of registration shall file an amended application electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T. Subsequent to being registered, an SBSEF would be required to submit rule and product filings under Rule 806 or 807, as well as provide other updates as may be required pursuant to other rules for SBSEFs.

Paragraph (b)(4) of proposed Rule 803 would address the effect of an incomplete application. Like § 37.3(b)(4), proposed Rule 803(b)(4) would provide that, if an application is incomplete, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

Paragraph (b)(5) of proposed Rule 803 would establish the Commission review period for an application to register as an SBSEF. Proposed Rule 803(b)(5) is closely modelled on § 37.3(b)(5) and would require the Commission to approve or deny an application for registration as an SBSEF within 180 days of the filing of the application. Proposed Rule

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[50] Section 37.3(b)(2), like many other provisions in the CFTC's SEF rules, states that a request for confidential treatment for parts of a required filing shall be made pursuant to § 145.9 of the CFTC's rules, which contains the CFTC's substantive requirements for requests for confidential treatment. Rather than adapting § 145.9 into proposed Regulation SE, the Commission instead is proposing that confidential treatment requests arising from SBSEF matters would be made and adjudicated pursuant to SEA Rule 24b-2, 17 CFR 240.24b-2. The Commission preliminarily believes that it is not necessary or appropriate to establish and utilize one set of procedures to handle confidential treatment requests made by SBSEFs while utilizing a different set of procedures for all other persons who request confidential treatment from the Commission under the SEA.

803(b)(5) would further provide that, if the Commission notifies the person that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period would be stayed from the time of such notification until the application is resubmitted in completed form. In such case, the Commission would have not less than 60 days to approve or deny the application from the time the application is resubmitted in completed form.

Paragraph (b)(6)(i) of proposed Rule 803, like § 37.3(b)(6)(i), would provide that the Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the SEA and the Commission's rules applicable to SBSEFs. Paragraph (b)(6)(i) would allow the Commission to issue an order granting registration, subject to conditions. Paragraph (b)(6)(ii) of proposed Rule 803, modelled on § 37.3(b)(6)(ii), would provide that the Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the SEA and the Commission's rules applicable to SBSEFs. If the Commission denies an application under proposed Rule 803(b)(6)(ii), it would be required to specify the grounds for the denial.

Paragraph (c) of § 37.3, which allows the CFTC to grant SEFs temporary registration under certain conditions, was adopted with a sunset provision that generally terminated the applicability of the paragraph two years after it became effective in August 2013.[51] Because this provision is now obsolete, the Commission is not proposing an equivalent provision in Regulation SE.

Paragraph (c) of proposed Rule 803, like § 37.3(d), would address reinstatement of a

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[51] *See* § 37.3(c)(5). Notwithstanding the general sunset provision, SEFs that applied for temporary registration before the termination date were permitted to continue operating if they had not yet been either granted or denied full registration by that date. *See id.*

dormant registration. Proposed Rule 803(c) would provide that a dormant SBSEF[52] may reinstate its registration under the procedures of proposed Rule 803(b). Proposed Rule 803(c) would further provide that the applicant may rely upon previously submitted materials if such materials accurately describe the dormant SBSEF's conditions at the time that it applies for reinstatement of its registration.

Paragraph (d) of proposed Rule 803, like § 37.3(e), would set out procedures for an SBSEF to request a transfer of registration. Paragraph (d)(1), which is closely modelled on § 37.3(e)(1), would provide that an SBSEF seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Commission in the form and manner specified by the Commission. Paragraph (d)(2), modelled on § 37.3(e)(2), would provide that a request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the SBSEF could not have known of the anticipated change three months prior to the anticipated change, as soon as it knows of such change.

Paragraph (d)(3) of proposed Rule 803, like § 37.3(e)(3), would require an SBSEF's request for transfer of registration to include the following:

- The underlying agreement that governs the corporate change;
- A description of the corporate change, including the reason for the change and its impact on the SBSEF, including its governance and operations, and its impact on

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52 *See* proposed Rule 802 (defining "dormant security-based swap execution facility" to mean "a security-based swap execution facility on which no trading has occurred for the previous 12 consecutive calendar months; provided, however, that no security-based swap execution facility shall be considered to be a dormant security-based swap execution facility if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months"). This proposed definition is modelled on the definition of "dormant swap execution facility" found in § 40.1(f).

the rights and obligations of members;[53]

- A discussion of the transferee's ability to comply with the SEA, including the core principles applicable to SBSEFs and the Commission's rules thereunder;
- The governing documents of the transferee, including, but not limited to, articles of incorporation and bylaws;
- The transferee's rules marked to show changes from the current rules of the SBSEF;
- A representation by the transferee that it:
    - Will be the surviving entity and successor-in-interest to the transferor SBSEF and will retain and assume, without limitation, all of the assets and liabilities of the transferor;
    - Will assume responsibility for complying with all applicable provisions of the SEA and the Commission's rules thereunder;
    - Will assume, maintain, and enforce all rules implementing and complying with the core principles applicable to SBSEFs, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to proposed Rules 806 or 807;
    - Will comply with all regulatory responsibilities[54] except if otherwise

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53 Here, and at several other places in § 37.3(e)(3), the CFTC uses the term "market participants" rather than "members." However, there are other places in the CFTC's rules that are being adapted by the Commission into proposed Regulation SE that use the term "member" synonymously with "market participant." When the context suggests that a rule is addressing participants of a particular SBSEF market, rather than market participants in the abstract, the Commission is proposing to use the term "member" throughout Regulation SE.

54 The equivalent provision in § 37.3(e)(3)(vi)(D) requires a representation from the transferee that it "[w]ill comply with all *self*-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all *self*-regulatory programs" (emphasis added). SBSEFs are not SROs under the SEA and therefore do not have self-regulatory responsibilities or self-regulatory programs.

indicated in the request, and will maintain and enforce all regulatory programs; and

  - Will notify members of all changes to the transferor's rulebook prior to the transfer and will further notify members of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

- A representation by the transferee that upon the transfer:
  - It will assume responsibility for and maintain compliance with core principles for all SBS previously made available for trading through the transferor, whether by certification or approval; and
  - None of the proposed rule changes will affect the rights and obligations of any member.

Paragraph (d)(4) of proposed Rule 803, modelled on § 37.3(e)(4), would provide that, upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

Paragraph (e) of proposed Rule 803, like § 37.3(f), would provide that an applicant for registration as an SBSEF may withdraw its application by filing a withdrawal request electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T.[55] Proposed Rule 803(e) would further provide that withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

Paragraph (f) of proposed Rule 803, like § 37.3(g), would provide that an SBSEF may

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[55] 17 CFR 232.405. The proposed electronic filing requirement discussed above does not appear in the CFTC version of this provision. The Commission is adding this specification to implement the Inline XBRL and EDGAR electronic filing requirements for certain documents required by proposed Regulation SE. *See infra* section XV.

request that its registration be vacated by filing a vacation request electronically with the Commission using the EDGAR system and must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T at least 90 days prior to the date that the vacation is requested to take effect. Section 37.3(g) provides that a registration may be vacated under section 7 of the CEA. Since the Commission does not operate under the CEA, the Commission is proposing to adapt relevant language from section 7 of the CEA directly into proposed Rule 803(f). Thus, proposed Rule 803(f) would continue as follows, with language taken from section 7 italicized and language taken from § 37.3(g) in regular text: "*Upon receipt of such request, the Commission shall promptly order the vacation to be effective upon the date named in the request and send a copy of the request and its order to all other security-based swap execution facilities, SBS exchanges, and registered clearing agencies that clear security-based swaps.* Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the security-based swap execution facility was registered by the Commission. *From and after the date upon which the vacation became effective the said security-based swap execution facility can thereafter be registered again by applying to the Commission in the manner provided in paragraph (b) of this section for an original application.*"

The Commission seeks comment on the following:

14. Do you believe in general that the Commission should closely harmonize the rules for SBSEF registration with the CFTC's rules for SEF registration? Why or why not?
15. In particular, do you agree with the language that the Commission is proposing to adapt from § 37.3 (Requirements and procedures for registration) into Rule 803? If not, what language would you delete or revise, and why?
16. Do you believe that the Commission should harmonize the application procedures and timeframes in proposed Rule 803 with § 37.3 of the CFTC's rules? Why or why not? Are there aspects of § 37.3 that you believe are not necessary or appropriate to

incorporate into Rule 803? If so, please describe. Are there different or additional requirements that the Commission should include in Rule 803 that are not included in § 37.3? If so, please describe.

17. Do you believe that any provisions of § 37.3(c) relating to temporary registration are still relevant and should be adapted into Rule 803? If so, which provisions and why?
18. Do you believe in general that proposed Rule 803 should include provisions relating to vacation of an SBSEF registration? If so, do you agree with the specific language adapted by the Commission from section 7 of the CEA and § 37.3(g) into proposed Rule 803(f)? If not, how would you revise that language?

B. Form SBSEF

As new § 249.2001, the Commission is proposing Form SBSEF, the application form for an entity to register with the Commission as an SBSEF. The proposed form would also be used for submitting any updates, corrections, or supplemental information to a pending application for registration. Proposed Form SBSEF is closely modelled on the CFTC's Form SEF for entities that seek to register with the CFTC as SEFs, with only minor changes to remove the concept of post-registration amendments, as the proposed rule would not require any amendments to Form SBSEF post-registration. The exhibits being proposed along with Form SBSEF are very similar to the exhibits in Form SEF. Like with Form SEF, each applicant submitting a Form SBSEF would be required to provide the Commission with documents and descriptions pertaining to its business organization, financial resources, and compliance program, including various documents describing the applicant's legal and financial status. An applicant would be required to disclose any affiliates and provide a brief description of the nature of the affiliation, and submit copies of any agreements between the SBSEF and third parties that would assist the applicant in complying with its duties under the SEA. In addition, an applicant would be required to demonstrate operational capability through documentation, including technical manuals and third-party service provider agreements.

Under proposed Rule 803(b)(1), an applicant for SBSEF registration would be required to complete Form SBSEF and provide, upon the Commission's request, any additional necessary information and documentation in order review the application. The determination as to when an application submission is complete would be at the sole discretion of the Commission. The Commission would review Form SBSEF and, at the conclusion of its review, by order either: (i) grant registration; (ii) deny the application for registration; or (iii) grant registration subject to certain conditions. After an applicant is granted registration, any updates or amendments to the information contained in its Form SBSEF by an active SBSEF would be required to be submitted as rules or rule amendments under proposed Rule 806 or 807 or as may be required by other rules in Regulation SE.

The CFTC's process for registering SEFs appears well understood by the industry and well designed for being adapted to the SBS market. Therefore, the Commission is using the CFTC's process as a basis for its own process for registering SBSEFs. Assuming that most if not all SBSEFs will be dually registered as SEFs, the Commission preliminarily believes that it is not necessary to require the same registrant to provide relevant information in one manner to the Commission if the CFTC requires it in a different manner.

The Commission seeks comment on the following:

19. Are there parts of Form SEF that you believe are not necessary or appropriate to incorporate into Form SBSEF? If so, please describe.
20. Are there different or additional requirements that the Commission should include in Form SBSEF that are not included in Form SEF? If so, please describe. What would be the benefits and costs of requiring that information in Form SBSEF that is not required by the CFTC in Form SEF?

C. Abbreviated registration procedures for CFTC-registered SEFs

Many of the entities that will seek registration with the Commission as SBSEFs are already registered with the CFTC as SEFs. Entities that seek dual registration presumably see

efficiencies in utilizing the same systems, policies, and procedures to trade both swaps and SBS. As noted throughout this release, the Commission seeks to harmonize the SBSEF regulatory regime as closely as practicable with the CFTC's SEF regulatory regime, achieving similar regulatory benefits as the CFTC regime while imposing only marginal costs on dually-registered SEF/SBSEFs and their members. If the Commission ultimately adopts SBSEF rules that are closely harmonized with those of the CFTC, SEFs that seek dual registration with the SEC would likely need to make only minor adjustments to their rules and trading procedures to support trading of SBS in addition to the trading of swaps. The Commission preliminarily believes that whether an entity is registered as a SEF and in good standing with the CFTC is relevant when considering its application to register as an SBSEF, and that an abbreviated registration for CFTC-registered SEFs is appropriate. Furthermore, the Commission is preliminarily considering that, after adopting final rules establishing a registration process for SBSEFs, it could exercise its exemptive authority under section 36(a)(1) of the SEA[56] to relax or eliminate entirely certain of the registration requirements for entities that are already registered as SEFs with the CFTC.

The Commission seeks comment on the following:

21. Do you believe in general that the Commission should utilize its authority under section 36(a)(1) of the SEA to establish an abbreviated procedure for entities wishing to register as SBSEFs that are already registered with the CFTC as SEFs? Why or why not?
22. If so, what registration requirements should the Commission relax or eliminate entirely for entities seeking dual registration?

VI. Rule and Product Filings by SBSEFs

Unlike section 19(b) of the SEA,[57] which sets out a process whereby national securities exchanges and other SROs submit filings to the Commission to add, delete, or amend rules

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[56] 15 U.S.C. 78mm(a)(1).

[57] 15 U.S.C. 78s(b).

(including rules to list products), section 3D of the SEA[58] does not set out an equivalent process for SBSEFs. It can be expected, however, that an SBSEF will seek to change its rules over time in order, for example, to implement new trading methodologies and to expand its product offerings, with the intent to make its market more attractive to participants. The Commission preliminarily believes, therefore, that some review process is necessary to assess whether such changes to an SBSEF's rules and product offerings are consistent with section 3D of the SEA and the Commission's rules thereunder. The Commission preliminarily believes that the CFTC's filing procedures are an appropriate model on which to base its own filing procedures. Furthermore, because of the likelihood that most if not all SBSEFs will be dually registered with the CFTC as SEFs and that many rule changes for a dual registrant will affect both its SBS and swap trading businesses, close harmonization with the CFTC's filing procedures would allow a dual registrant to make a similar filing to each agency, allowing each agency to carry out its oversight functions while minimizing the burdens on dual registrants.

Parts 37 and 40 of the CFTC's rules set out processes whereby SEFs may establish or amend rules and list products. In short, these processes allow a SEF to voluntarily submit a rule, rule amendment, or new product for CFTC review and approval, or to "self-certify" that a rule, rule amendment, or new product meets applicable standards under the CEA and the CFTC's rules thereunder without obtaining CFTC approval, although the CFTC retains the ability, in certain circumstances, to stay the self-certification for further review before it may become effective. Using its general authority to impose any requirement on SBSEFs and to prescribe rules governing the regulation of SBSEFs,[59] the Commission is proposing to establish similar filing processes for registered SBSEFs in proposed Rules 804 to 810 of Regulation SE.

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58 15 U.S.C. 78c-4.

59 *See* 15 U.S.C. 78c-4(d)(1)(A)(ii) (requiring an SBSEF, to be registered and to maintain registration, to comply with any requirement that the Commission may impose by rule or regulation); 15 U.S.C. 78c-4(f) (directing the Commission to prescribe rules governing the regulation of SBSEFs).

A. Rule 804—Listing products for trading by certification

Proposed Rule 804 is modelled on § 40.2 of the CFTC's rules and would set forth procedures by which an SBSEF may list a product via certification.

§ 40.2(a) specifies the filing requirements for DCMs and SEFs to certify a product for listing. Paragraph (a) of proposed Rule 804 would adapt these requirements for SBSEFs, with one exception, as explained in the next paragraph. Paragraph (a)(1) of proposed Rule 804 would require an SBSEF to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T.

Paragraph (a)(2) of proposed Rule 804 would provide that the Commission must receive the submission by the open of business on the business day that is ten business days preceding the product's listing. By contrast, the parallel provision in § 40.2(a) provides that a DCM or SEF must file the self-certification only one business day before listing the product.[60] The Commission preliminarily believes that a ten-business-day review period for self-certified SBS products before they can be listed strikes a reasonable balance between allowing SBSEFs to bring new products to market quickly while affording the Commission staff a reasonable period in which to assess them prior to listing. The Commission is concerned that one business day would not provide the SEC staff sufficient time to review a new product, especially a novel or complex product that might be difficult to analyze. As discussed below, the Commission is proposing that it could stay a product for reasons similar to those in the CFTC's stay provision. If a product does warrant a stay, the Commission also would need sufficient time to go through the administrative steps of formally issuing the stay. The proposed ten-business-day review period for self-certified products accords with the CFTC's ten-business-day review period for

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[60] *See* § 40.2(a)(2) (one of the conditions for a valid self-certification of a product is that the CFTC has received the submission by the open of business on the business day preceding the product's listing).

self-certified rules,[61] which the Commission is proposing to replicate in Rule 807(a)(3).[62]

Paragraph (a)(3) of proposed Rule 804 would require a self-certification to include:

(1) A copy of the submission cover sheet;[63]

(2) A copy of the product's rules, including all rules related to its terms and conditions;

(3) The intended listing date;

(4) A certification by the SBSEF that the product to be listed complies with the SEA and the Commission's rules thereunder;

(5) A concise explanation and analysis of the product and its compliance with applicable provisions of the SEA, including core principles, and the Commission's rules thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(6) A certification that the SBSEF posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website;[64] and

(7) A request for confidential treatment, if appropriate, as permitted pursuant to SEA Rule 24b-2.[65]

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61 *See* § 40.6(a)(3) (one of the conditions for a valid self-certification of a rule or rule amendment is that the CFTC has received the submission not later than the open of business on the business day that is ten business days prior to the registered entity's implementation of the rule or rule amendment).

62 *See infra* section VI(D).

63 The Commission is proposing, in new § 249.2002, a submission cover sheet (with instructions) that is closely modelled on the CFTC's submission cover sheet.

64 Under proposed Rule 804(a)(3)(vi), information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but would have to be republished consistent with any determination made by the Commission pursuant to SEA Rule 24b-2.

65 Section 40.2(a)(3) instructs filers to make any request for confidential treatment pursuant to § 40.8 of the CFTC's rules, which in turn cross-references § 145.9. The Commission is proposing instead to direct filers to make any request for confidential treatment pursuant to existing SEA Rule 24b-2. *See supra* note 50.

Paragraph (b) of proposed Rule 804, modelled on § 40.2(b), would provide that, if requested by Commission staff, an SBSEF shall provide any additional evidence, information, or data that demonstrates that the SBS meets, initially or on a continuing basis, the requirements of the SEA or the Commission's rules or policies thereunder.

Section 40.2(c) provides that the CFTC may stay the listing of a contract pursuant to paragraph (a) of this section during the pendency of CFTC proceedings for filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions pursuant to section 8a(7) of the CEA. The SEA does not include the CEA's provisions regarding altering or amending the terms and conditions of an SBS listed by an SBSEF like the authority granted to the CFTC with respect to products listed by SEFs, such that the Commission would be able to stay the listing of an SBS that it believes may be inconsistent with the SEA, pending proceedings to exercise that authority. Nor are proceedings for false certification of an SBS contemplated by the SEA. For this reason, in lieu of harmonizing with § 40.2(c), the Commission is proposing, in Rule 804(c), a provision that would allow the Commission to stay the certification of a new product in the same manner that proposed Rule 807(c)—which, as described below, is itself based on § 40.6(c) of the CFTC rules—would allow the Commission to stay the self-certifications of a new rule or rule amendment.[66]

Thus, paragraph (c)(1) of proposed Rule 804 would provide that the Commission may stay the certification of a new product by issuing a notification informing the SBSEF that the Commission is staying the certification on the grounds that the product presents novel or complex issues that require additional time to analyze, is accompanied by an inadequate explanation, or is potentially inconsistent with the SEA or the Commission's rules thereunder.

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[66] The Commission also is not proposing to adapt—either in Rule 807 or here in Rule 804—§ 40.6(c)(4), which relates to rules already implemented and permits the CFTC to stay the effectiveness of such rules during the pendency of proceedings for filing a false certification or of a petition to alter or amend the rule pursuant to section 8a(7) of the CEA.

Under paragraph (c)(1), the Commission would have an additional 90 days from the date of the notification to conduct the review. Paragraph (c)(2) would require the Commission to provide a 30-day comment period during that 90 days, and to publish a notice of the 30-day comment period on the Commission's website. Comments from the public could be submitted as specified in that notice. Paragraph (c)(3) would provide that the product that had been stayed would become effective, pursuant to the certification, at the expiration of the 90-day review period, unless the Commission withdraws the stay prior to that time, or the Commission notifies the SBSEF during the 90-day time period that it objects to the proposed certification on the grounds that the proposed product is inconsistent with the SEA or the Commission's rules.

Paragraph (d) of § 40.2 provides that a DCM or SEF may submit a class certification of swaps based on an "excluded commodity,"[67] subject to certain conditions. The proposed rules do not provide for class certification of any SBS although, as noted below, the Commission seeks commenters' views on whether the concept of class certification would be appropriate for SBSEFs.

The Commission preliminarily believes that proposed Regulation SE should allow SBSEFs to introduce new SBS products to their market places as speedily as practicable while affording the Commission an effective mechanism to assess their consistency with section 3D of the SEA. The Commission preliminarily believes that the CFTC's self-certification procedures are well articulated and well understood by SEFs, and that harmonizing with these procedures for new product filings by SBSEF would yield comparable regulatory benefits while minimizing burdens on SBSEFs. At the same time, the Commission preliminarily believes that, for the reasons noted above, a ten-business-day pre-listing review period is more appropriate than a one-business-day review period for self-certified SBS products.

The Commission seeks comment on the following:

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[67] *See* section 1a(19) of the CEA, 7 U.S.C. 1a(19) (defining "excluded commodity").

23. Do you believe in general that Regulation SE should include a rule that allows SBSEFs to list products for trading by certification? Why or why not?
24. In particular, should the Commission establish a procedure for listing SBS products for trading by certification by harmonizing closely with § 40.2 of the CFTC's rules? Why or why not?
25. Do you agree with the ten-business-day pre-listing review period for self-certified products in proposed Rule 804(a)(2) instead of the CFTC's one-business-day review period? Why or why not? What economic harm might an SBSEF and/or its members suffer if the Commission ultimately adopted a review period other than one business day? If you believe that the Commission should adopt a review period of greater than one day (but other than ten), please explain.
26. Do you believe that the Commission should adapt the concept of class certification from § 40.2(d) into proposed Rule 804? Why or why not? If so, how do you believe a "class" should be defined for purposes of listing SBS products on an SBSEF? Should there be any conditions for class certification? If so, what conditions and why?
27. Are there any provisions of proposed Rule 804 that the Commission has adapted from § 40.2 that you believe would be inappropriate, or would not create any benefit, in a Commission rule to establish procedures for SBSEFs to list SBS products for trading by certification? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.
28. Do you believe that proposed Rule 804(c), relating to stays of product certifications, mirroring the Commission's proposed provisions relating to stays of self-certifications of new rules, is appropriate and workable? Why or why not? If not, what alternatives, if any, should be considered to enable the Commission to stay

product certifications that it believes pose issues with respect to consistency with the SEA?

B. Rule 805—Voluntary submission of new products for Commission review and approval

Proposed Rule 805 is closely modelled on § 40.3 of the CFTC's rules and would set forth procedures by which an SBSEF may voluntarily submit new SBS products for Commission review and approval.

Section 40.3(a) provides that a SEF or DCM may request the CFTC to approve a new or dormant product prior to listing it for trading, and sets out the filing requirements. Paragraph (a) of proposed Rule 805 would adapt these requirements for SBSEFs. First, an SBSEF would be required to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T. The filing also would have to include a copy of the submission cover sheet, a copy of the rules that set forth the terms and conditions of the SBS to be listed, and an explanation and analysis of the product and its compliance with applicable provisions of the SEA, including the Core Principles and the Commission's rules thereunder.[68] The submission also would have to describe any agreements or contracts entered into with other parties that enable the SBSEF to carry out its responsibilities.

Furthermore, paragraph (a) of proposed Rule 805, modelled on § 40.3(a), would require the SBSEF to include, if requested by Commission staff, additional evidence, information, or data demonstrating that the SBS meets, initially or on a continuing basis, the requirements of the SEA, or other requirement for registration under the SEA, or the Commission's rules or policies thereunder. The SBSEF would be required to submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff, or at

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[68] This explanation and analysis would have to either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources.

the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the SBSEF. Paragraph (a) of proposed Rule 805, like § 40.3(a), would permit the submitting SBSEF to include a request for confidential treatment regarding portions of its application.[69] Finally, paragraph (a) of proposed Rule 805, like § 40.3(a), would require the SBSEF to certify that it posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[70]

Paragraph (a) of proposed Rule 805 would omit two provisions in § 40.3(a). First, § 40.3(a)(6) requires the submitting entity to include the certifications required in § 41.22 for product approval of a commodity that is a security future or a security futures product, as defined in sections 1a(44) or 1a(45) of the CEA, respectively. The Commission is not adapting this provision into proposed Regulation SE because it pertains to security futures and security futures products, not to swaps or SBS. Second, § 40.3(a)(8) requires the submitting entity to include a filing fee. The Commission is not proposing to charge SBSEFs filing fees for submitting new product proposals.

Paragraph (b) of proposed Rule 805, like § 40.3(b), would provide that the Commission shall approve a new product unless the terms and conditions of the product violate the SEA or the Commission's rules thereunder.

Paragraph (c) of proposed Rule 805, modelled on § 40.3(c), would provide that a product submitted for Commission approval under Rule 805 shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period

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69 Section 40.3(a), like § 40.2(a)(3), instructs filers to make any request for confidential treatment pursuant to § 40.8 of the CFTC's rules, which in turn cross-references § 145.9. As noted previously, the Commission proposes instead to direct filers to make any request for confidential treatment pursuant to SEA Rule 24b-2. *See supra* note 50.

70 Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but would have to be republished consistent with any determination made by the Commission pursuant to SEA Rule 24b-2.

as provided under proposed Rule 805(d), unless notified otherwise within the applicable period, if the submission complies with the requirements of Rule 805(a) and the SBSEF does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering, or other non-substantive revisions, during that period. Paragraph (c) also would provide that any voluntary, substantive amendment by the SBSEF would be treated as a new submission under Rule 805.

Paragraph (d) of proposed Rule 805, modelled on § 40.3(d), would provide that the Commission may extend the 45-day review period in paragraph (c) for an additional 45 days, if the product raises novel or complex issues that require additional time to analyze, in which case the Commission shall notify the SBSEF within the initial 45-day review period and briefly describe the nature of the specific issue(s) for which additional time for review is required. Paragraph (d) also would provide that the Commission may extend the 45-day review period for any length of time to which the SBSEF agrees in writing.

Paragraph (e) of proposed Rule 805 would provide that the Commission, at any time during its review, may notify the SBSEF that it will not, or is unable to, approve the product. This notification would have to briefly specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, including the form or content requirements of proposed Rule 805(a), that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission. Paragraph (f) of proposed Rule 805, like § 40.3(f), would provide that such notification of the Commission's determination not to approve a product does not prejudice the SBSEF from subsequently submitting a revised version of the product for Commission approval, or from submitting the product as initially proposed pursuant to a supplemented submission. Furthermore, such notification would be presumptive evidence that the entity may not truthfully certify under proposed Rule 804 that the same, or substantially the same, product does not violate the SEA or the Commission's rules

thereunder.

The Commission preliminarily believes that it is reasonable and appropriate to supplement the product certification procedures in proposed Rule 804 by also including in Regulation SE, as proposed Rule 805, procedures for voluntary submission of new products for Commission review and approval. The Commission preliminarily believes that providing this approval process, as the CFTC does, can be valuable to an SBSEF seeking the Commission's concurrence that a new product is in compliance with the SEA prior to listing it. The Commission preliminarily believes that the CFTC's procedures in this regard are well articulated and well understood by SEFs, and that closely harmonizing with these procedures would yield comparable regulatory benefits while minimizing burdens on SBSEFs.[71]

The Commission requests comment on the following:

29. Do you believe in general that Regulation SE should include a rule setting forth procedures for an SBSEF to voluntarily submit new SBS products for Commission review and approval? Why or why not?
30. In particular, should the Commission adopt procedures for voluntary submission of new SBS products for Commission review and approval by harmonizing closely with § 40.3 of the CFTC's rules? Why or why not?
31. Are there any provisions of § 40.3 that are adapted into proposed Rule 805 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would

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[71] The Commission does not discount the possibility that an entity might elect to register as an SBSEF with the SEC but not as a SEF with the CFTC. In such case, the SEC-only registrant would not have any familiarity with the CFTC's rules and filing procedures. Nevertheless, because the Commission preliminarily believes that most if not all entities that will seek SBSEF registration with the SEC are or will also be registered as SEFs with the CFTC, such dual registrants would benefit from harmonized procedures. Furthermore, if the Commission ultimately adopts these procedures substantially as proposed, it likely would be unnecessary to establish and apply one set of procedures for dual registrants and a different set for SEC-only SBSEFs.

be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

C. Rule 806—Voluntary submission of rules for Commission review and approval

Proposed Rule 806 is closely modelled on § 40.5 of the CFTC's rules and would set forth procedures by which an SBSEF may voluntarily submit rules, rule amendments, or dormant rules for Commission review and approval.

Section 40.5(a) provides that a registered entity, including a SEF, may request that the CFTC approve a new rule, rule amendment, or dormant rule and sets out the filing requirements. Paragraph (a) of proposed Rule 805 would adapt these requirements for SBSEFs. First, an SBSEF would be required to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T. The filing also would have to include a copy of the submission cover sheet and set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated). Further, the SBSEF would be required to describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the SBSEF or by its governing board or by any committee thereof, and cite the rules of the SBSEF that authorize the adoption of the proposed rule. The SBSEF also would be required to provide an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the SEA, including the core principles relating to SBSEFs and the Commission's rules thereunder, and, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the SBSEF's framework of regulation.

Moreover, the SBSEF would be required to provide additional information which may be beneficial to the Commission in analyzing the new rule or rule amendment. If a proposed rule affects, directly or indirectly, the application of any other rule of the SBSEF, the pertinent text of

any such rule would have to be set forth and the anticipated effect described. The SBSEF also would be required to provide a brief explanation of any substantive opposing views expressed to the SBSEF by governing board or committee members, members of the SBSEF, or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed.

The SBSEF could request confidential treatment for portions of its submission, as permitted by SEA Rule 24b-2. Finally, the SBSEF would have to certify that it posted a notice of the pending rule with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[72]

Paragraph (b) of proposed Rule 806, modelled on § 40.5(b), would provide that the Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the SEA or the Commission's rules thereunder. Paragraph (c) of proposed Rule 806, like § 40.5(c), would provide that a rule or rule amendment submitted for Commission approval under Rule 806 shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the SBSEF is notified otherwise within the applicable period, if the submission complies with the requirements of proposed Rule 806(a) and the SBSEF does not amend the proposed rule or supplemented the submission, except as requested by the Commission, during the pendency of the review period, other than for correction of typographical errors, renumbering, or other non-substantive revisions. Paragraph (c) also would provide that any amendment or supplementation not requested by the Commission would be treated as the submission of a new filing under Rule 806.

Paragraph (d) of proposed Rule 806, modelled on § 40.5(d), would provide that the

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[72] Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website, but would have to be republished consistent with any determination made pursuant to SEA Rule 24b-2.

Commission may further extend the review period in paragraph (c) for an additional 45 days, if the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting SBSEF within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required. Paragraph (d) also would allow an extension to which the SBSEF agrees in writing.

Paragraph (e) of proposed Rule 806, like § 40.5(e), would provide that, at any time during its review, the Commission may notify the SBSEF that it will not, or is unable to, approve the new rule or rule amendment. This notification would have to briefly specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, including the form or content requirements of proposed Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the SEA or the Commission's rules thereunder. Paragraph (f) of proposed Rule 806, like § 40.5(f), would provide that such notification to an SBSEF would not prevent the SBSEF from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission. Paragraph (f) would further provide that the revised submission would be reviewed without prejudice. Finally, paragraph (f) would provide that such notification to an SBSEF of the Commission's determination not to approve a proposed rule or rule amendment shall be presumptive evidence that the SBSEF may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under proposed Rule 807(a).

Paragraph (g) of proposed Rule 806, like § 40.5(g), would provide that, notwithstanding Rule 806(c), changes to a proposed rule or a rule amendment, including changes to terms and conditions of a product that are consistent with the SEA and the Commission's rules thereunder, may be approved by the Commission at such time and under such conditions as the Commission

shall specify in the written notification; provided, however, that the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.

The Commission preliminarily believes that Regulation SE should afford the Commission a means for assessing whether SBSEF rules and rule amendments are consistent with section 3D of the SEA, and that it is appropriate to achieve this aim by aligning closely with the CFTC's process for voluntary rule-approval submission in § 40.5. The CFTC's procedures are well articulated and well understood by SEFs, and closely harmonizing with these procedures should yield comparable regulatory benefits while minimizing burdens on SBSEFs. As with the process for seeking Commission approval of new products, the Commission preliminarily believes that providing a process for voluntarily seeking Commission approval of rules, rule amendments, and dormant rules—as the CFTC does—can be valuable to an SBSEF seeking the Commission's concurrence that the rule change is consistent with the SEA prior to implementing it. Moreover, for dually registered SEF/SBSEFs, it is likely that certain rules will apply to member behavior generally—and not to one product market (*e.g.*, swaps or SBS) exclusively—and so will have to be filed with both the SEC and CFTC. Closely harmonizing the SEC's filing procedures with § 40.5 would allow dually registered entities to submit the same (or substantially the same) filing to both agencies for review and approval. The Commission preliminarily believes that it is not necessary to require SBSEFs to make a substantially different type of filing to the SEC than to the CFTC for the same underlying rule.

The Commission seeks comment on the following:

32. Do you believe in general that Regulation SE should include a rule establishing procedures for an SBSEF to voluntarily submit rules and rule amendments for Commission review and approval? Why or why not?
33. In particular, should the Commission adopt procedures for voluntary submission of rules and rule amendments for Commission review and approval by harmonizing

closely with § 40.5 of the CFTC's rules? Why or why not?

34. Are there any provisions of § 40.5 that are adapted into proposed Rule 806 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

D. Rule 807— Self-certification of rules

Proposed Rule 807 is closely modelled on § 40.6 of the CFTC's rules and would set forth procedures by which an SBSEF may self-certify changes to its rules. Paragraph (a) of proposed Rule 807, modelled on § 40.6(a), would set forth the conditions that an SBSEF must comply with before implementing a rule or rule amendment via self-certification. Like § 40.6(a), proposed Rule 807(a) would permit an SBSEF to implement a rule or rule amendment without obtaining the Commission's prior approval under Rule 806, but only if it "self-certifies" the rule or rule amendment in compliance with the conditions set forth in Rule 807. Rule 807(a) also would permit an SBSEF to self-certify a rule or rule amendment that the Commission had previously approved under Rule 806, or that the SBSEF had previously self-certified under this Rule 807, but that in the interim had become a dormant rule (*i.e.,* unimplemented for 12 consecutive calendar months).[73]

Paragraph (a)(1) of proposed Rule 807 would require the SBSEF to file its submission

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[73] Also like § 40.6(a), proposed Rule 807(a) would include an exception that would allow an SBSEF to implement a certain kind of rule without having to comply with the full set of conditions set forth in paragraphs (a)(1) through (8) of proposed Rule 807, the details of which are discussed below. Specifically, the exception would provide that, when submitting a rule delisting or withdrawing the certification of a product with no open interest, an SBSEF would be required only to meet the conditions of paragraphs (a)(1), (a)(2), and (a)(6) of proposed Rule 807. The introductory language being proposed by the Commission in paragraph (a) of proposed Rule 807 generally tracks the language of § 40.6(a), with slight changes for clarity. However, proposed Rule 807(a) would not include an equivalent of the reference in § 40.6(a) to submissions under § 40.10, which concerns only systemically important derivatives clearing organizations and thus are not relevant to SBSEFs.

electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T. Paragraph (a)(2) would require the SBSEF to provide a certification that the SBSEF posted a notice of the self-certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[74] Paragraph (a)(3) would provide that the Commission must have received the submission not later than the open of business on the business day that is ten business days before the SBSEF's implementation of the rule or rule amendment. Paragraph (a)(4) would provide that the SBSEF may not implement the rule or rule amendment if the Commission has stayed it pursuant to proposed Rule 807(c), discussed below.

Section 40.6(a)(5) sets forth an additional condition that the rule or rule amendment is not a rule or rule amendment of a DCM that materially changes a term or condition of a contract for future delivery of an agricultural commodity enumerated in section 1a(4) of the CEA or an option on such a contract or commodity in a delivery month having open interest. Because this provision applies to DCMs that trade contracts for future delivery of agricultural commodities, it is not germane to the SBS markets; therefore, the Commission is not adapting this condition into proposed Rule 807.

Section 40.6(a)(6) sets out procedures for emergency rule certifications, which the Commission is proposing to adapt into paragraph (a)(5) of Rule 807. Paragraph (a)(5)(i) would require a new rule or rule amendment that establishes standards for responding to an emergency[75] to be submitted pursuant to Rule 807(a). Paragraph (a)(5)(ii) would provide that a

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[74] Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but must be republished consistent with any determination made pursuant to SEA Rule 24b-2.

[75] *See* § 40.1(h) (defining "emergency" as "any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading

rule or rule amendment implemented under procedures of the governing board to respond to an emergency shall, if practicable, be filed with the Commission prior to implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than 24 hours after implementation. In addition, paragraph (a)(5)(ii) would provide that any such submission be subject to the certification and stay provisions of proposed Rules 807(b) and (c), described below.

Paragraph (a)(6) of proposed Rule 807, modelled on § 40.6(a)(7), would set out the required elements for a rule submission under Rule 807. These requirements would include a copy of the submission cover sheet (in the case of a rule or rule amendment that responds to an emergency, "Emergency Rule Certification" should be noted in the description section of the submission cover sheet); the text of the rule (in the case of a rule amendment, deletions and additions must be indicated); the date of intended implementation; a certification by the SBSEF that the rule complies with the SEA and the Commission's rules thereunder; a concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the SEA, including Core Principles relating to SBSEFs and the Commission's rules thereunder; and a brief explanation of any substantive opposing views expressed to the SBSEF by governing board or committee members, members of the SBSEF, or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed. Paragraph (a)(6)(vii) also would permit the SBSEF to request confidential treatment for portions of its submission.[76]

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in, or the liquidation of or delivery pursuant to, any agreements, contracts, swaps or transactions or the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization"). The definition goes on to list a series of circumstances that are deemed emergencies under the definition. The Commission is proposing a definition of "emergency" in proposed Rule 802 that is adapted from § 40.1(h).

[76] Section 40.6(a)(7)(vii) directs the submitting entity to follow the procedures in § 40.8 when making a request for confidential treatment, which in turn cross-references § 145.9. As noted previously, the Commission proposes instead to direct filers to make any request for confidential treatment pursuant to SEA Rule 24b-2. *See supra* note 50.

Paragraph (a)(7) of proposed Rule 807, like § 40.6(a)(8), would require an SBSEF to provide, if requested by Commission staff, additional evidence, information, or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the SBSEF's compliance with any of the requirements of the SEA or the Commission's rules or policies thereunder.

Paragraph (b) of proposed Rule 807, modelled on § 40.6(b), would give the Commission ten business days to review the new rule or rule amendment before it is deemed certified and can be made effective, unless the Commission notifies the SBSEF during that ten-business-day review period that it intends to issue a stay of the certification under proposed Rule 807(c).

Paragraph (c)(1) of proposed Rule 807, modelled on § 40.6(c)(1), would provide that the Commission may stay the certification of a new rule or rule amendment by issuing a notification informing the SBSEF that the Commission is staying the certification on the grounds that it presents novel or complex issues that require additional time to analyze, is accompanied by an inadequate explanation, or is potentially inconsistent with the SEA or the Commission's rules thereunder. In addition, paragraph (c)(1) would afford the Commission an additional 90 days from the date of the notification to conduct the review.

Paragraph (c)(2) of proposed Rule 807, modelled on § 40.6(c)(2), would require the Commission to provide a 30-day comment period within the 90-day period in which the stay is in effect. The Commission would be required to publish a notice of the 30-day comment period on the Commission's internet website, and comments from the public could be submitted as specified in that notice.

Paragraph (c)(3) of proposed Rule 807, modelled on § 40.6(c)(3), would provide that the new rule or rule amendment subject to the stay shall become effective, pursuant to the certification, at the expiration of the 90-day review period, unless the Commission withdraws the stay prior to that time, or the Commission notifies the SBSEF during the 90-day period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is

inconsistent with the SEA or the Commission's rules thereunder.

Section 40.6(c)(4), relating to rules or rule amendments already implemented by a SEF (as opposed to rules or rule amendments that are the subject of a new submission) provides: "The Commission may stay the effectiveness of an implemented rule during the pendency of Commission proceedings for filing a false certification or during the pendency of a petition to alter or amend the rule pursuant to section 8a(7) of the Act. The decision to stay the effectiveness of a rule in such circumstances shall not be delegable to any employee of the Commission." As previously noted,[77] the SEA does not provide the Commission explicit authority to alter or amend the terms and conditions of an SBS like the authority granted to the CFTC with respect to swaps, and does not contemplate proceedings for a false certification. Hence the Commission is not proposing a provision corresponding to § 40.6(c)(4).[78]

Section 40.6(d) of the CFTC's rules allows a registered entity to place certain rules or rule amendments into effect even without a self-certification, if certain enumerated conditions are met. Certain types of these rules or rule amendments must be disclosed on a "Weekly Notification of Rule Amendments," pursuant to § 40.6(d)(1) and (2), while others can be put into effect without any notification to the CFTC at all, pursuant to § 40.6(d)(3). Paragraph (d) of proposed Rule 807, modelled on § 40.6(d), would provide that certain kinds of rules or rule amendments may be put into effect by an SBSEF without certification to the Commission if similar enumerated conditions are met. Some would be subject to a Weekly Notification of Rule Amendments, which is closely modelled on the CFTC notification; others would not be subject to any notification requirement.

Under paragraph (d)(2) of proposed Rule 807, the following types of rules could be put into effect by an SBSEF without self-certification, so long as they are disclosed on the Weekly Notice of Rule Amendments:

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77 *See supra* note 66 and accompanying text.

78 *See id.*

- *Non-substantive revisions.* Corrections of typographical errors, renumbering, periodic routine updates to identifying information about the SBSEF, and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product;
- *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that total $1.00 or more per contract, and are established by an independent third party or are unrelated to delivery, trading, clearing, or dispute resolution.
- *Survey lists.* Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;
- *Approved brands.* Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;
- *Trading months.* The initial listing of trading months, which may qualify for implementation without notice, within the currently established cycle of trading months; or
- *Minimum tick.* Reductions in the minimum price fluctuation (or 'tick').

Under paragraph (d)(3)(ii) of proposed Rule 807, the following types of rules could be put into effect by an SBSEF without self-certification and without having to be disclosed on the Weekly Notice of Rule Amendments:

- *Transfer of membership or ownership.* Procedures and forms for the purchase, sale, or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership, or dues or assessments;
- *Administrative procedures.* The organization and administrative procedures of governing bodies such as a governing board, officers, and committees, but not voting requirements, governing board, or committee composition requirements or procedures, decision-making

procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

- *Administration.* The routine daily administration, direction, and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays; and changes to facilities housing the market, trading floor, or trading area;
- *Standards of decorum.* Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules;
- *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs that are less than $1.00 or relate to matters such as dues, badges, telecommunication services, booth space, real-time quotations, historical information, publications, software licenses, or other matters that are administrative in nature.
- *Trading months.* The initial listing of trading months which are within the currently established cycle of trading months.

Paragraphs (d)(2) and (3) of proposed Rule 807, which enumerate the types of rule and rule amendments that an SBSEF could put into effect without a self-certification, are adapted from the types of rules enumerated in § 40.6(d)(2) and (3). However, the Commission is not adapting into proposed Rules 807(d)(2) and (d)(3) the other types of rules enumerated in § 40.6(d)(2) and (3).[79]

The Commission preliminarily believes that Regulation SE should afford the

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[79] These rules pertain to products that are only distantly related, if at all, to the types of products that are likely to trade on SBSEFs. *See* § 40.6(d)(2)(ii) (delivery standards set by third parties); § 40.6(d)(2)(iii) (index products); § 40.6(d)(2)(iv) (option contract terms); § 40.6(d)(2)(viii) (delivery facilities and delivery service providers); § 40.6(d)(3)(ii)(F) (securities indexes); § 40.6(d)(3)(ii)(G) (option contract term).

Commission a mechanism to assess new SBSEF rules and rule amendments for consistency with section 3D of the SEA, and to permit SBSEFs to submit new rules and rule amendments using a self-certification process closely aligned with the § 40.6. The CFTC's procedures are well articulated and well understood by SEFs, and closely harmonizing with these procedures should yield comparable regulatory benefits while minimizing burdens on SBSEFs. It is likely that certain rules of dually registered SEF/SBSEFs will apply to member behavior generally—and not to one product market (*e.g.*, swaps or SBS) exclusively—and so will have to be filed with both the SEC and CFTC. Closely harmonizing the SEC's filing procedures with the CFTC's would allow dually registered entities to submit the same (or substantially the same) filing to both agencies for review. The Commission preliminarily believes that it is not necessary to require SBSEFs to make a substantially different type of filing to the SEC than to the CFTC for the same underlying rule.

The Commission requests comment on the following:

35. Do you believe in general that Regulation SE should include a rule establishing procedures for an SBSEF to establish rules via self-certification? Why or why not?
36. In particular, should the Commission adopt procedures for self-certification of rules by harmonizing closely with § 40.6 of the CFTC's rules? Why or why not?
37. Are there any provisions of § 40.6 that are adapted into proposed Rule 807 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.
38. Do you disagree with the specific language that the Commission is proposing? If so, what revisions to the language would you suggest?
39. Do you agree with the proposed list of the types of rules and rule amendments that the Commission would allow an SBSEF to make effective without a self-certification?

Are there any types that you believe should be added to that list? If so, which types and why? Are there any types that you believe should be removed from that list? If so, which types and why?

E. Submission cover sheet and instructions

As new § 249.2002, the Commission is proposing a submission cover sheet and instructions that an SBSEF would be required to use in conjunction with filings submitted pursuant to proposed Rules 804 through 807, 809, and 816. These are modelled on the cover sheet and instructions used by SEFs in conjunction with their analogous filings with the CFTC.[80]

The same cover sheet and instructions would be used for a new rule, rule amendment, or new product filing, with the SBSEF checking the appropriate box to indicate which of these types the filing represents. The SBSEF also would be required to check boxes to indicate whether the submission was seeking approval by the Commission or whether it was being filed as a certification by the SBSEF; and to identify the specific provision in the Commission's rules pursuant to which the filing was being submitted. The submission cover sheet also would include a box that the SBSEF would check if it intends to submit a request for a joint interpretation from the Commission and the CFTC regarding whether the product is a swap, an SBS, or mixed swap pursuant to SEA Rule 3a68-2.[81] Finally, the cover sheet would include a check box by which an SBSEF could indicate that it was requesting confidential treatment of materials in the submission.

The cover sheet would divide the rules and rule amendment filings into two categories: one for general rules of the SBSEF and the other for rules relating to the terms and conditions of

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[80] The CFTC cover sheet and instructions, found in appendix D to part 40 of the CFTC's rules, are designed for rule and product filings from a wider range of registered entities than just SEFs, and thus include entries that are omitted from the Commission's proposed adaptation.

[81] Proposed Rule 809 would provide that a product filing will be stayed or tolled, as applicable, if such a request for a joint interpretation is made by the SBSEF, the SEC, or the CFTC. *See infra* section VI(G).

a product. Additional boxes would need to be checked if a filing under the terms-and-conditions category concerned specifically a determination by the SBSEF that a particular SBS was now to be considered MAT ("made-available-to-trade");[82] or if the filing concerned the delisting of an SBS with no open interest.[83] The cover sheet would need to be used in conjunction with the weekly notifications that SBSEFs would be required to file pursuant to Rule 807(d) for certain changes that do not need to be approved or certified, as discussed above.

Paragraph (a) of the submission cover sheet instructions would provide that a properly completed submission cover sheet must accompany all rule and product submissions submitted electronically to the Commission by an SBSEF, using the EDGAR system and must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T. Per paragraph (a), a properly completed submission cover sheet would include all of the following:

1. The name and platform ID of the SBSEF.[84]
2. The date of the filing.
3. An indication as to whether the filing is a new rule, rule amendment, or new product.
4. For rule filings, the rule number(s) being adopted or, in the case of rule amendments,

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82 *See infra* section VII(F).

83 *See supra* note 73.

84 "Platform ID" is a term utilized in Regulation SBSR, 17 CFR 242.900 *et seq.*, and means the unique identification code ("UIC") assigned to a platform on which an SBS is executed. *See* 17 CFR 242.900(w). The term "platform" includes an SBSEF. *See* Rule 900(v), 17 CFR 242.900(v). A registered SBSEF is required by Rule 903(a) of Regulation SBSR, 17 CFR 242.903(a), to use as its platform ID an identifier issued by an internationally recognized standards-setting system ("IRSS") if the IRSS meets enumerated criteria and has therefore been recognized by the Commission pursuant to Rule 903(a). This identification requirement stems from a registered SBSEF's status as a "participant" of a registered SDR under Rule 900(u), 17 CFR 242.900(u), because the term "participant" includes a "platform," as defined in Rule 900(v), 17 CFR 242.900(v), that incurs reporting duties under Rule 901(a), 17 CFR 242.901(a). Currently, the Global Legal Entity Identifier System ("GLEIS") is the only IRSS that has been recognized by the Commission under Rule 903(a). *See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, SEA Release No. 74244 (February 11, 2015), 80 FR 14564, 14631-32 (March 19, 2015) ("Regulation SBSR Adopting Release I"). Therefore, LEIs issued through the GLEIS are currently the only allowable platform IDs that may be used by registered SBSEFs.

the number of the rule(s) being modified.

5. For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the SBSEF, its members, and the overall market. The instructions will state that the narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

Paragraph (b) of the proposed submission cover sheet instructions would state that a submission must comply with all applicable filing requirements for proposed rules, rule amendments, or products, and that the filing of the submission cover sheet would not obviate the SBSEF's responsibility to comply with applicable filing requirements.

Paragraph (c) of the proposed submission cover sheet would state that checking the box marked "confidential treatment requested" would not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment under SEA Rule 24b-2 and would not substitute for notice or full compliance with such requirements.

The Commission contemplates establishing a system for electronic completion of the cover sheet and attachment of the submissions required by proposed Rules 804, 805, 806, 807, and 809, and will advise affected persons regarding its use by public announcement in advance of the effective date of these rules.

The Commission seeks comment on the following:

40. Do you agree in general that the submission cover sheet and instructions for SBSEF filings should be harmonized with the CFTC's? Why or why not?
41. Do you agree with the specific language proposed in the cover sheet and instructions? If not, how should the language be revised? Is there any information not included in the proposed cover sheet and instructions that you believe should be included?
42. Do you agree with the requirement for an SBSEF to report its platform ID on the cover sheet? Should the disclosure of standard identifiers such as the LEI, the Financial Instrument Global Identifier ("FIGI"), and the Unique Product Identifier

("UPI") be included in an SBSEF's other reporting obligations under the proposed rules?

43. Are any of the instructions in the submission cover sheet unclear? If so, what matters do you believe require clarification?

F. Rule 808—Availability of public information

Section 40.8 of the CFTC's rules is entitled "Availability of public information." § 40.8(a) provides that any part of an application to register as a SEF (among other CFTC-registered entities) that is not covered by a request for confidential treatment will be made publicly available. Section 40.8(a) also sets out the sections of an application to register as a SEF that shall be made publicly available. Section 40.8(c)[85] provides that rule and new product filings by a SEF, whether made under the self-certification procedures or pursuant to CFTC review and approval, will be treated as public information unless accompanied by a request for confidential treatment. Section 40.8(c) includes procedures for such requests for confidential treatment. Section 40.8(d) provides that CFTC staff will not consider confidential treatment requests for information that is required to be made public under the CEA, and that the terms and conditions of a product submitted to the CFTC shall be made publicly available at the time of submission.

Proposed Rule 808 is closely modelled on § 40.8. Section 40.8(a) does not provide a list of the exhibits required to be made public, but rather refers to a general description of items required to be made public. For purposes of clarity and ease of reference, however, the Commission is proposing to list the specific corresponding exhibits in proposed Rule 808 that would be made publicly available. Therefore, paragraph (a) of proposed Rule 808 would provide that the Commission shall make publicly available on its website the following parts of an application to register as an SBSEF, unless confidential treatment is obtained pursuant to SEA

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[85] Section 40.8(b) has no text and is marked "reserved."

Rule 24b-2: the transmittal letter and first page of the application cover sheet; Exhibit C; Exhibit G; Exhibit L; and Exhibit M.

Paragraph (b) of proposed Rule 808, adapted from § 40.8(c), would provide that the Commission shall make publicly available on its website, unless confidential treatment is obtained pursuant to SEA Rule 24b-2,[86] an SBSEF's filing of new products pursuant to the self-certification procedures of proposed Rule 804, new products for Commission review and approval pursuant to proposed Rule 805, new rules and rule amendments for Commission review and approval pursuant to proposed Rule 806, and new rules and rule amendments pursuant to the self-certification procedures of proposed Rule 807. Paragraph (c), adapted from § 40.8(d), would provide that the terms and conditions of a product submitted to the Commission pursuant to any of proposed Rules 804 through 807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to SEA Rule 24b-2.

The Commission preliminarily believes that it would be appropriate to include in proposed Regulation SE a rule similar to § 40.8 that would clarify how SBSEFs may request confidential treatment for their filings, and what information contained in those filings would be publicly available by the Commission. The Commission preliminarily believes that the items enumerated in proposed Rule 808 are not of the type that typically would constitute confidential information.

The Commission requests comment on the following:

44. Do you believe in general that Regulation SE should include a rule modelled on § 40.8? Why or why not?

45. In particular, do you agree with the specific language proposed by the Commission to

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[86] An application for confidential treatment shall contain, among other things, a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Freedom of Information Act, and a justification of the period of time for which confidential treatment is sought. *See* 17 CFR 240.24b-2(b)(2)(ii).

adapt § 40.8 into proposed Rule 808? If not, how would you revise that language?

46. Are there any provisions of § 40.8 that are adapted into proposed Rule 808 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

47. Do you prefer the Commission's proposed approach of listing specific exhibits or the CFTC's approach of providing in the rule only a general description of items required to be made public? If the former, are there any additional exhibits that you believe should be enumerated in Rule 808 that should be made publicly available? If so, which exhibits and why?

G. Rule 809—Staying of certification and tolling of review period pending jurisdictional determination

Section 40.12 of the CFTC's rules is entitled "Staying of certification and tolling of review period pending jurisdictional determination" and reflects the process described in section 718 of the Dodd-Frank Act, which is entitled "Determining Status of Novel Derivative Products." Section 718 of the Dodd-Frank Act sets forth a mechanism for addressing a situation where a person wishes to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities)—*i.e.*, it is unclear whether the product is a security under the jurisdiction of the SEC or a future under the jurisdiction of the CFTC. Section 718(a) provides that the SEC or the CFTC may request that the other agency issue a determination as to the classification of that product, and section 718(b) provides that the CFTC and SEC may petition for the judicial review of any such determination. Section 40.12 provides that if a SEF (among other registered entities) certifies, submits for approval, or otherwise files a proposal to list or trade such a novel derivative product, the product certification shall be stayed or the approval review period shall be tolled until a final determination order is issued under section 718.

Proposed Rule 809 is loosely modelled on § 40.12, but modified to focus on the products and jurisdictional problems that are more likely to be relevant to SBSEFs. An SBSEF might seek to list a product where it is unclear whether the product is a swap or an SBS. While section 718 of the Dodd-Frank Act addresses situations where it is unclear if a product is a security or a future, the SEC and the CFTC have adopted separate rules—SEA Rule 3a68-2 and § 1.8, respectively—governing requests for interpretation regarding a product that might be an SBS, a swap, or a mixed swap. Accordingly, the Commission believes that it would be appropriate for proposed Rule 809 to reflect the process set forth in SEA Rule 3a68-2. Nonetheless, the objective of proposed Rule 809 would be consistent with the objective of § 40.12—to provide for a stay or tolling of a product filing where it is unclear whether the product is under the jurisdiction of the SEC or the CFTC.

Paragraph (a) of proposed Rule 809, modelled on § 40.12(b), would provide that a product certification made by an SBSEF pursuant to proposed Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to proposed Rule 805 shall be tolled, upon request for a joint interpretation of whether the product is a swap, SBS, or mixed swap made pursuant to Rule 3a68-2 under the SEA[87] by the SBSEF, the SEC, or the CFTC. Paragraph (b) is modelled on § 40.12(b)(1) and would require the SEC to provide the SBSEF with a written notice of the stay or tolling pending issuance of a joint interpretation by the SEC and CFTC. Paragraph (c) is modelled on § 40.12(b)(2) and would provide that the stay shall be withdrawn, or the approval review period shall resume, if a joint interpretation finding that the SEC has jurisdiction over the product is issued.

The Commission preliminarily believes that it is appropriate for Regulation SE to include a mechanism for the staying or tolling of a filing by an SBSEF where it is unclear whether the product is a swap or an SBS—should an SBSEF ever seek to list such a product. Although

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[87] 17 CFR 240.3a68-2.

proposed Rule 809 would deviate from § 40.12 in that it would apply where it is unclear whether a product is swap or an SBS, rather than where it is unclear whether the product is a security or a future, the Commission preliminarily believes that modifying the scope of proposed Rule 809, in relation to § 40.12, would appropriately address the jurisdictional questions that are more likely to arise from a product listed by an SBSEF.

The Commission seeks comment on the following:

48. Do you believe in general that Regulation SE should include a rule setting out a procedure for staying a product certification or tolling a product review period if a request for a joint interpretation regarding the classification of the product is made pursuant to SEA Rule 3a68-2? Why or why not?
49. In particular, do you agree with the specific language proposed by the Commission to adapt § 40.12 into proposed Rule 809? If not, how would you revise that language?
50. Do you agree that Rule 809 should apply to a product that might be an SBS or a swap, rather than to a product that might be a security or a future? Why or why not?
51. Are there any provisions of § 40.12 that are adapted into proposed Rule 809 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

H. Rule 810—Product filings by SBSEFs that are not yet registered and by dormant SBSEFs

Part 37 directs SEFs to submit product filings via self-certification or for CFTC review and approval, using § 40.2 or § 40.3, respectively. However, these sections cannot be utilized by an entity that has submitted an application for SEF registration but has not yet been registered, or by a dormant SEF that has submitted an application to reinstate its registration. Under § 37.4, either entity may submit a swap's terms and conditions before being registered or having its registration reinstated, and the CFTC will consider the swap listing request as part of the

application for registration or reinstatement, respectively.

Proposed Rule 810 is closely modelled on § 37.4. Paragraph (a) of proposed Rule 810 is closely modelled on § 37.4(a) and would provide that an applicant for registration as an SBSEF may submit an SBS's terms and conditions prior to listing the product as part of its application for registration. Paragraph (b) is closely modelled on § 37.4(b) and would provide that any SBS terms and conditions or rules submitted as part of an application for registration shall be considered for approval by the Commission at the time the Commission issues the SBSEF's order of registration. Paragraph (c) is closely modelled on § 37.4(c) and would provide that, after the Commission issues the order of registration, the SBSEF shall submit an SBS's terms and conditions, including amendments to such terms and conditions, new rules, or rule amendments pursuant to the procedures in proposed Rules 804 to 807. Paragraph (d) is closely modelled on § 37.4(d), would provide that any SBS terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant SBSEF shall be considered for approval by the Commission at the time the Commission approves the reinstatement of registration of the dormant SBSEF.

The Commission preliminarily believes that it is appropriate for Regulation SE to include provisions that address new products submitted as part of an SBSEF registration by an entity that has not yet been registered, or by a dormant SBSEF seeking reinstatement of its registration, and that these provisions should align with the CFTC's provisions as closely as possible.

The Commission seeks comment on the following:

52. Do you believe in general that Regulation SE should include a rule setting out how dormant SBSEFs and applicants for SBSEF registration can submit new products? Why or why not?
53. In particular, do you agree with the specific language proposed by the Commission to adapt § 37.4 into proposed Rule 810? If not, how would you revise that language?
54. Are there any provisions of § 37.4 that are adapted into proposed Rule 810 that you

believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

VII. Miscellaneous Requirements

Sections 37.5 to 37.12 of the CFTC's rules impose miscellaneous requirements on SEFs. The Commission seeks to impose similar requirements on SBSEFs in proposed Rules 811 to 817 of Regulation SE.

A. Rule 811— Information relating to SBSEF compliance

1. Harmonization with § 37.5

Paragraphs (a) to (c) of proposed Rule 811 are modelled on § 37.5, which is entitled "Information regarding swap execution facility compliance." Section 37.5 provides that the CFTC may request various types of information from a SEF, and that the SEF must supply the information to the CFTC in a form and manner specified by the CFTC. Paragraph (a) of § 37.5 requires a SEF, at the CFTC's request, to provide information related to its business as a SEF. Paragraph (b) states that a SEF may be required to provide a written demonstration, containing supporting data, information, and documents that it is in compliance with one or more core principles or with its other obligations under the CEA. Paragraph (c) sets out procedures for a SEF to notify the CFTC of any transfer of 50% or more of the equity interest in the SEF.

Proposed Rules 811(a) to (c) are closely modelled on § 37.5. Paragraph (a) of proposed Rule 811 is closely modelled on § 37.5(a) and would provide that, upon the Commission's request, an SBSEF shall file with the Commission information related to its business as an SBSEF in the form and manner, and within the timeframe, specified by the Commission. Paragraph (b) is closely modelled on § 37.5(b) and would provide that, upon the Commission's request, an SBSEF shall file with the Commission a written demonstration, containing supporting data, information, and documents, that it is in compliance with one or more Core

Principles or with its other obligations under the SEA or the Commission's rules thereunder, as the Commission specifies in its request. Also, under proposed Rule 811(b), the SBSEF would be required to file such written demonstration in the form and manner, and within the timeframe, specified by the Commission.

Paragraph (c)(1) of proposed Rule 811 is closely modelled on § 37.5(c)(1) and would provide that an SBSEF shall file with the Commission a notification of any transaction involving the direct or indirect transfer of 50% or more of the equity interest in the SBSEF. Also, under proposed Rule 811(c)(1), the Commission could, upon receiving such notification, request supporting documentation of the transaction. Paragraph (c)(2) is closely modelled on § 37.5(c)(2) and would provide that the equity interest transfer notice shall be filed with the Commission in a form and manner specified by the Commission at the earliest possible time, but in no event later than the open of business ten business days following the date upon which the SBSEF enters into a firm obligation to transfer the equity interest. Paragraph (c)(3) is closely modelled on § 37.5(c)(3), would provide that, notwithstanding the foregoing, if any aspect of an equity interest transfer requires an SBSEF to file a rule, the SBSEF shall comply with the applicable rule filing requirements of proposed Rule 806 or 807.

Paragraph (c)(4) of proposed Rule 811 is closely modelled on § 37.5(c)(4) and would provide that, upon a transfer of an equity interest of 50% or more in an SBSEF, the SBSEF shall file with the Commission, in a form and manner specified by the Commission, a certification that the SBSEF meets all of the requirements of section 3D of the SEA and the Commission rules thereunder, no later than two business days following the date on which the equity interest of 50% or more was acquired.

The Commission preliminarily believes that it is appropriate for Regulation SE to include provisions requiring an SBSEF to provide the Commission with the information described above. Information about its business as an SBSEF and transfers of 50% of its equity would promote understanding of its operations and ownership, which should facilitate oversight of the

SBSEF; therefore, the Commission preliminarily believes that it should, similar to the CFTC, clarify that it may request such information from an SBSEF. In addition, should questions about compliance arise, the Commission should be able to obtain from an SBSEF supporting data, information, and documents that the SBSEF is in compliance with relevant obligations under the SEA. By modelling its proposed requirements on existing CFTC rules, the Commission seeks to obtain comparable regulatory benefits while imposing only marginal additional burdens on dually registered entities that are already subject to similar obligations.

The Commission requests comment on the following:

55. Do you believe in general that Regulation SE should include a rule that would require an SBSEF to provide the Commission with information about its business or its compliance with the SEA, as well as information regarding transfers of 50% or more of its equity interest? Why or why not?
56. In particular, do you agree with the specific language proposed by the Commission to adapt § 37.5 into proposed Rule 811? If not, how would you revise that language?
57. Are there any provisions of § 37.5 that are adapted into proposed Rule 811 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

2. Harmonization with § 1.60

Paragraph (d) of proposed Rule 811 is not modelled on § 37.5 but rather on § 1.60 of the CFTC's rules, which is entitled "Pending legal proceedings." Because it is conceptually similar to § 37.5 in that it requires another type of information relevant to the regulatory oversight of a SEF, the Commission is proposing to adapt this provision into Rule 811.

Section 1.60 requires a SEF (among other entities) to provide the CFTC with copies of any legal proceeding to which it is a party, or to which its property or assets is subject.

Paragraph (d) of proposed Rule 811 would adapt paragraphs (a), (c), and (e) of § 1.60 to apply to SBSEFs.[88]

Paragraph (d)(1) of proposed Rule 811 is closely modelled on § 1.60(a) and would provide that an SBSEF shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the SBSEF is a party or its property or assets is subject. Paragraph (d)(2) is closely modelled on § 1.60(c) and would provide that an SBSEF shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF and alleging violations of the SEA or any rule, regulation, or order thereunder; the constitution, bylaws, or rules of the SBSEF; or the applicable provisions of State law relating to the duties of officers, directors, or other officials of business organizations.

Paragraph (d)(3) of proposed Rule 811 is loosely modelled on § 1.60(e) and would provide that documents required by Rule 811(d) to be submitted to the Commission shall be submitted electronically in a form and manner specified by the Commission within ten days after the initiation of the legal proceedings to which they relate, after the date of issuance, or after receipt by the SBSEF of the notice of appeal, as the case may be.[89]

Paragraph (d)(4) of proposed Rule 811 is closely modelled on the final two sentences of § 1.60(e) and would provide that, for purposes of Rule 811(d), a "material legal proceeding"

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88 Paragraphs (b) and (d) of § 1.60 apply to futures commission merchants and do not appear germane to SEFs or SBSEFs. Therefore, the Commission is not adapting these paragraphs into proposed Rule 811(d).

89 Section 1.60(e) requires relevant documents to be "mailed via first-class or submitted by other more expeditious means."

includes but is not limited to actions involving alleged violations of the SEA or the Commission rules thereunder, and that a legal proceeding is not "material" for the purposes of Rule 811 if the proceeding is not in a Federal or State court or if the Commission is a party.

The Commission preliminarily believes that, to properly oversee an SBSEF, the Commission needs to be aware of any pending legal proceedings involving the SBSEF or any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF. The Commission preliminarily believes, furthermore, that § 1.60 provides an established and well understood mechanism for obtaining this information, and therefore is using § 1.60 as the model for proposed Rule 811(d).

The Commission seeks comment on the following:

58. Do you believe in general that Regulation SE should include a rule that would require an SBSEF to provide the Commission with information about its pending legal proceedings? Why or why not?
59. In particular, do you agree with the specific language proposed by the Commission to adapt § 1.60 into proposed Rule 811? If not, how would you revise that language?
60. Are there any provisions of § 1.60 that are adapted into proposed Rule 811 that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

B. Rule 812— Enforceability

Section 37.6(a) of the CFTC's rules provides that a transaction entered into on or pursuant to the rules of a SEF shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of a violation by the SEF of the Core Principles or the part 37 rules thereunder. Section 37.6(a) also provides generally that such a transaction would not be void or voidable as a result of a CFTC or other proceeding to alter or supplement a

rule, term, or trading rule or procedure. Section 37.6(b) requires a SEF to provide each counterparty to a transaction that is entered into on or pursuant to the rules of the SEF with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction. Furthermore, under § 37.6(b), the confirmation of all terms of the transaction must take place at the same time as execution, provided that specific customer identifiers for accounts included in bunched orders need not be included in confirmations if certain conditions are met.

Proposed Rule 812 generally is modelled on § 37.6, but omits certain of its detailed provisions. Paragraph (a) of proposed Rule 812, which is based on § 37.6(a)(1), would provide that a transaction on or pursuant to the rules of an SBSEF cannot be invalidated as a result of a violation by the SBSEF of section 3D of the SEA or the Commission's rules thereunder.[90] An SBS executed on an SBSEF should not be invalidated by the SBSEF's violation of any of the securities laws, given that swaps executed on SEFs are afforded the same legal certainty under § 37.6(a).

Paragraph (b) of proposed Rule 812 is modelled on the first sentence of § 37.6(b) and would provide that an SBSEF shall, as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms. The Commission preliminarily believes that it would be appropriate to require an SBSEF to inform counterparties as soon as technologically practicable after they have effected a trade on or pursuant the rules of the SBSEF, and to provide them with a written record of the terms to which

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[90] The Commission is not adapting into proposed Rule 812 paragraphs (a)(2) and (a)(3) of § 37.6, which provide that a transaction on a SEF may not be invalidated by CFTC proceedings that alter or supplement SEF rules, terms, and conditions, because the Commission has no authority in the SEA analogous to the CFTC's authority under section 8a(7) of the CEA to conduct such proceedings. *See supra* note 66 and accompanying text.

they have agreed. The Commission also preliminarily believes that it would be appropriate to require that this written record legally supersede any previous agreement regarding the terms that were agreed to on the SBSEF. The Commission recognizes, however, that there may be other terms of an uncleared SBS transaction that are specified in one or more agreements previously negotiated between the counterparty pair (relating, *e.g.*, to credit support). Because agreements between counterparty pairs likely are not known or easily obtained by an SBSEF, the Commission is not including a requirement that the SBSEF provide a written record of any such terms.[91]

The Commission seeks comment on the following:

61. Do you believe in general that Regulation SE should include a rule regarding enforceability of contracts entered into on an SBSEF that is modelled on § 37.6? Why or why not?
62. In particular, do you agree with the specific language proposed by the Commission to adapt § 37.6 into proposed Rule 812? If not, how would you revise that language?
63. Are there any provisions of § 37.6 that the Commission is proposing to adapt into Rule 812 that you believe would be inappropriate, or fail to create any benefit, in a

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[91] Section 37.6(b) requires a SEF to provide a written record of "all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction." In the adopting release for the final part 37 rules, the CFTC explained that, with respect to uncleared swaps, a SEF could satisfy this requirement by incorporating by reference terms set forth in agreements previously negotiated by the counterparties, provided that such agreements had been submitted to the SEF ahead of execution. *See* 2013 CFTC Final SEF Rules Release, 78 FR at 33491, n. 195. The CFTC staff has provided no-action relief with respect to the confirmation requirements for uncleared swaps in response to assertions by industry participants that it is impracticable for a SEF to satisfy the written confirmation requirements by incorporating by reference terms from previously negotiated agreements between the counterparties if the SEF must receive copies of such agreements prior to execution. *See* CFTC No Action Letter 17-17 (March 24, 2017) (issued by the CFTC's Division of Market Oversight). In so doing, the CFTC staff indicated that it was continuing to assess confirmation requirements, including establishing a permanent solution to the issues raised. Given these circumstances, the Commission preliminarily believes that it is appropriate to require an SBSEF to provide counterparties with a written record of only those terms that are agreed to on the SBSEF.

Commission rule applicable to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

64. Do you believe that any of the provisions of § 37.6 for which the Commission has not proposed an analog warrant inclusion? If so, which one(s) and why?

65. Rule 15Fi-2(f)(1) under the SEA[92] provides SBS dealers and major SBS participants with an exception from the trade acknowledgment and verification requirements for SBS transactions "executed on [an SBSEF] or national securities exchange, provided that the rules, procedures or processes of the [SBSEF] or national securities exchange provide for the acknowledgment and verification of *all terms* of the security-based swap transaction no later than the time required by [Rule 15Fi-2(b) and (d)(2)]" (emphasis added). Proposed Rule 812(b) would require an SBSEF to provide a written record only of the terms of the transaction that are agreed to on the SBSEF. As a result, if the Commission were to adopt Rule 812(b) substantially as proposed, the exception in Rule 15Fi-2(f)(1) would not be available where the counterparty pair has agreed to other terms of the SBS transaction away from the SBSEF. Do you agree with this result? If not, how would an SBSEF be able to provide a record of *all terms* of an SBS transaction effected on or pursuant to the rules of the SBSEF when there are one or more pre-existing agreements between the counterparty pair where the counterparties agree to additional terms?

C. Rule 813—Prohibited use of data collected for regulatory purposes

Section 37.7 of the CFTC's rules provides that a SEF shall not use for business or marketing purposes any proprietary data or personal information that it collects or receives from

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[92] 17 CFR 240.15Fi-2(f)(1).

or on behalf of any person for the purpose of fulfilling its regulatory obligations. The SEF may use data or information for business or marketing purposes if the person consents, but the SEF may not condition access to the SEF on the person's providing such consent. Finally, § 37.7 provides that a SEF, where necessary for regulatory purposes, may share such data or information with another SEF or a DCM.

Proposed Rule 813 is modelled on § 37.7. Persons who trade on an SBSEF may have to provide proprietary data or personal information to the SBSEF from time to time to allow the SBSEF to carry out its regulatory obligations. The Commission preliminarily believes, in general, that an SBSEF using that information for business or marketing purposes would be a misappropriation, because the SBSEF's powers to compel production of that information by its members is for regulatory purposes, not for the benefit of the SBSEF's business interests. While a member of the SBSEF could consent to the SBSEF using this information for business or marketing purposes, the Commission preliminarily believes that access to the SBSEF should not be conditioned on such consent being given. The Commission preliminarily believes that § 37.7 is well understood by market participants and well designed for adaptation to the SBS market to deter such misappropriation. Therefore, the Commission preliminarily believes that close harmonization with § 37.7 is appropriate.

The Commission seeks comment on the following:

66. Do you believe in general that Regulation SE should include a rule that prohibits an SBSEF from using for business or marketing purposes any proprietary data or personal information that it collects or receives from or on behalf of any person for the purpose of fulfilling its regulatory obligations? Why or why not?
67. In particular, do you agree with the specific language proposed by the Commission to adapt § 37.7 into proposed Rule 813? If not, how would you revise that language?
68. Are there any provisions of § 37.7 that are adapted into proposed Rule 813 that you believe would be inappropriate, or would not create any benefit, in a Commission rule

applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

D. Rule 814—Entity operating both a national securities exchange and SBSEF

Section 37.8 of the CFTC's rules applies to a board of trade that operates both a DCM and a SEF. Paragraph (a) of § 37.8 requires the board of trade to separately register the DCM and the SEF with the CFTC under the respective rules for each type of market. Paragraph (b) requires a board of trade that operates both types of market and that uses the same electronic trade execution system for executing and trading swaps on both markets to clearly identify to market participants whether an execution of a swap took place on the DCM or on the SEF.

Proposed Rule 814 is modelled on § 37.8. Paragraph (a) of proposed Rule 814 would provide that an entity intending to operate both a national securities exchange and an SBSEF shall separately register the two facilities pursuant to section 6 of the SEA and Rule 803 thereunder. Paragraph (b), although adapted generally from § 37.8(b), draws its specific language from section 3D(c) of the SEA.[93] Section 3D(c) contemplates that a single entity may operate both a national securities exchange and an SBSEF, and would provide that a national securities exchange shall, to the extent that the exchange also operates an SBSEF and uses the same electronic trade execution system for listing and executing trades of SBS on or through the exchange and the facility, identify whether electronic trading of SBS is taking place on or through the national securities exchange or the SBSEF. Proposed Rule 814(b) copies section 3D(c) of the SEA verbatim.

The Commission preliminarily believes that it is appropriate for proposed Regulation SE to include a rule that clarifies the registration status of an entity that operates both an exchange and an SBSEF, and that broadly parallels § 37.8.

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[93] 15 U.S.C. 78c-4(c).

The Commission seeks comment on the following:

69. Do you believe in general that Regulation SE should include a rule that clarifies the registration status of an entity that operates both an exchange and an SBSEF? Why or why not?

70. In particular, do you agree with the specific language proposed by the Commission in Rule 814? If not, how would you revise that language?

71. Do you believe that more detailed rules are necessary to address the extent to which an entity should keep separate its exchange and its SBSEF or, conversely, areas where overlapping functionality or personnel should expressly be allowed? If so, please discuss.

E. Rule 815—Methods of execution for Required and Permitted Transactions

A key goal of the Dodd-Frank Act is to bring trading of swaps and SBS onto regulated markets, as reflected in the statutory requirements for mandatory clearing and mandatory trade execution of certain swap and SBS products.[94] If the relevant agency makes a mandatory clearing determination regarding a product, the product becomes subject to mandatory trade execution if at least one DCM/exchange or SEF/SBSEF makes the product "available to trade." The legislative history of the Dodd-Frank Act indicates that exchange trading is a mechanism to "provide pre- and post-trade transparency for end users, market participants, and regulators."[95] Exchange trading also enhances market efficiency by allowing multiple market participants the

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[94] *See* 7 U.S.C. 2(h)(1)(A) (mandatory clearing for swaps) and 2(h)(8) (mandatory trade execution for swaps); 15 U.S.C. 78c-3(a)(1) (mandatory clearing for SBS) and 78c-3(h) (mandatory trade execution for SBS). The heads of the Group of Twenty countries ("G20") have also emphasized the importance of exchange-trading of OTC derivatives, noting in 2009 that "[a]ll standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest." *See* G20, *Leaders' Statement: The Pittsburgh Summit (*September 24-25, 2009*)* at p. 9.

[95] S. Rep. No. 111-176, at 34 (2010). *See also* Mark Jickling & Kathleen Ann Ruane, "The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives," Cong. Research Serv., R41398, at 7 (August 30, 2010) (explaining that the goal of the trade execution requirement is to promote pre-trade price transparency).

opportunity to compete for individual transactions on price, in contrast to the bilateral, dealer-driven market that prevailed before the Dodd-Frank Act.[96] The Dodd-Frank Act does not require, however, that all products be subject to mandatory clearing and/or mandatory trade execution, and does not impose any execution requirements for transactions in such products. Section 37.9 of the CFTC's rules addresses these issues using the concepts of "Required Transaction" and "Permitted Transaction." The Commission is proposing Rule 815 of Regulation SE to adapt § 37.9 for SBSEFs.

Section 37.9(a) defines a "Required Transaction" as any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the CEA, subject to certain exceptions. Section 37.9(c) defines a "Permitted Transaction" as the obverse of a Required Transaction: any transaction involving a swap that is *not* subject to the CEA's trade execution requirement. Section 37.9(c) provides that a SEF may offer any method of execution for a Permitted Transaction. In addition, § 37.9(a) provides that a Required Transaction that is not a block trade must generally be executed by a SEF using an order book[97] or a request-for-quote ("RFQ") system.[98]

Under § 37.9(a)(3), a SEF that offers an RFQ system in connection with a Required

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96 *See id.* at 34 (quoting Stanford University Professor Darrel Duffie: "The relative opaqueness of the OTC market implies that bid/ask spreads are in many cases not being set as competitively as they would be on exchanges. This entails a loss in market efficiency"). *See also id.* (quoting International Risk Analytics co-founder Christopher Whalen: "The absence of an exchange trading mandate provides 'supra normal returns paid to the dealers in the closed OTC derivatives market [and] are effectively a tax on other market participants, especially investors who trade on open, public exchanges").

97 Section 37.9(a)(2)(i)(A) defines "order book" by cross-referencing to § 37.3(a)(3) for a definition of "order book," which in turn relies on cross-references to other provisions of the CEA for the embedded terms "trading facility" and "electronic trading facility."

98 Section 37.9(a)(3) defines "request for quote system" as a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond. § 37.9(a)(3) further provides that, to meet the definition, the three market participants shall not be affiliates or controlled by the requester, and shall not be affiliates of or controlled by each other.

Transaction must, at the same time that the requester receives the first responsive bid or offer, communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the SEF's order books. In addition, the SEF must provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders. Finally, the SEF must ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

Section 37.9(b) establishes a time-delay requirement for a Required Transaction on an order book. Under the rule, a SEF must require that a broker or dealer who seeks to either execute against its customer's order or to execute two of its customers' orders against each other through the SEF's order book (following some form of pre-arrangement or pre-negotiation of such orders) be subject to at least a 15-second time delay between the entry of those two orders into the order book, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction, whether for the broker's or dealer's own account or for the second customer, is submitted for execution.[99]

Paragraphs (a) through (c) of proposed Rule 815 are modelled on paragraphs (a) through (c) of § 37.9. Proposed Rule 815(a)(1), based on § 37.9(a)(1), would define "Required Transaction" as "any transaction involving a security-based swap that is subject to the trade execution requirement in section 3C(h) of the Act." Proposed Rule 815(a)(2), based on § 37.9(a)(2), would specify execution methods for Required Transactions. Proposed Rule 815(a)(3), based on § 37.9(a)(3), would define an RFQ system as "a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument

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[99] Section 37.9(b) permits a SEF to adjust the time-delay requirement to something other than 15 seconds, based on a swap's liquidity or other product-specific considerations. However, any such adjustment must still be for a sufficient length so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against it.

to no less than three market participants in the trading system or platform, to which all such market participants may respond" and specify other requirements for an RFQ system to be recognized as such under the rule. The three market participants could not be affiliates of or controlled by the requester and shall not be affiliates of or controlled by each other. Also, an SBSEF that offers an RFQ system in connection with a Required Transaction would be required, at the same time that the requester receives the first responsive bid or offer, to communicate to the requester any firm bid or offer pertaining to the same SBS resting on any of the SBSEF's order books. In addition, the SBSEF would be required to provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders. Finally, the SBSEF would be required to ensure that its trading protocols provide each of its members with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

Paragraph (b) of proposed Rule 815 is modelled on § 37.9(b) and would provide for a time delay requirement for Required Transactions on an order book. Section 37.9(b) recognizes that there are situations where a broker or dealer might seek to trade against a customer order (a "facilitation cross") or cross two customer orders (a "customer cross") where the product being traded is subject to mandatory trade execution. Under § 37.9(b), the broker or dealer must expose customer orders on the SEF order book for a required minimum period so that other market participants have the opportunity to offer a better price than the broker or dealer had intended for the cross. Proposed Rule 815(b) closely follows the order-handling requirements of § 37.9(b) for facilitation and customer crosses that are Required Transactions.

The Commission preliminarily believes that the CFTC's rules relating to Required Transactions are reasonably designed to promote price competition in products that are subject to the trade execution requirement. The Commission recognizes that, when considering rules for SBS that are subject to mandatory clearing and mandatory trade execution, additional or different criteria could plausibly achieve the goal of promoting price competition. It is debatable, for

example, whether slightly different standards—such as RFQ-to-4 or RFQ-to-2 in lieu of RFQ-to-3, or a 30-second book-exposure requirement instead of 15 seconds—might promote these ends more effectively. However, the Commission's determination to propose rules that are closely modelled on those in § 37.9 reflects the baseline established by the CFTC rules. Most if not all SBSEFs will be dually registered with the CFTC as SEFs, and most if not all market participants in the SBS market will likely be participants in the swap market. The Commission appreciates that different or additive requirements—particularly for the key concept of a "Required Transaction"—could introduce complexity and confusion if one set of trading protocols applied to Required Transactions for SBS but different protocols—ones that have been understood and utilized for many years—applied to Required Transactions for swap transactions.

Under both the CEA and SEA, Core Principle 2 requires a SEF/SBSEF to specify trading procedures to be used in entering and executing orders on the facility, including block trades.[100] The CFTC implements this provision by excepting block trades from the required execution methods in § 37.9(a)(2). That rule cross-references § 43.2, which defines the term "block trade" for purposes of public dissemination of swap transactions.

The Commission preliminarily believes that it should adopt an approach to block trades in Regulation SE that closely aligns with the approach taken by the CFTC. The purpose of having a block exception to the required methods of execution is to balance the promotion of price competition and all-to-all trading against the potential costs to market participants who wish to trade large orders. Forcing a market participant who seeks liquidity to expose a large order to a SEF/SBSEF order book or to utilize RFQ-to-3 could cause the market to move against the liquidity requester before it can obtain an execution. Under the CFTC's rules, a block trade in a product that is subject to mandatory trade execution may be traded on-SEF using flexible means of execution on the SEF's non-order-book trading system or platform, or away from a

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[100] 15 U.S.C. 78c-4(d)(2)(C); 7 U.S.C. 7b-3(f)(2)(C).

SEF's trading system or platform, provided that it is executed pursuant to the SEF's rules and procedures.

Proposed Rule 815(a)(2) would exclude block trades from the required execution methods using language closely modelled on § 37.9(a)(2). The Commission also preliminary believes that it should align the definition of "block trade" in proposed Regulation SE as closely as possible to the CFTC's definition. Therefore, the proposed definition—located in proposed Rule 802 of Regulation SE—is based on the four-pronged definition found in § 43.2(a), but with one modification. The third prong of the CFTC definition characterizes a block trade in a particular swap as having "a notional or principal amount at or above the appropriate minimum block size applicable to such swap." Appendix F to the CFTC's part 43 divides swap asset classes into a number of categories, and sets forth a minimum block size threshold to each category. SBS are not within the CFTC's jurisdiction, so the CFTC has never considered what an appropriate minimum block size threshold would be for any SBS asset class. In this respect, there is no threshold for the SEC to harmonize with, so the Commission is proposing to establish a threshold tailored specifically for the SBS market.

For the third prong of the "block trade" definition, the Commission is proposing that the SBS is based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of $5 million or greater. The Commission previously employed a $5 million block threshold for credit SBS as a condition to one prong of its no-action statement regarding Regulation SBSR.[101] In imposing

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[101] *See* SEA Release No. 87780 (December 18, 2019), 85 FR 6270, 6347 (February 4, 2020) ("ANE Adopting Release and No-Action Statement") (stating, in relevant part, that there would not be a basis for a Commission enforcement action if "a registered SDR does not disseminate an SBS transaction in a manner consistent with Rule 902 [of Regulation SBSR] but instead disseminates (or does not disseminate), the SBS transaction in a manner consistent with part 43 of the CFTC's swap reporting rules in force at the time of the transaction, provided that for an SBS based on a single credit instrument or a narrow-based index of credit instruments having a notional size of $5 million or greater, the registered SDR that receives the report of the SBS transaction does not utilize any

that condition, the Commission noted that the Financial Industry Regulatory Authority ("FINRA") applies a $5 million cap when disseminating transaction reports of economically similar cash debt securities.[102]

The proposed definition of "block trade" in Rule 802 does not include any equity SBS. In this regard, the Commission's approach follows the CFTC's; appendix F to the CFTC's part 43 does not include a block threshold for any type of equity swap. Accordingly, no equity swap may qualify for the exception to required means of execution for block trades provided in § 37.9(a)(2), and no equity SBS could qualify for the exception to required means of execution for block trades in proposed Rule 815(a)(2).

Paragraphs (d) and (e) of § 37.9 provide additional exceptions that allow for flexible methods of execution for what would otherwise be Required Transactions. The Commission would include similar exceptions in proposed Rules 815(d) and (e).

Paragraph (d) of § 37.9 allows for flexible methods of execution for package transactions that meet certain enumerated criteria. § 37.9(d)(1) defines "package transaction" as two or more component transactions executed between two or more counterparties where at least one component is a Required Transaction, execution of each component is contingent upon the execution of all other components, and the component transactions are priced or quoted together as one economic transaction with simultaneous (or near-simultaneous) execution of all components. Section 37.9(d)(2) provides that a Required Transaction that is executed as a component of a package transaction that includes a component swap that is subject exclusively to the CFTC's jurisdiction, but is not subject to mandatory clearing, may be executed on a SEF using any method of execution as if it were a Permitted Transaction. Section 37.9(d)(3) provides

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capping or bucketing convention under part 43 of the CFTC's swap reporting rules but instead disseminates a capped size of $5 million (*e.g.*, '$5MM+' or similar) in lieu of the true notional size").

[102] *See id.* at n. 768 (citing FINRA Regulatory Notice 12-39, available at *https://www.finra.org/rules-guidance/notices/12-39*).

that a Required Transaction that is executed as a component of a package transaction that includes a component that is not a swap may be executed on a SEF using any method of execution as if it were a Permitted Transaction. Section 37.9(d)(3) further states that this general exception, which allows flexible means of execution for certain package transactions, shall not apply to a Required Transaction that is executed as a component of a package transaction in which all other non-swap components are U.S. Treasury securities; a Required Transaction that is executed as a component of a package transaction in which all other non-swap components are contracts for the purchase or sale of a commodity for future delivery; a Required Transaction that is executed as a component of a package transaction in which all other non-swap components are agency mortgage-backed securities; or a Required Transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market.

Proposed Rule 815(d) is closely modelled on § 37.9(d) and is designed to balance the goal of promoting transparency in the SBS market through required methods of execution against the market efficiency of allowing multiple instruments to trade as a package using flexible methods of execution.[103] A rule that was too lenient could subvert the goal of promoting transparency and competition through all-to-all trading, while a rule that was too strict could cause market participants to break the package into its individual components, thereby increasing transaction costs and reducing the economic purpose and efficiency of the package transaction. The Commission preliminarily believes that the CFTC has struck an appropriate balance between these competing policy goals in § 37.9(d), and is therefore proposing to align its own rule closely with the CFTC's. The Commission recognizes, however, that the kinds of packages described in

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[103] To the extent that counterparties may be facilitating a package transaction that involves a "swap," as defined in section 1(a)(47) of the CEA, 7 U.S.C. 1a(47), or any contract for the purchase or sale of a commodity for future delivery (or option on such a contract), or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable law and regulations.

§ 37.9(d)(3) might be used only in the swap market and might not be utilized in the SBS market. The Commission seeks comment on that matter below.

Section 37.9(e) sets out procedures for resolution of operational and clerical error trades, which could be for swaps that otherwise would be subject to required means of execution. Section 37.9(e)(1) defines the terms "correcting trade," "error trade," and "offsetting trade" that are used in the rule. Section 37.9(e)(2) requires a SEF to maintain rules and procedures that facilitate the resolution of error trades and sets forth certain requirements designed to promote resolution in a fair, transparent, and consistent manner. As their names suggest, these types of trades are necessary to reverse errors. They are not conducted for the purpose of competitive price discovery and thus the pre-trade transparency goals for SEF/SBSEF trading are not implicated.

Proposed Rule 815(e) is modelled on § 37.9(e), although definitions of the terms "correcting trade," "error trade," and "offsetting trade" would be included in proposed Rule 802 rather than in proposed Rule 815(e).[104] A fair and orderly market needs rules to address error trades when they occur, and such rules should be fair, transparent, and consistent. The market might need to make correcting trades or offsetting trades to reverse the effect of the original error trade. The CFTC's rules for addressing error trades are well articulated and well understood by the market, so the Commission preliminarily believes that they serve as an appropriate model for the Commission's rules. Furthermore, because most if not all SBSEFs also will be registered with the CFTC as SEFs, close harmonization in this regard would allow dually registered entities to employ the same procedures for addressing error trades, whether they arise in the context of

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[104] *See* proposed Rule 802 (defining "correcting trade" as a trade executed and submitted for clearing to a registered clearing agency with the same terms and conditions as an error trade other than any corrections to any operational or clerical error and the time of execution; defining "error trade" as any trade executed on or subject to the rules of an SBSEF that contains an operational or clerical error; and defining "offsetting trade" as a trade executed and submitted for clearing to a registered clearing agency with terms and conditions that economically reverse an error trade that was accepted for clearing). These proposed definitions are modelled on the definitions of the same terms in § 37.9(e)(1).

swap trading or SBS trading.

Section 37.9(f) addresses counterparty anonymity and is widely referred to as the prohibition on "post-trade name give-up." Section 37.9(f) generally prohibits any person, directly or indirectly (including through a third-party service provider), from disclosing the identity of a counterparty to a swap that is executed anonymously on a SEF and intended to be cleared, and requires the SEF to establish and maintain rules to that effect. Section 37.9(f) provides that "executed anonymously" as used in the rule includes a swap that is pre-arranged or pre-negotiated anonymously, including by a SEF participant. Finally, § 37.9(f) provides that, where a package transaction includes a component swap that is not intended to be cleared, disclosing the identity of a counterparty would not violate § 37.9.

Proposed Rule 815(f) is modelled on § 37.9(f). The Commission preliminarily agrees with the CFTC that prohibiting post-trade name give-up is reasonably necessary to facilitate and promote trading on SEFs.[105] The practice of requiring disclosure of one counterparty's name to the other counterparty (*i.e.*, "name give-up") increases the risk of information leakage and can deter participation by liquidity seekers on SEFs and SBSEFs. The Commission preliminarily believes, like the CFTC, that prohibiting post-trade name give-up will promote pre-trade price transparency by encouraging a greater number, and a more diverse set, of market participants to anonymously post bids and offers on regulated markets. Therefore, the Commission preliminarily that it should incorporate the same prohibition into Regulation SE.

The Commission seeks comment on the following:

72. Do you believe in general that the CFTC's concepts of "Required Transactions" and "Permitted Transactions" should be incorporated into proposed Regulation SE? Why or why not?

73. In particular, do you believe that the execution methods set forth in § 37.9 for

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[105] CFTC, *Post Trade Name Give-Up on Swap Execution Facilities*, 85 FR 44693, 44695 (July 24, 2020).

Required Transactions are appropriate for SBSEFs and the SBS market? Why or why not? Do you observe differences between swap and SBS products that warrant different or additional criteria for Required Transactions on SBSEFs? If so, please describe those differences, and suggest and justify any different execution methods for Required Transactions in SBS that you believe appropriate.

74. Do you believe that proposed Rule 815 should harmonize with the CFTC rule for handling facilitation and customer crosses in products subject to the trade execution requirement? Why or why not? If not, please suggest and justify any different order-handling requirements that you believe appropriate.
75. Do you agree in general with excepting block trades from the required methods of execution? Why or why not?
76. Do you agree in general with the Commission's proposed approach of adapting the CFTC definition of "block trade" from § 43.2 for SBSEFs? Why or why not?
77. Do you agree in particular with the $5 million prong of the SEC's proposed definition of "block trade"? Why or why not? Do you believe that a threshold other than $5 million would be appropriate? If so, what numerical threshold and why? Do you believe that there should be different thresholds for different asset classes (or sub-asset classes)? If so, please discuss.
78. Do you believe in general that the Commission, like the CFTC in § 37.9(d), should allow for flexible means of execution for an SBS subject to the trade execution requirement when it is part of a package trade? Why or why not?
79. If so, do you believe that the exceptions to required methods of execution for package transactions set forth in proposed Rule 815(d) are appropriate? Why or why not? Are there aspects of the CFTC's criteria that are not relevant for the SBS market and should be omitted? If so, which provision(s) and why? Are there different types of packages that involve SBS that are not prevalent in the swap market that should be

incorporated into the SEC's exceptions? If so, please describe these packages and suggest an appropriate way to characterize them in Rule 815(d).

80. Do you agree with how the Commission is proposing to harmonize with the § 37.9(d)(3)'s "exceptions to the exception" for package trades in proposed Rule 815(d)(3)? Why or why not? Are the kinds of packages described in § 37.9(d)(3) unique to the swap market? If there are other types of package transactions involving SBS that you believe should be subject to required means of execution despite allowing other types of packages to use flexible means of execution, please describe these types of packages and explain why you believe they should nevertheless be subject to required means of execution.

81. Do you believe in general that the Commission, like the CFTC in § 37.9(e), should allow for flexible means of execution for products that otherwise would be subject to the trade execution requirement when an SBSEF is performing a correcting, error, or offsetting trade? Why or why not?

82. If so, do you believe that the SEC's proposed definitions for these terms, which are closely modelled on the CFTC's definitions, are appropriate? Why or why not? If not, what alternative definition(s) would you suggest, and why?

83. Do you agree in general that the SEC rules for SBSEFs, like the CFTC rules for SEFs, should prohibit post-trade name give-up? Why or why not? If so, do you agree with the manner in which the Commission is proposing to implement it (*i.e.*, close harmonization with § 37.9(f))? Why or why not?

F. Rule 816—Trade execution requirement and exemptions therefrom

Section 3C of the SEA[106] sets out a procedure whereby an SBS becomes subject to mandatory clearing. Section 3C(h) of the SEA provides that, if a transaction involving an SBS is

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[106] 15 U.S.C. 78c-3.

subject to the mandatory clearing requirement, the counterparties shall execute the transaction on an exchange, on an SBSEF registered under section 3D of the SEA, or on an SBSEF that is exempt from registration under section 3D(e) of the SEA, unless no exchange or SBSEF makes the SBS available to trade or if the SBS transaction is subject to an exception from the clearing requirement under section 3C(g) of the SEA. This obligation under section 3C(h) is commonly referred to as the "trade execution requirement." Proposed Rule 816 of Regulation SE would establish procedures for an SBSEF to make an SBS available to trade (assuming it is also subject to the clearing requirement), thereby activating the trade execution requirement with respect to that SBS. Proposed Rule 816 also would include three proposed exemptions from the trade execution requirement.

1. Process for an SBSEF to make an SBS product available to trade

Paragraphs (a) through (d) of proposed Rule 816 are modelled on § 37.10 of the CFTC's rules and would establish a process whereby an SBS product is "made available to trade" ("MAT") by an SBSEF. An SBSEF may list an SBS that is subject to mandatory clearing, but listing the product does not by itself subject the product to the trade execution requirement in section 3C(h) of the SEA. Only if a product that is subject to mandatory clearing is listed *and* MAT would the SBS then become subject to the trade execution requirement. A MAT determination would have to be made and filed by an SBSEF pursuant to proposed Rule 816 to trigger the trade execution requirement, similar to the MAT process of § 37.10.

Paragraph (a)(1) of proposed Rule 816, like § 37.10(a)(1), would provide that an SBSEF that makes an SBS available to trade in accordance with paragraph (b) of this section, must submit to the Commission its determination with respect to such SBS as a rule, pursuant to the procedures under proposed Rule 806 or 807. Paragraph (a)(2), modelled on § 37.10(a)(2), would provide that an SBSEF that makes an SBS available to trade must demonstrate that it lists or offers that SBS for trading on its trading system or platform.

Paragraph (b) of proposed Rule 816 would set out the factors that an SBSEF must

consider when making a MAT determination for an SBS product. Proposed Rule 816(b) would incorporate the same six factors enumerated in § 37.10(b): (1) Whether there are ready and willing buyers and sellers; (2) The frequency or size of transactions; (3) The trading volume; (4) The number and types of market participants; (5) The bid/ask spread; and (6) The usual number of resting firm or indicative bids and offers.

Paragraph (c) of proposed Rule 816, modelled on § 37.10(c), would provide that, upon a determination that an SBS is MAT on an SBSEF or SBS exchange,[107] all other SBSEFs and SBS exchanges shall comply with the requirements of section 3C(h) of the SEA in listing or offering such SBS for trading. Paragraph (d) of proposed Rule 816, like § 37.10(d), would provide that the Commission may issue a determination that an SBS is no longer MAT upon determining that no SBSEF or SBS exchange lists such SBS for trading.

The Commission preliminarily believes that it is appropriate for Regulation SE to establish a mechanism whereby an SBSEF can MAT an SBS product, and that this mechanism should align with the CFTC's as closely as possible. The CFTC's procedures are well articulated and well understood by SEFs, so the Commission preliminarily believes that closely harmonizing with these procedures would yield comparable regulatory benefits while minimizing burdens on SBSEFs. In particular, the Commission preliminarily believes that the criteria for MAT consideration are equally applicable to the SEF and SBSEF markets, and thus the Commission is not proposing any different or additional criteria that would have to be considered by an SBSEF when it wishes to MAT an SBS product.

The Commission seeks comment on the following:

84. Do you believe in general that Regulation SE should establish a process whereby an SBSEF can MAT an SBS product that harmonizes closely with § 37.10? Why or why

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[107] An SBS exchange, like all national securities exchanges, must submit any rule change—including a rule change to list a new derivative securities product and/or to MAT an SBS product—pursuant to SEA Rule 19b-4, 17 CFR 240.19b-4. The Commission is not proposing to establish a new procedure for SBS exchanges to list or MAT SBS products.

not?

85. In particular, do you object to any of the specific language choices made to adapt § 37.10 into proposed Rules 816(a) to (d)? If so, what alternative language would you suggest?

86. Are there any provisions of § 37.10 that are adapted into proposed Rules 816(a) to (d) that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

2. Exemptions from trade execution requirement

Paragraph (e) of proposed Rule 816 has no analog in § 37.10, but instead is adapted from § 36.1, which sets out certain exemptions from the trade execution requirement. The exemptions incorporated into § 36.1 result from the CFTC's many years of experience in administering the CEA's trade execution requirement. The Commission preliminarily believes that it should borrow from the CFTC's experience and incorporate the same exemptions into Regulation SE.

Paragraph (e)(1) of proposed Rule 816, modelled on § 36.1(a), would provide that an SBS transaction that is executed as a component of a package transaction that also includes a component transaction that is the issuance of a bond in a primary market is exempt from the trade execution requirement in section 3C(h) of the SEA. In addition, paragraph (e)(1), like § 36.1(a), would provide that, for purposes of paragraph (e), a package transaction would consist of two or more component transactions executed between two or more counterparties where at least one component transaction is subject to the trade execution requirement in section 3C(h) of the SEA; execution of each component transaction is contingent upon the execution of all other component transactions; and the component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

For the same reasons identified by the CFTC,[108] the Commission, pursuant to section 36(a)(1) of the SEA,[109] preliminarily believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt SBS from the trade execution requirement in section 3C(h) of the SEA if the criteria in proposed Rule 816(e)(1) are met.

Section 36.1(b) provides that section 2(h)(8) of the CEA does not apply to a swap transaction that qualifies for the exception under section 2(h)(7) of the CEA or an exception or exemption under part 50 of the CFTC's rules, and for which the associated requirements are met.[110] The Commission is proposing to adapt § 36.1(b) as paragraph (e)(2) of proposed Rule 816, to provide that section 3C(h) of the SEA does not apply to an SBS transaction that qualifies for an exception[111] under section 3C(g) of the SEA, or any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met.[112] Unlike the CFTC, the Commission does not have a specific rule to cite to regarding exemptions from the clearing requirement, so proposed Rule 816(e)(2) would refer only generally to such exemptions.

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108 *See* CFTC, *Swap Execution Facility Requirements*, 85 FR 82313, 82320 (December 18, 2020).

109 15 U.S.C. 78mm(a)(1).

110 By its terms, section 2(h)(8) of the CEA provides that the trade execution requirement does not apply to swaps that are excepted from the clearing requirement pursuant to section 2(h)(7) of the CEA. However, when adopting § 36.1(b), the CFTC noted that it also has adopted exemptions from the clearing requirement pursuant to other statutory authority (*i.e.*, its exemptive authority under CEA section 4(c)). *See* CFTC, *Exemptions From Swap Trade Execution Requirement*, 86 FR 8993, 8995 (February 11, 2021) ("CFTC Swap Trade Execution Exemptions Release") (discussing exemptions relating to cooperatives and inter-affiliate swaps).

111 The Commission notes that section 3C(g) of the SEA is entitled "*Exceptions*," not "*Exemptions*."

112 As with section 2(h)(8) of the CEA, section 3C(h) of the SEA provides that the trade execution requirement does not apply to SBS that are excepted from the clearing requirement pursuant to section 3C(g) of the SEA. However, the Commission could, like the CFTC, grant exemptions from the clearing requirement pursuant to other statutory authority, such as section 36 of the SEA.

When adopting § 36.1(b), the CFTC found that exempting swaps that qualified for an exemption from or exception to the clearing requirement was consistent with its authority under section 4(c) of the CEA.[113] The CFTC also noted Congress's intent to link the clearing requirement with the trade execution requirement, so that a swap that was exempted or excepted from the former also should be exempted from the latter.[114] For the same reasons identified by the CFTC, the Commission, pursuant to section 36(a)(1) of the SEA, preliminarily believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt an SBS from the trade execution requirement in section 3C(h) of the SEA if the SBS qualifies for an exception under section 3C(g) of the SEA, or benefits from any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met.

Section 36.1(c) provides that section 2(h)(8) of the CEA does not apply to a swap transaction that is executed between counterparties that have eligible affiliate counterparty status pursuant to paragraph (a) of § 50.52 of the CFTC's rules, which provides an exception from the clearing requirement for inter-affiliate swaps, subject to conditions. Counterparties to a swap that have eligible affiliate counterparty status may rely on the § 36.1(c) even if they clear the swap transaction. The Commission is proposing to adapt § 36.1(c) as paragraph (e)(3) of proposed Rule 816 to provide that section 3C(h) of the SEA does not apply to an SBS transaction that is executed between counterparties that qualify as "eligible affiliate counterparties." Since the Commission does not have an equivalent to § 50.52 to reference, the Commission is proposing instead to define the term "eligible affiliate counterparties" directly in proposed Rule 816(e)(3).

Counterparties would be "eligible affiliate counterparties" for purposes of proposed Rule 816(e)(3) if: (i) one counterparty, directly or indirectly, holds a majority ownership interest in

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113 *See* CFTC, Swap Trade Execution Exemptions Release, 86 FR at 8996.

114 *See id.*

the other counterparty, and the counterparty that holds the majority interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned counterparty; or (ii) a third party, directly or indirectly, holds a majority ownership interest in both counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the counterparties. In addition, for purposes of proposed Rule 816(e)(3), a counterparty or third party directly or indirectly would hold a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership. These definitions closely are modelled on the equivalent definitions used in § 50.52, which are incorporated into § 36.1(c).

When adopting § 36.1(c), the CFTC noted that it was codifying previously issued no-action relief.[115] The CFTC also stated that these transactions are not intended to be arm's-length, market-facing, or competitively executed under any circumstance, irrespective of the type of swap involved. Therefore, these transactions would not contribute to the price discovery process if executed on a SEF or DCM.[116] The CFTC recognized the efficiency benefits associated with entering into inter-affiliate swaps via internal processes and acknowledged that applying the trade execution requirement to such transactions could inhibit affiliated counterparties from efficiently executing these types of transactions for risk management, operational, and accounting purposes.[117] The CFTC concluded, therefore, that—as with the exemptions set forth in § 36.1(a) and (b)—granting an exemption from the trade execution requirement for swap

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115 *See id.* at 8997.

116 *See id.*

117 *See id.*

transactions that are executed between counterparties that have eligible affiliate counterparty status was consistent with its exemptive authority under the CEA, regardless of whether the swap is submitted to clearing.[118] For the same reasons identified by the CFTC, the Commission, pursuant to section 36(a)(1) of the SEA, preliminarily believes that it is appropriate to exempt from the trade execution requirement an SBS that is executed between counterparties that qualify as eligible affiliate counterparties, even if the counterparties clear the SBS transaction. The Commission also preliminarily believes that it is appropriate in the public interest to adapt into proposed Rule 816 the definition of "eligible affiliate counterparties" used in the CFTC's rules because this term is generally well understood by market participants. Furthermore, the Commission preliminarily believes that market participants should be permitted to apply the same standard for determining whether an inter-affiliate swap or SBS will be exempt from the trade execution requirement.

The Commission seeks comment on the following:

87. Do you believe in general that Regulation SE should incorporate similar exemptions from the trade execution requirement that the CFTC provides in § 36.1? Why or why not?
88. In particular, do you object to any of the specific language choices made to adapt § 36.1 into proposed Rule 816(e)? If so, what alternative language would you suggest?
89. Do you believe that the exemption in proposed Rule 816(e)(1) is even necessary? In other words, do market participants engage in package transactions involving SBS and new issuance bonds of the type described in § 36.1(a), or do these types of packages involve only IRS and thus would not be applicable to the SBS market?
90. Are there any other provisions of § 36.1 that are adapted into proposed Rule 816(e)

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[118] *See id.* at 8998.

that you believe would be inappropriate, or would not create any benefit, in a Commission rule applying to SBSEFs? If so, please identify any such provision, explain why it would be inappropriate or unnecessary for SBSEFs, and what economic benefit that you believe would result from omitting it from the Commission's final rule.

91. Are there any types of SBS that you believe *should* be exempt from the trade execution requirement that have no analog in the swap market and thus are not reflected in the CFTC's list of exemptions to the CEA trade execution requirement in § 36.1? If so, please describe and justify any potential exemptions that you believe should be added to proposed Rule 816(e).

G. Rule 817—Trade execution compliance schedule

Proposed Rule 817 is modelled on § 37.12 of the CFTC's rules, which is designed to inform market participants of the precise date on which the trade execution requirement for a particular product commences. Section 37.12(a) provides that a swap becomes subject to the trade execution requirement upon the later of the applicable deadline established under the compliance schedule provided under § 50.25(b) or 30 days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 or deemed certified under § 40.6.

The Commission does not have a close equivalent to § 50.25(b). However, Rule 3Ca-1 under the SEA[119] provides that the Commission may determine, following a submission from a clearing agency, that an SBS (or a group, category, type, or class of SBS) must be cleared. This determination could follow a stay of the clearing requirement for additional review. Accordingly, paragraph (a) of proposed Rule 817 would provide that an SBS transaction shall be subject to the requirements of section 3C(h) of the SEA upon the later of (1) a determination by

[119] 17 CFR 240.3Ca-1.

the Commission that the SBS is required to be cleared as set forth in section 3C(a) or any later compliance date that the Commission may establish as a term or condition of such determination or following a stay and review of such determination pursuant to section 3C(c) of the SEA and Rule 3Ca-1 thereunder; and (2) 30 days after the available-to-trade determination submission or certification for that SBS is, respectively, deemed approved under Rule 806 or deemed certified under Rule 807.

Paragraph (b) of proposed Rule 817, modelled on § 37.12(b), would provide that a counterparty may voluntarily comply with the trade execution requirement sooner than required by paragraph (a).

The Commission seeks comment on the following:

92. Do you believe in general that Regulation SE should include a trade execution compliance schedule similar to that in § 37.12? Why or why not?

93. In particular, do you agree with the language that the Commission is proposing to adapt from § 37.12 into Rule 817? If not, what alternative language would you suggest, and why?

VIII. Implementation of Core Principles

Section 3D(d) of the SEA[120] sets forth 14 Core Principles with which SBSEFs must comply. These provisions, with one exception, correspond to the 15 Core Principles for SEFs set forth in section 5h(f) of the CEA.[121]

Core Principle Title	CEA #	SEA #
Compliance with Core Principles	1	1
Compliance with Rules	2	2
(Security-Based) Swaps Not Readily Susceptible to Manipulation	3	3
Monitoring of Trading and Trade Processing	4	4
Ability to Obtain Information	5	5
Position Limits or Accountability	6	n/a

[120] 15 U.S.C. 78c-4(d).

[121] *Compare* 7 U.S.C. 7b-3(f) (enumerating 15 Core Principles for SEFs) *with* 15 U.S.C. 78c-4(d) (enumerating 14 Core Principles for SBSEFs). CEA Core Principle 6 for SEFs (Position Limits or Accountability) has no analog in the SEA, so the numbering of the subsequent Core Principles between the two statutes differs by one.

Financial Integrity of Transactions	7	6
Emergency Authority	8	7
Timely Publication of Trading Information	9	8
Recordkeeping and Reporting	10	9
Antitrust Considerations	11	10
Conflicts of Interest	12	11
Financial Resources	13	12
System Safeguards	14	13
Designation of Chief Compliance Officer	15	14

The Commission preliminarily believes generally that it would be appropriate to closely harmonize with the CFTC rules that implement the SEF Core Principles, although there are some instances where close harmonization is not practicable. Where there are substantive differences between an existing CFTC rule and an SEC-proposed rule, the Commission will note and discuss the proposed difference and seek comment. The Commission also will note when there is not, or at least not intended to be, a difference between the SEC rule and the analogous CFTC rule.

Part 37 of the CFTC's rules includes an appendix B, setting forth "Guidance on, and Acceptable Practices in, Compliance with Core Principles." The introduction to appendix B provides that the guidance for the Core Principle is illustrative only and "is not intended to be used as a mandatory checklist." Where the CFTC includes guidance and/or accepted practices pertaining to a Core Principle for SEFs, the Commission will explain how (if at all) the Commission proposes to incorporate the substance of these statements into Regulation SE.

A. Rule 818—Core Principle 1—Compliance with Core Principles

Core Principle 1[122] requires an SBSEF, to be registered and maintain registration as an SBSEF, to comply with the Core Principles and any requirement that the Commission may impose by rule or regulation. Core Principle 1 also provides that an SBSEF shall have reasonable discretion in establishing the manner in which it complies with the Core Principles. CEA Core Principle 1[123] is substantively identical.

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[122] Section 3D(d)(1) of the SEA, 15 U.S.C. 78c-4(d)(1).

[123] 7 U.S.C. 7b-3(f)(1).

The CFTC implemented Core Principle 1 for SEFs in subpart B of part 37. Section 37.100 repeats the statutory text of SEF Core Principle 1. There are no other rules in subpart B. Proposed Rule 818 also would repeat the statutory text of the Core Principle.

The Commission seeks comment on the following:

94. Do you agree with how the Commission is proposing to implement SEA Core Principle 1? Why or why not?

B. Rule 819—Core Principle 2—Compliance with rules

Core Principle 2[124] requires an SBSEF to establish and enforce compliance with any rule that is established by the SBSEF, including the terms and conditions of the SBS that it trades or processes, and any limitation on access to the SBSEF. It further requires the SBSEF to establish and enforce trading, trade processing, and participation rules that will deter abuses, and to have the capacity to detect, investigate, and enforce those rules, including the means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred. Finally, Core Principle 2 requires an SBSEF to establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades. Core Principle 2 for SEFs[125] is substantively identical, except that it includes an additional paragraph requiring a SEF to provide in its rules that, when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement, the swap dealer or major swap participant shall be responsible for compliance with the trade execution requirement.[126]

1. Rules modelled on subpart C of part 37

The CFTC implemented Core Principle 2 for SEFs in subpart C of part 37. Section

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124 Section 3D(d)(2) of the SEA, 15 U.S.C. 78c-4(d)(2).

125 7 U.S.C. 7b-3(f)(2).

126 *See* 7 U.S.C. 7b-3(f)(2)(D).

37.200 of subpart C repeats the statutory text of CEA Core Principle 2, including the paragraph not present in SEA Core Principle 2 pertaining to swaps subject to the mandatory clearing requirement. Section 37.201 requires a SEF to establish rules governing the operation of the facility, including, but not limited to, rules specifying trading procedures to be followed by members and market participants when entering and executing orders traded or posted on the SEF. Section 37.201 also requires a SEF to establish and impartially enforce compliance with the SEF's rules, including, but not limited to the terms and conditions of any swaps traded or processed on or through the SEF, access to the SEF, trade practice rules, audit trail requirements, disciplinary rules, and mandatory trading requirements.

Section 37.202 imposes access requirements on SEFs. Section 37.202(a) requires a SEF to provide any eligible contract participant ("ECP") and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays. Furthermore, the SEF must have criteria governing access that are impartial, transparent, and applied in a fair and nondiscriminatory manner; procedures whereby ECPs provide the SEF with written or electronic confirmation of their status as ECPs before obtaining access; and comparable fee structures for ECPs and independent software vendors receiving comparable access to, or services from, the SEF. Section 37.202(b) requires a SEF, before granting any ECP access to its facilities, to require that the ECP consent to its jurisdiction. Section 37.202(c) requires the SEF to establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar access to the SEF, including when such decisions are made as part of a disciplinary or emergency action taken by the SEF.

Section 37.203 requires a SEF to establish and enforce trading, trade processing, and participation rules that will deter abuses and to have the capacity to detect, investigate, and enforce those rules. Section 37.203 includes lengthy and detailed provisions relating to that goal. Section 37.203(a) requires a SEF to prohibit, among other things, front-running, wash trading, pre-arranged trading (except for block trades), fraudulent trading, money passes, and any other

trading practices that the SEF deems to be abusive. Section 37.203(b) requires the SEF to have arrangements and resources to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the SEF's members. Section 37.203(c) requires the SEF to have sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. Section 37.203(d) requires the SEF to maintain an automated trade surveillance system capable of detecting potential trade practice violations, and imposes certain performance requirements on that system. Section 37.203(e) requires the SEF to conduct real-time market monitoring of all trading activity to identify any market or system anomalies, and to have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by system malfunctions. Section 37.203(f) requires the SEF to establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations and imposes various requirements relating to those investigations.

Section 37.204 allows a SEF to contract with a regulatory services provider to assist in complying with the supervisory functions noted above. Section 37.204 also imposes requirements on the SEF's relationship with the regulatory services provider and provides that the SEF must retain exclusive authority in all substantive decisions made by its regulatory service provider, including decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and denials of access.

Section 37.205 requires a SEF to capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the swap execution facility. Section 37.205 includes lengthy and detailed provisions relating to the elements of an acceptable audit trail program, requirements for the transaction history database, electronic analysis capability, and safe storage capability. Furthermore, § 37.205 requires a SEF to enforce its audit

trail and recordkeeping requirements through at least annual reviews of all members to verify their compliance, and to establish a program for effective enforcement of its audit trail and recordkeeping requirements. An effective program must identify members subject to the SEF's recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and impose meaningful sanctions when deficiencies are found.

Section 37.206 requires a SEF to establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including suspension or expulsion of members or market participants that violate the SEF's rules. Accordingly, § 37.206 requires the SEF to establish disciplinary panels and procedures for disciplinary hearings that meet certain enumerated requirements, and provides that disciplinary sanctions imposed by the SEF shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other market participants.

Appendix B to part 37 includes detailed guidance to facilitate compliance with the rules that implement CEA Core Principle 2. The guidance addresses, for example, the use of warning letters by SEF compliance staff, potential conflicts of interest of the SEF's enforcement staff, the serving of notices of charges, a respondent's right to representation, providing sufficient time to answer a charge, consequences of a respondent admitting to or failing to deny a charge, right to a hearing, settlement offers, right of appeal and appeal procedures, final decisions, summary fines for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions, and emergency disciplinary actions.

Proposed Rule 819 would implement Core Principle 2 and is adapted from subpart C of part 37. Paragraph (a) of proposed Rule 819, like § 37.200, would repeat the statutory text of Core Principle 2. Paragraph (b) is closely modelled on § 37.201 and would require an SBSEF to specify trading procedures (including for block trades, if offered) and to establish and impartially enforce compliance with the rules of the SBSEF.

Paragraph (c) of proposed Rule 819 is closely modelled on § 37.202 and would require an SBSEF to provide any ECP and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays. An SBSEF also would be required, among other things, to establish comparable fee structures for ECPs and independent software vendors receiving comparable access to, or services from the SBSEF, and to establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar an ECP's access to the SBSEF, including when a decision is made as part of a disciplinary or emergency action taken by the SBSEF.

Paragraph (d) of proposed Rule 819 is closely modelled on § 37.203. Paragraph (d)(1) of proposed Rule 819 would require an SBSEF to prohibit abusive trading practices generally, enumerating certain practices in particular.[127] Paragraph (d)(2) would require an SBSEF to have arrangements and resources for effective enforcement of its rules, including the authority to collect information and documents on both a routine and non-routine basis and to supervise its market to determine whether a rule violation has occurred. Paragraph (d)(3) would require an SBSEF to establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. Paragraph (d)(4) would require an SBSEF to maintain an automated trade surveillance system that meets certain criteria. Paragraph (d)(5) would require real-time market monitoring of all trading activity on the SBSEF. The SBSEF also would be required to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members. Paragraph (d)(6) is modelled on § 37.203(f), again using the same structure and rule text. Like

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[127] To promote uniformity throughout proposed Regulation SE, the Commission believes that it is appropriate to denote all persons who have a right to participate in an SBSEF's market as "members." Section 37.203(a) provides that a SEF shall prohibit abusive trading practices on its markets by members and market participants. The equivalent provision in proposed Rule 819(d) would provide that an SBSEF shall prohibit abusive trading practices on its markets by members (without reference to "market participants").

§ 37.203(f), proposed Rule 819(d)(6) would address investigations and investigation reports and includes provisions relating to procedures, timeliness, when a reasonable basis does or does not exist for finding a violation, and warning letters.[128]

Paragraph (e) of proposed Rule 819 is modelled on § 37.204 and would allow an SBSEF to contract with a regulatory services provider. If it does so, the SBSEF would have to ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on its behalf, hold regular meetings with the regulatory service provider, and conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. The SBSEF would at all times remain responsible for the performance of any regulatory services received and retain exclusive authority in all substantive decisions made by its regulatory service provider. Proposed Rule 819(e)(1) makes a slight modification to § 37.204(a)'s list of entities that can serve as a regulatory service provider.[129]

Paragraph (f) of proposed Rule 819 is modelled on § 37.205, using the same paragraph structure and rule text. Paragraph (f) would require an SBSEF to capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses and impose other requirements on the SBSEF's audit trail pertaining to the records that must be kept, electronic analysis capability, safe-storage capability, and enforcement of the audit trail requirements.

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128 Proposed Rule 819(d)(6)(v) would provide that the rules of an SBSEF may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action, and that no more than one warning letter could be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period. The first provision is derived from the CFTC's guidance pertaining to CEA Core Principle 2 for SEFs; the second provision is from the text of § 37.203(f)(5).

129 Under § 37.204(a), a regulatory services provider for a SEF can be a registered futures association, FINRA, or "another registered entity." "Registered entity" is a term of art in the CEA that does not exist in the SEA. Therefore, the Commission is proposing instead that a regulatory services provider for an SBSEF can be a registered futures association (under section 17 of the CEA), a national securities exchange, a national securities association (which would include FINRA), or another SBSEF.

Paragraph (g) of proposed Rule 819 is based on § 37.206 and would generally track all of its rule text, but includes additional language derived from the appendix B guidance that is interwoven throughout. In converting the guidance to proposed rule text, the Commission preliminarily believes that grouping conceptually related items together would yield the most coherent and readable ruleset, instead of incorporating the guidance into a stand-alone section of the rules. Accordingly, paragraph (g)(1)(i) of proposed Rule 819 is taken from § 37.206(a) and would require an SBSEF to establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the SBSEF. Paragraphs (g)(1)(ii) through (iv) are taken from the appendix B guidance and would provide, respectively, that:

- The enforcement staff of an SBSEF shall[130] not include members or other persons whose interests conflict with their enforcement duties.
- A member of the enforcement staff shall not operate under the direction or control of any person or persons with trading privileges at the SBSEF.
- The enforcement staff of an SBSEF may operate as part of the SBSEF's compliance department.

Paragraph (g)(2) of proposed Rule 819 is modelled on § 37.206(b) and would require an SBSEF to establish one or more disciplinary panels that are authorized to fulfill their obligations under Rule 819. Section 37.206(b) provides that disciplinary panels must meet the composition requirements of part 40. To help ensure fairness and prevent special treatment or preference of any person or member and to provide for consistency of the makeup of members of SBSEF major disciplinary committees and hearing panels, the Commission is proposing instead to require the disciplinary panels established under proposed Rule 819(g)(2) to meet the

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130 In this bullet and the next bullet, the word used in the corresponding CFTC guidance was "should" but the Commission is proposing the word "shall" in both places to convert the guidance into an enforceable rule.

composition requirements of proposed Rule 834(d), which would apply to each major disciplinary committee and hearing panel of an SBSEF.[131]

Paragraphs (g)(3) through (8) of proposed Rule 819 have no parallel in § 37.206 itself, but derive from the guidance in appendix B pertaining to § 37.206, following the paragraph structure and wording of the guidance closely. Paragraph (g)(3) would impose procedural requirements relating to the notice of charges made to a respondent. Paragraph (g)(4) would provide that a respondent has a right to representation. Paragraph (g)(5) would provide that a respondent must be given adequate time to respond to any charges. Paragraph (g)(6) would state that the rules of an SBSEF may provide that, if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges have been committed. Paragraph (g)(6) would further state that, if the SBSEF's rules so provide, then: (i) The disciplinary panel may impose a sanction for each violation found to have been committed; (ii) The disciplinary panel shall promptly notify the respondent in writing of any sanction to be imposed and shall advise the respondent that the respondent may request a hearing on such sanction within the period of time, which shall be stated in the notice; and (iii) The rules of the SBSEF may provide that, if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

Paragraph (g)(7) of proposed Rule 819 would provide that, where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent shall be given an opportunity for a hearing in accordance with the rules of the security-based swap execution facility. Paragraph (g)(8) would address settlement offers.

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[131] Proposed Rule 834(d) would require each SBSEF and SBS exchange to ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process, and that each major disciplinary committee or hearing panel include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel. *See infra* section X.

Paragraph (g)(9) of proposed Rule 819 returns to the text of § 37.206(c) for provisions regarding hearings. Paragraph (g)(9)(i) is modelled on § 37.206(c)(1) and would require an SBSEF to have rules requiring a hearing to be fair, conducted before members of the disciplinary panel, and promptly convened after reasonable notice to the respondent. The Commission is proposing an additional provision, which derives from the guidance, that an SBSEF need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing.

Paragraphs (g)(9)(ii) through (vi) of proposed Rule 819 are also adapted from the guidance. Paragraph (g)(9)(ii) would bar a member of the disciplinary panel for the hearing from having a financial, personal, or other direct interest in the matter under consideration. Paragraph (g)(9)(iii) would address the respondent's access to evidence in the SBSEF's possession. Paragraph (g)(9)(iv) would provide that the SBSEF's enforcement and compliance staffs shall[132] be parties to the hearing, and the enforcement staff shall present their case on those charges and sanctions that are the subject of the hearing. Paragraph (g)(9)(v) would provide that the respondent shall be entitled to appear personally at the hearing, to cross-examine any persons appearing as witnesses at the hearing, to call witnesses, and to present such evidence as may be relevant to the charges. Paragraph (g)(9)(vi) would provide that the SBSEF shall require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence.

Paragraph (g)(9)(vii) of proposed Rule 819 is modelled on the text of § 37.206(c)(2) and would require that, if the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. Paragraph (g)(9)(vii) would not require the record to be transcribed unless the transcript is requested by Commission staff or the

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[132] The CFTC's guidance in appendix B that is adapted into paragraphs (g)(9)(ii) through (vi) of proposed Rule 819 uses the word "should" here and in other similar instances. The Commission is proposing to use the word "shall" in such instances instead.

respondent, the decision is appealed pursuant to the rules of the SBSEF, or the decision is reviewed by the Commission pursuant to § 201.442.[133] In all other instances, a summary record of a hearing is permitted.

Paragraph (g)(10) of proposed Rule 819 is modelled on § 37.206(d) and would provide that, promptly following a hearing conducted in accordance with the rules of the SBSEF, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The written decision would have to include six enumerated elements, all of which are closely modelled on those in § 37.206(d).

Paragraph (g)(11) of proposed Rule 819 would address emergency disciplinary actions and is drawn from the appendix B guidance. It would provide that an SBSEF may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place. Furthermore, any emergency disciplinary action would have to be taken in accordance with an SBSEF's procedures that provide for notice (if practicable), rights for representation in all proceedings, an opportunity for a hearing as soon as reasonably practicable, and the rendering of a written decision promptly following the hearing based upon the weight of the evidence contained in the record. Proposed Rule 819(g)(11) seeks to balance the need to allow an SBSEF to take summary action against the need to afford due process to respondents.[134]

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133 *See infra* section XVI(E) (discussing proposed Rule 442, which would establish the right to appeal to the Commission certain actions taken by an SBSEF, and setting out certain procedural matters relating to any such appeal).

134 *Compare* proposed Rule 819(g)(11)(i) (allowing an SBSEF to impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place) *with* proposed Rule 819(g)(11)(ii)(A) (providing that, if practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity).

Paragraph (g)(12) of proposed Rule 819 also is drawn from the appendix B guidance and provides that, if the rules of the SBSEF permit appeals,[135] the SBSEF shall establish an appellate panel that is authorized to hear appeals. The composition of the panel would have to be consistent with proposed Rule 834(d)[136] and could not include any members of the SBSEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding. Promptly following the appeal or review proceeding, the appellate panel would be required to issue a written decision and to provide a copy to the respondent.

Paragraph (g)(13) of proposed Rule 819 is adapted partly from § 37.206(e) and partly from the appendix B guidance. Paragraph (g)(13)(i) is drawn from § 37.206(e) and would provide that all disciplinary sanctions imposed by an SBSEF or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other members. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, would be required to take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction would also be required to include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. Paragraph (g)(13)(i) is adapted from the guidance and would allow an SBSEF to adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions.

The Commission preliminarily believes that combining text from § 37.206 with the associated guidance from appendix B provides a logical set of procedures for addressing Core

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135 Neither § 37.206 or the associated guidance from appendix B requires a SEF to allow appeals. The guidance states, rather, that a SEF's rules "may permit" appeals and includes certain procedural requirements only if the rules of a swap execution facility permit appeals. The Commission is adhering to this permissive approach in this proposal but seeks comment on whether the final rules should require an SBSEF to create an appeals procedure.

136 *See supra* note 131.

Principle 2 (Compliance with Rules), from requirements relating to enforcement staff generally (proposed Rule 819(g)(1)); to the composition of disciplinary panels and notices of charges (proposed Rules 819(g)(1) and (g)(2)); to rights to representation (proposed Rule 819(g)(4)), answer to charges and admission or failure to deny charges (proposed Rules 819(g)(5) and (g)(6)), denial of charges and right to a hearing (proposed Rule 819(g)(7)), settlement offers (proposed Rule 819(g)(8)); and, finally, hearings (proposed Rule 819(g)(9)), decisions (proposed Rule 819(g)(10)), emergency disciplinary actions (proposed Rule 819(g)(11)), right to appeal (proposed Rule 819(g)(12)), and disciplinary sanctions (proposed Rule 819(g)(13)).

The Commission recognizes that a set of rules that govern compliance and enforcement matters for SBSEFs could, in the abstract, differ in a number of details from the rules adopted by the CFTC in subpart C of part 37 and still plausibly satisfy the requirements of Core Principle 2. However, in light of the baseline set by the CFTC's rules, the Commission is concerned that implementing rules for SBSEFs having major or even minor differences with the rules applicable to SEFs could increase compliance costs and cause confusion for dually registered SEF/SBSEFs and market participants. This would particularly be the case if a potential violation involved a rule that was not specific to the swap or SBS market, but rather involved member conduct generally. No regulatory purpose would be served if the SEF/SBSEF had to pursue one cause of action against a member pursuant to a CFTC rule and a slightly different cause of action pursuant to an SEC rule, for the same underlying facts.

The Commission seeks comment on the following:

95. Do you agree generally with the manner in which the Commission is proposing to implement Core Principle 2? Why or why not?
96. In particular, do you agree with the proposed access requirements in Rule 819(c)? Why or why not? Do you see differences between the swap and SBS markets that warrant different requirements for access to a SEF than to an SBSEF? If so, please describe.

97. Do you see differences between the swap and SBS markets that warrant different audit trail requirements or trade surveillance capability for SBSEFs than for SEFs? If so, please describe.

98. Do you believe that SBSEFs, like SEFs, should be able to utilize regulatory service providers? What entities currently serve as regulatory service providers for SEFs? Do you believe that the types of regulatory service providers that could be utilized by SBSEFs under proposed Rule 819(e)(1) are appropriate? If not, what other regulatory service providers should be permitted?

99. Do you agree with how the Commission is proposing to implement requirements for disciplinary procedures and sanctions in proposed Rule 819(g)? Why or why not?

100. In particular, do you agree with the manner in which the Commission is proposing to incorporate significant portions of the appendix B guidance into proposed Rule 819(g)? Why or why not? Are there provisions from the guidance that the Commission is proposing to incorporate that you believe should be revised or omitted entirely? If so, please describe. Are there provisions from the guidance that the Commission has not proposed to incorporate but that you believe should be incorporated? If so, please describe.

101. Do existing SEFs treat the appendix B guidance as if it were mandatory? By converting the non-binding guidance applicable to SEFs into formal rules that would apply to SBSEFs, would dually registered entities be compelled to deviate from their present practices? If so, please describe.

102. Do you believe that proposed Rule 819(g)(12) should be revised to require an SBSEF to permit appeals of enforcement decisions to an appellate panel established by the SBSEF, despite the fact that neither subpart C of part 37 nor the CFTC's associated guidance requires appeals? Why or why not?

2. Provisions of Rule 819 adapted from other SEF requirements

Proposed Rule 819 includes four paragraphs—(h), (i), (j), and (k)—that are not derived from subpart C of part 37, which directly implements CEA Core Principle 2, or from the associated guidance in appendix B to part 37. Instead, these four paragraphs are modelled on requirements for SEFs located in other parts of the CFTC's rules. Because these requirements fall under the general heading of "Compliance with Rules," the Commission is proposing them as part of Rule 819, which implements SEA Core Principle 2.

a. Rule 819(h)—Activities of SBSEF's employees, governing board members, committee members, and consultants

Paragraph (h) of proposed Rule 819 generally would prohibit persons who are employees of an SBSEF, or who otherwise might have access to confidential information because of their role with the SBSEF, from improperly utilizing that information. Proposed Rule 819(h) is modelled on § 1.59 of the CFTC's rules, which requires an SRO (which term, under § 1.3 of the CFTC regulations, includes a SEF) to place restrictions on trading by its governing board members, committee members, consultants, and employees and to prohibit any such person from disclosing any material, non-public information obtained as a result of their official duties with the SRO.

In particular, § 1.59(b)(1)(i) requires an SRO to maintain in effect rules that, at a minimum, prohibit employees of the SRO from trading, directly or indirectly, in:

- Any "commodity interest"[137] traded on or cleared by the employing contract market, SEF, or clearing organization;
- Any "related commodity interest"[138];

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137 *See* § 1.59(a)(8) (defining "commodity interest" to mean "any commodity futures, commodity option or swap contract traded on or subject to the rules of a contract market, a swap execution facility or linked exchange, or cleared by a derivatives clearing organization, or cash commodities traded on or subject to the rules of a board of trade which has been designated as a contract market").

138 *See* § 1.59(a)(9) (defining "related commodity interest" to mean "any commodity interest which is traded on or subject to the rules of a contract market, swap execution facility,

- A commodity interest traded on a contract market or SEF or cleared by a DCO other than the employing SRO if the employee has access to material, non-public information concerning such commodity interest;
- A commodity interest traded on or cleared by a "linked exchange" if the employee has access to material, non-public information concerning such commodity interest.

The Commission is proposing to adapt § 1.59(b)(1) into Regulation SE in a simplified way. The Commission preliminarily believes that, in the SBS market, the policy goals of the rule can be achieved without the complexities of the CFTC definitions of "commodity interest" and "related commodity interest." Paragraph (h)(2)(i) of proposed Rule 819 would require an SBSEF to maintain in effect rules that, at a minimum, prohibit an employee of the SBSEF from trading, directly or indirectly, any "covered interest." Proposed Rule (h)(1)(i) would define "covered interest" to mean, with respect to an SBSEF: an SBS that trades on the SBSEF; a security of an issuer that has issued a security that underlies an SBS that is listed on the SBSEF; or a derivative based on a security that falls within the immediately preceding prong. The Commission preliminarily believes that the opportunity to observe order submission and trading in an SBS on an SBSEF could yield material non-public information about the future performance not just of that SBS, but of all securities issued by that entity. The single-name CDS market, in particular, is a market for assessing the creditworthiness of particular issuers. Non-public information derived from activity on the SBSEF pertaining to the market's assessment of an issuer's creditworthiness is likely to be material to the markets for that issuer's

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linked exchange, or other board of trade, exchange, or market, or cleared by a derivatives clearing organization, other than the self-regulatory organization by which a person is employed, and with respect to which: (i) such employing self-regulatory organization has recognized or established intermarket spread margins or other special margin treatment between that other commodity interest and a commodity interest which is traded on or subject to the rules of the employing self-regulatory organization; or (ii) such other self-regulatory organization has recognized or established intermarket spread margins or other special margin treatment with another commodity interest as to which the person has access to material, nonpublic information").

cash securities as well as to markets for derivatives based on the issuer's cash securities (*e.g.*, single-stock options).

Paragraph (h)(2)(ii), modelled on § 1.59(b)(1)(ii), would prohibit an SBSEF employee from disclosing to any other person any material non-public information which such employee obtains as a result of their employment at the SBSEF, and where such employee has or should have a reasonable expectation that the information disclosed may assist another person in trading any covered interest. In addition, paragraph (h)(2)(ii), like § 1.59(b)(1)(ii), would provide an exception for disclosures made in the course of an employee's duties, or disclosures made to another SBSEF, court of competent jurisdiction, or representative of any agency or department of the Federal or State government acting in their official capacity.

Paragraph (h)(3) of Rule 819, modelled on § 1.59(b)(2), would allow an SBSEF to adopt rules setting forth circumstances under which exemptions from the employee trading prohibition may be granted. In particular, paragraph (h)(3) would include the following possible carve-outs from the employee trading prohibition: (1) participation by an employee in a "pooled investment vehicle" where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicle; (2) trading by an employee in a derivative based on such a pooled investment vehicle; (3) trading by an employee in a derivative based on an index in which no covered interest constitutes more than 10% of the index; and (4) trading by an employee under circumstances enumerated in rules which the SBSEF determines are not contrary to applicable law, the public interest, or just and equitable principles of trade. The first and the fourth carve-outs listed above are comparable to those listed in § 1.59(b)(2). The Commission is proposing to include the second and third carve-outs to permit an SBSEF employee to trade derivatives that provide indirect exposure to a covered interest where the exposure to the covered interest is sufficiently diluted. In such cases, it would be unlikely that the employee would be using material non-public information about the covered interest to gain an unfair advantage when trading the derivative.

The Commission is proposing to depart from the CFTC definition of "pooled investment vehicle"[139] to adapt it for the SBS and securities markets. Proposed Rule (h)(1)(ii) would define "pooled investment vehicle" to mean an investment company registered under the Investment Company Act of 1940 in which no covered interest constitutes more than 10% of the investment company's assets. Thus, under this definition, if an SBSEF were to list a single-name CDS on company XYZ, a "pooled investment vehicle" would include a broad-based mutual fund or ETF that contains a security issued by company XYZ, assuming that the XYZ security does not exceed 10% of the fund's holdings. The proposed 10% limit on a covered interest's composition of the fund is designed to permit SBSEF employees to trade most index-based mutual funds and ETFs that contain covered interests, except those where a component of the fund becomes sufficiently large that material non-public information about an issuer derived from activity on the SBSEF could provide an unfair advantage to an SBSEF employee when trading that fund.

Finally, the Commission notes that, under proposed Rule 819(h)(3)—as with § 1.59(b)(2)—the exemptions from the trading restrictions would not be automatically available to SBSEF employees. Proposed Rule 819(h)(3) still would require the SBSEF to adopt rules that set forth circumstances under which exemptions from the trading prohibition may be granted. Furthermore, proposed Rule 819(h)(3), which is modelled on § 1.59(b)(2), would state that any exemption must be administered by the SBSEF "on a case-by-case basis."

Paragraph (h)(4) of proposed Rule 819, like § 1.59(d),[140] would address prohibited conduct not just of employees of an SBSEF, but also of governing board members, committee members, and consultants of the SBSEF. Paragraph (h)(4)(i)(A) is modelled on § 1.59(d)(1)(i)

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139 *See* § 1.59(a)(10) (defining "pooled investment vehicle" to mean "a trading vehicle organized and operated as a commodity pool within the meaning of § 4.10(d) of this chapter, and whose units of participation have been registered under the Securities Act of 1933, or a trading vehicle for which § 4.5 of this chapter makes available relief from regulation as a commodity pool operator, i.e., registered investment companies, insurance company separate accounts, bank trust funds, and certain pension plans").

140 Section 1.59(c) applies only to national futures associations and is not considered here.

and would prohibit any employee, governing board member, committee member, or consultant of the SBSEF from trading for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information obtained through special access related to the performance of such person's official duties as an employee, governing board member, committee member, or consultant. Paragraph (h)(4)(i)(B), modelled on § 1.59(d)(1)(ii), would prohibit any employee, governing board member, committee member, or consultant of the SBSEF from disclosing for any purpose inconsistent with the performance of such person's official duties as an employee, governing board member, committee member, or consultant any material, non-public information obtained through special access related to the performance of such duties. Paragraph (h)(4)(ii), modelled on § 1.59(d)(2), would provide that no person shall trade for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information that such person knows was obtained in violation of paragraph (h)(4) of this section from an employee, governing board member, committee member, or consultant.

The Commission preliminarily believes that persons who have professional duties with an SBSEF should not trade on material non-public information derived from the SBSEF or improperly disclose that information to third parties, and therefore that harmonizing with the comparable CFTC rule as closely as practicable, taking into account the difference in products subject to the respective jurisdictions of the SEC and CFTC, is an appropriate means of furthering that policy goal. If the Commission adopts Rule 819(h) in substantially the same form as proposed herein, dually registered SEF/SBSEFs would be able to utilize the same rules and procedures for complying with Rule 819(h) as they do for § 1.59. The Commission recognizes that the scope of assets under restriction would differ in Rule 819(h) than in § 1.59, as reflected in the SEC's use of the term "covered interest" rather than "commodity interest" in the analogous CFTC provisions, as well as the significant differences in the potential exemptions from the trading restriction (including in the "pooled investment vehicle" definition).

Nevertheless, SBS are different from swaps, so the material non-public information that can be obtained from observing order submission and SBS trading on an SBSEF is different from the material non-public information that can be obtained from observing order submission and swap trading on a SEF. The Commission preliminarily believes, therefore, that it is appropriate for Rule 819(h) to utilize a definition of "covered interest" to denote the scope of the trading restrictions in the proposed rule—and a definition of "pooled investment vehicle" to denote the scope of one of the potential exemptions from those restrictions—that is customized for the SBS and securities markets.

The Commission seeks comment on the following:

103. Do you believe in general that the Commission should incorporate into Regulation SE a rule that restricts how persons with official duties at an SBSEF may utilize information that they obtain in the course of their official duties? Why or why not?

104. Do you agree with the specific language proposed by the Commission to adapt § 1.59 into proposed Rule 819(h)? If not, how would you revise the proposed rule?

105. In particular, do you agree with the Commission's proposed definition of "covered interest"? Why or why not? Do you believe that the term "covered interest" should be expanded to include securities underlying an index swap and other securities issued by an issuer whose securities underlie an index swap that trade on a dually registered SEF/SBSEF? Why or why not?

106. Do you agree with the proposed potential exemptions from the trading restrictions in proposed Rule 819(h)(3)? For example, do you believe in general that an SBSEF should be permitted to allow its employees, governing board members, committee members, and consultants to hold covered interests through pooled investment vehicles? Why or why not?

107. Do you agree with the Commission's proposed definition of "pooled investment

vehicle"? Why or why not? Do you agree with the Commission's proposed requirement that no covered interest may constitute more than 10% of the pooled investment vehicle? Why or why not? If you believe another threshold would be more appropriate, please justify that threshold.

108. Are there additional provisions of § 1.59 that the Commission has omitted but which you believe should be incorporated into Regulation SE? If so, which provisions and why?

b. Rule 819(i)—Service on SBSEF governing boards or committees by persons with disciplinary histories

Paragraph (i) of proposed Rule 819 would bar persons with specified disciplinary histories from serving on the governing board or committees of an SBSEF and impose certain other duties on the SBSEF associated with that fundamental requirement. Proposed Rule 819(i) is modelled on § 1.63 of the CFTC's rules, which imposes similar requirements in connection with SROs (which term, under the CEA, includes SEFs).

Section 1.63(b) requires each SRO to maintain in effect rules that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels, or governing board[141] who meets any of six enumerated criteria. These criteria generally relate to a disciplinary offense having been committed by that person within the past three years. While § 1.63(b) requires the SRO to implement rules imposing a bar, § 1.63(c) in addition imposes a bar on such persons directly, stating that no person may serve on a disciplinary committee, arbitration panel, oversight panel or governing board of an SRO if such person is subject to any of the conditions listed in § 1.63(b). Section 1.63(d) requires an SRO to maintain, keep current, and provide to the CFTC and the public a list of the rule violations which constitute disciplinary

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[141] Section 1.63 uses the term "governing board" throughout. Certain other CFTC rules that the Commission is proposing to adapt into Regulation SE use "board of directors" to denote the same concept. As noted above, the Commission is proposing to utilize the term "governing board" throughout Regulation SE, even when the parallel CFTC rule on which an SEC rule is based uses "board of directors." *See supra* note 29.

offenses that would trigger the bar in § 1.63. Section 1.63(e) requires an SRO to submit to the CFTC, within 30 days of the end of each calendar year, a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels, or governing board pursuant to § 1.63 during the prior year.

Paragraph (i) of proposed Rule 819 is closely modelled on § 1.63. Paragraph (i)(1), like § 1.63(b), would require an SBSEF to maintain rules[142] that render a person ineligible to serve on its disciplinary committees,[143] arbitration panels, oversight panels,[144] or governing boards who falls into any of six enumerated criteria, all of which are modelled closely on the criteria in

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[142] Section 1.63(b), in relevant part, requires a SEF to maintain rules that have been submitted to the Commission pursuant to section 5c(c) of the CEA and part 40 of the CFTC's rules. As noted above, the Commission is proposing to adapt §§ 40.5 (Voluntary submission of rules for Commission review and approval) and 40.6 (Self-certification of rules) into proposed Rules 806 and 807, respectively. Therefore, proposed Rule 819(i)(1) would require an SBSEF to maintain in effect rules which have been submitted to the Commission pursuant to Rules 806 or 807.

[143] Proposed Rule 802 would define "disciplinary committee" as any person or committee of persons, or any subcommittee thereof, that is authorized by an SBSEF or SBS exchange to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the SBSEF or SBS exchange, except those cases where the person or committee is authorized summarily to impose minor penalties for violating rules regarding decorum, attire, the timely submission of accurate records for clearing or verifying each day's transactions, or other similar activities. The CFTC rules contain two slightly different definitions of "disciplinary committee" that appear in § 1.63(a)(2) and § 1.69(a)(1), respectively. Because the definition in § 1.69(a)(1) is more comprehensive, the Commission is modelling its proposed definition of "disciplinary committee" on § 1.69(a)(1) rather than on § 1.63(a)(2). The Commission is locating the definition in proposed Rule 802, since the term is used by multiple rules in Regulation SE.

[144] Proposed Rule 802 would define "oversight panel" as any panel, or any subcommittee thereof, authorized by an SBSEF or SBS exchange to recommend or establish policies or procedures with respect to the surveillance, compliance, rule enforcement, or disciplinary responsibilities of the SBSEF or SBS exchange. The CFTC's definitions of "oversight panel" are contained in § 1.63(a)(4) and § 1.69(a)(4), respectively. Because the definition in § 1.69(a)(4) is more comprehensive, the Commission is modelling its proposed definition of "oversight panel" on § 1.69(a)(4) rather than on § 1.63(a)(4). As with the definition of "disciplinary committee," the Commission is locating the definition of "oversight panel" in proposed Rule 802, since the term is used by multiple rules in Regulation SE.

§ 1.63(b).[145] Paragraph (i)(2), modelled on § 1.63(c), would impose a direct bar on any person from serving on a disciplinary committee, arbitration panel, oversight panel, or governing board of an SBSEF who meets any of the six criteria enumerated in proposed Rule 819(i)(1). Paragraph (i)(3), modelled on § 1.63(d), would require an SBSEF to submit to the Commission a schedule listing the rule violations which constitute disciplinary offenses that would trigger the bar and, to the extent necessary to reflect revisions, would have to submit an amended schedule within 30 days of the end of each calendar year. The SBSEF would be required to maintain and keep current this schedule and post it on its website so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public. Paragraph (i)(4), like § 1.63(e), would require an SBSEF to submit to the Commission within 30 days of the end of each calendar year a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels, or governing board pursuant to Rule 819(i) during the prior year. Paragraph (i)(5), modelled on § 1.63(f), would provide that, whenever an SBSEF finds by final decision that a person has committed a disciplinary offense and such finding makes such person ineligible to serve on that SBSEF's disciplinary committees, arbitration panels, oversight panels, or governing board, the SBSEF shall inform the Commission of that finding and the length of the ineligibility, in a form and manner specified by the Commission.

Paragraph (i)(6) of proposed Rule 819(i) would define the terms "arbitration panel,"

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[145] Section 1.63(b)(5) provides that one criterion for the bar would be that the person in question is subject to or has had imposed on him within the prior three years a CFTC registration revocation or suspension in any capacity for any reason, or has been convicted within the prior three years of any of the felonies listed in section 8a(2)(D)(ii) through (iv) of the CEA. Since the SEC is not subject to the CEA and cannot cross-reference those provisions, the Commission is proposing for the equivalent criterion in Rule 819(i)(1)(v) that a person would be barred for having been convicted within the prior three years of any felony, without limitation on the type of felony.

"disciplinary offense," and "final decision" which are used in proposed Rule 819(i).[146] These definitions are closely modelled on those provided in § 1.63(a).[147]

The Commission preliminarily believes that it is appropriate to bar persons with inappropriate disciplinary histories from serving on the disciplinary committees, arbitration panels, oversight panels, or governing board of an SBSEF, and that closely modelling a rule in Regulation SE on § 1.63 would be an appropriate means of furthering that policy goal. The requirements of § 1.63 should be well understood by SEFs, who have been complying with them for several years, and incorporating similar requirements into Regulation SE should impose few if any additional costs on dually registered SEF/SBSEFs. The Commission preliminarily believes, in particular, that establishing criteria for the bar that are as similar as possible to the CFTC's criteria would avoid a situation where a person is ineligible under one agency's rules to serve on a disciplinary committee, arbitration panel, oversight panel, or the governing board, but would be eligible under the other agency's rules.

The Commission seeks comment on the following:

109. Do you believe in general that Regulation SE should include a rule that prohibits persons having an inappropriate disciplinary history from serving on the disciplinary

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146 Proposed Rule 819(i)(6)(i) would define "arbitration panel" as any person or panel empowered by an SBSEF to arbitrate disputes involving the SBSEF's members or their customers. Proposed Rule 819(i)(6)(ii) would define "disciplinary offense" as: any violation of the rules of an SBSEF, except a violation resulting in fines aggregating to less than $5000 within a calendar year involving decorum or attire, financial requirements, or reporting or recordkeeping; any rule violation which involves fraud, deceit, or conversion or results in a suspension or expulsion; any violation of the SEA or the Commission's rules thereunder; or any failure to exercise supervisory responsibility when such failure is itself a violation of either the rules of the SBSEF, the SEA, or the Commission's rules thereunder. Proposed Rule 819(i)(6)(iii) would define "final decision" as a decision of an SBSEF which cannot be further appealed within the SBSEF, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction; or any decision by an administrative law judge, a court of competent jurisdiction, or the Commission which has not been stayed or reversed.

147 Since these terms are used only in proposed Rule 819(i) and not elsewhere in Regulation SE, the Commission is defining them in proposed Rule 819(i) and not the omnibus definitions rule in Regulation SE (Rule 802).

committees, arbitration panels, oversight panels, or governing board of an SBSEF? Why or why not?

110. In particular, do you agree with the specific language proposed by the Commission to adapt § 1.63 into proposed Rule 819(i)? If not, how would you revise the rule?

111. Are there additional provisions of § 1.63 that the Commission has not adapted into proposed Rule 819(i) but which you believe should be incorporated? If so, which provisions and why?

112. Proposed Rule 819(i)(1)(iv) would require an SBSEF to have rules that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels, or governing board if that person is subject to an agreement with the Commission, an SBSEF, or an SRO not to apply for registration with the Commission or membership in any SRO. Should similar agreements with any other types of entities be included in the ineligibility provision of proposed Rule 819(i)(1)(iv)? For example, should registered futures associations such as the NFA be included in this list? Why or why not?

c. Rule 819(j)—Notification of final disciplinary action involving financial harm to a customer

Paragraph (j) of proposed Rule 819 is a modified version of § 1.67 of the CFTC's rules. Section 1.67(b) provides, in relevant part, that upon any final disciplinary action[148] in which a contract market or SEF finds that a member has committed a rule violation that involved a

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148 *See* § 1.67(a) (defining "final disciplinary action" as any decision by or settlement with a contract market or swap execution facility in a disciplinary matter which cannot be further appealed at the contract market or swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction).

transaction for a customer,[149] whether executed or not, and that resulted in harm to the customer, the contract market or SEF must promptly provide notice of the disciplinary action to the futures commission merchant or other registrant. The futures commission merchant or other registrant that receives the notice must promptly provide written notice of the disciplinary action to the customer as disclosed on its books and records. Such written notice must include the principal facts of the disciplinary action and a statement that the contract market or SEF has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer.

Paragraph (j)(1) of proposed Rule 819 is designed to replicate for SBSEFs the fundamental duty of § 1.67 and would provide that, upon any final disciplinary action in which an SBSEF finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer, the SBSEF must promptly provide written notice of the disciplinary action to the member. In addition, the SBSEF would be required to have established a rule pursuant to Rule 806 or 807 that requires a member that receives such a notice to promptly provide that notice to the customer, as disclosed on the member's books and records.[150] Paragraph (j)(2) would provide that the written notice must include the principal facts of the disciplinary action and a statement

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149 *See* § 1.3 (defining "customer" as any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest; *Provided, however,* an owner or holder of a proprietary account as defined in this section shall not be deemed to be a customer within the meaning of section 4d of the CEA, the regulations that implement sections 4d and 4f of the CEA and § 1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a customer within the meaning of the CEA and §§ 1.37 and 1.46 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the CEA).

150 The provision on which proposed Rule 819(j)(1)(i)(B) is based, § 1.67(b)(1)(ii), requires a futures commission merchant or other registrant that receives such a notice to forward it to the injured customer. Because of differences in the respective agencies' statutory authority, the Commission is proposing to require the SBSEF to establish a rule that requires the relevant member to forward the notice, not to propose a Commission rule that would impose such a duty on the member directly.

that the SBSEF has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer.

Paragraph (j)(3) of proposed Rule 819 would provide definitions for two terms used in Rule 819(j). The proposed definition for "final disciplinary action" is closely modelled on the CFTC's definition in § 1.67(a).[151] The proposed definition of "customer" is only loosely modelled on the definition of "customer" provided in § 1.3, which includes complexities deriving from the CEA that the Commission does not believe are necessary or appropriate to adapt into a rule that applies to SBSEFs.[152] The Commission is proposing to define "customer" in proposed Rule 819(j)(3)(i) as a person that utilizes an agent in connection with trading on an SBSEF.

The Commission preliminarily believes that, if an SBSEF member commits a rule violation that involved a transaction for the customer and financial harm to the customer results, the customer should be apprised of that fact. The Commission preliminarily believes, therefore, that closely modelling a rule in Regulation SE on § 1.67 would be an appropriate means of furthering that policy goal. The requirements of § 1.67 should be well understood by SEFs, who have been complying with them for several years, and incorporating similar requirements into Regulation SE should impose lower compliance costs on dually registered SEF/SBSEFs.

The Commission seeks comment on the following:

113. Do you believe in general that Regulation SE should include a rule designed to provide a customer of an SBSEF member notice if the member commits a violation of

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151 *See* proposed Rule 819(j)(3)(ii) (defining "final disciplinary action" as any decision by or settlement with an SBSEF in a disciplinary matter which cannot be further appealed at the SBSEF, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction).

152 The Commission notes, finally, that the definitions of "customer" and "final disciplinary action" would apply only within proposed Rule 819(j), so they are not included in the omnibus definitions rule for proposed Regulation SE (Rule 802).

an SBSEF rule that results in harm to the customer? Why or why not?

114. In particular, do you agree with the specific language proposed by the Commission to adapt § 1.67 into proposed Rule 819(j)? If not, how would you revise that language?

115. Do you agree with the proposed definition of "customer" in proposed Rule 819(j)? If not, how would you revise it?

d. Rule 819(k)—Designation of agent for non-U.S. member

Paragraph (k) of proposed Rule 819 would require non-U.S. persons who trade on an SBSEF to have an agent for service process, which could be an agent of its own choosing or, by default, the SBSEF. Proposed Rule 819(k) is modelled on § 15.05(i) of the CFTC's rules, which concerns the designation of agents for foreign persons participating on "reporting markets," a category in the CFTC's rules that includes SEFs.[153] With respect to SEFs, § 15.05(i) provides that a SEF that permits a foreign trader to effect contracts, agreements, or transactions on the SEF shall be deemed to be the agent of the foreign trader with respect to any such contracts, agreements, or transactions executed by the foreign trader. § 15.05(i) further provides that service or delivery of any communication issued by or on behalf of the CFTC to the SEF shall constitute valid and effective service upon the foreign trader, and that a SEF that has been served with, or to which there has been delivered, a communication issued by or on behalf of the CFTC to a foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the CFTC in the communication, to the foreign trader.

Paragraph (i)(1) of § 15.05 provides, with respect to SEFs, that it shall be unlawful for a SEF to permit a foreign trader to effect contracts on the SEF unless the SEF has informed the

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153 A "reporting market" is defined in § 15.00(q) to mean a DCM or registered entity under section 1a(40) of the CEA. The term "registered entity" as defined in section 1a(40) of the CEA includes SEFs, among other entities.

foreign trader of the requirements of § 15.05. Paragraph (i)(2) of § 15.05 permits a foreign trader to appoint its own agent for service of process if it provides a copy of the agency agreement to the SEF, and the SEF files the agreement with the CFTC. Paragraph (i)(3) of § 15.05 provides that the foreign trader would have to notify the CFTC immediately if that agreement is no longer in effect.

Paragraph (k)(1) of proposed Rule 819 is modelled on § 15.05(i) and would provide that an SBSEF that admits a non-U.S. person as a member shall be deemed to be the agent of the "non-U.S. member"[154] with respect to any SBS executed by the non-U.S. member. Under proposed Rule 819(k)(1), service or delivery of any communication issued by or on behalf of the Commission to the SBSEF shall constitute valid and effective service upon the non-U.S. member. If an SBSEF is served with a communication issued by or on behalf of the Commission to a non-U.S. member, the SBSEF would be required to transmit the communication to the non-U.S. member. Paragraph (k)(2) of proposed Rule 819 is modelled on § 15.05(i)(1) and would provide that it shall be unlawful for an SBSEF to permit a non-U.S. member to execute SBS transactions on the facility unless the SBSEF informs the non-U.S. member in writing of the requirements of proposed Rule 819(k).

Paragraph (k)(3) of proposed Rule 819 is modelled on § 15.05(i)(2) and would permit a non-U.S. member of an SBSEF to utilize an agent for service of process other than the SBSEF. The non-U.S. member would have to provide a copy of its agreement with the alternate agent to the SBSEF, and the SBSEF would then have to file the agreement with the Commission, before

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[154] "Non-U.S. member" would be a defined term in proposed Rule 819(k) that does not appear in § 15.05 of the CFTC's rules but which, the Commission preliminarily believes, appropriately conveys the meaning of the CFTC rule for purposes of SBSEFs in proposed Rule 819(k). A foreign trader that executes contracts on a trading platform such as an SBSEF must be a member of that platform. Therefore, to promote uniformity throughout Regulation SE, the Commission is using the term "member" for this concept. Furthermore, the Commission has defined the term "U.S. person" for purposes of the cross-border application of its Title VII rules— *see* Rule 3a71-3(a)(4), § 240.3a71-3(a)(4) —and thus is proposing to define "non-U.S. member" in Rule 802 as "a member of a security-based swap execution facility that is not a U.S. person."

executing any transaction on the SBSEF. Paragraph (k)(4) of proposed Rule 819, modelled on § 15.05(i)(3), would require the non-U.S. member to notify the Commission if the agency agreement is no longer in effect.

The Commission preliminarily believes that, for an SBSEF to have an effective regulatory program and thereby comply with Core Principle 2 (Compliance with Rules), the SBSEF must have jurisdiction over all of its members, including members who are not U.S. persons. Proposed Rule 819(k) would further an SBSEF's ability to ensure compliance by its non-U.S. members with its rules by requiring each non-U.S. member of the SBSEF to have an agent for service of process, whether an agent of its own choosing that has been disclosed to the SBSEF and the Commission or, as a default, the SBSEF itself. This would eliminate any question of how to provide valid notice to a non-U.S. member of any proceedings involving potential rule violations.

The Commission preliminarily believes that the CFTC has adequately addressed these concerns with § 15.05(i), and therefore that proposed Rule 819 should include provisions adapted from § 15.05(i) for application to SBSEFs. If the Commission ultimately adopts Rule 819(k) in the same or similar form as it is proposed, non-U.S. members of dually registered SEF/SBSEFs that trade both swaps and SBS should already be in compliance with these requirements.

The Commission seeks comment on the following:

116. Do you believe in general that Regulation SE should include a provision making an SBSEF the default agent for service of process for its non-U.S. members? Why or why not?

117. Do you agree with the specific language proposed by the Commission to adapt § 15.05(i) into proposed Rule 819(k)? If not, how would you revise the rule?

118. Are there additional provisions of § 15.05 that the Commission has omitted but which you believe should be incorporated into proposed Rule 819(k)? If so, which

provisions and why?

119. Do you anticipate that SBSEFs will have any non-U.S. members? Do you believe that proposed Rule 819(k) will even be necessary?

120. Do you agree with the proposed definition of "non-U.S. member" in Rule 802? If not, how would you revise it?

C. Rule 820—Core Principle 3—SBS not readily susceptible to manipulation

Core Principle 3[155] provides that an SBSEF may permit trading only in SBS that are not readily susceptible to manipulation. CEA Core Principle 3 for SEFs is substantively identical.[156]

The CFTC implemented Core Principle 3 in subpart D of part 37. Section 37.300 of subpart D repeats the statutory text of CEA Core Principle 3. § 37.301 provides that, for a SEF to demonstrate its compliance with the core principle, it must, at the time it submits a new swap contract pursuant to part 40, provide the applicable information as set forth in appendix C to part 38 (Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation).[157] Section 37.301 also states that a SEF may refer to the guidance provided in appendix B of part 37, which provides in relevant part that, when identifying a reference price, a SEF should either calculate its own reference price using suitable and well-established acceptable methods or carefully select a reliable third-party index.

Proposed Rule 820 would implement Core Principle 3. Although, like § 37.300,

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155 Section 3D(d)(3) of the SEA, 15 U.S.C. 78c-4(d)(3).

156 *See* section 5h(f)(3) of the CEA, 7 U.S.C. 7b-3(f)(3).

157 Appendix C to part 38 provides, *inter alia*, that careful consideration should be given to the potential for manipulation or distortion of the cash settlement price of a swap, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is highly regarded by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interviews with principal market trading agents, pricing experts, marketing agents, etc. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash flows of the swap.

proposed Rule 820 repeats the statutory text of the Core Principle, the Commission preliminarily believes that it is not necessary or appropriate to harmonize with the CFTC guidance referenced in § 37.301, as this guidance was developed for products other than SBS.

The Commission seeks comment on the following:

121. Do you agree with how the Commission is proposing to implement Core Principle 3? Why or why not? If not, what other rules would you suggest?

D. Rule 821—Core Principle 4—Monitoring of trading and trade processing

Core Principle 4[158] requires an SBSEF to establish and enforce rules or terms and conditions defining or specifications detailing: (1) trading procedures to be used in entering and executing orders traded on or through the facilities of the SBSEF; and (2) procedures for trade processing of SBS on or through the facilities of the SBSEF. Core Principle 4 also requires an SBSEF to monitor trading in SBS to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions. CEA Core Principle 4 for SEFs[159] is substantively identical.

The CFTC implemented Core Principle 4 in subpart E of part 37. Section 37.401 of subpart E provides that a SEF must collect and evaluate data on its market participants' market activity; demonstrate an effective program for conducting real-time monitoring to detect and resolve abnormalities; demonstrate the ability to comprehensively and accurately reconstruct daily trading; and demonstrate that it has access to sufficient information to assess whether trading in the swaps on its market, in the index or instruments used as a reference price, or other underlying instruments is being used to affect prices on its market. Sections 37.402 and 37.403 impose additional requirements for physical-delivery swaps and cash-settled swaps, respectively.

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[158] Section 3D(d)(4) of the SEA, 15 U.S.C. 78c-4(d)(4).

[159] Section 5h(f)(4) of the CEA, 7 U.S.C. 7b-3(f)(4).

Section 37.404(a) requires a SEF to demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market. Section 37.404(b) requires a SEF to have rules that require its market participants to keep records of their trading, including records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, and make such records available, upon request, to the SEF or, if applicable, to its regulatory service provider, and the CFTC. Section 37.405 requires a SEF to establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the SEF. Section 37.406 requires a SEF to have the ability to reconstruct all trading on its facility, and requires that all audit-trail data and reconstructions shall be made available to the CFTC in a form, manner, and time that is acceptable to the CFTC. Section 37.407 requires a SEF to comply with subpart E of part 37 through a dedicated regulatory department or by contracting with a regulatory services provider. Section 37.408 provides that SEFs may refer to the guidance in appendix B to part 37 to demonstrate compliance with subpart E of part 37.[160]

Proposed Rule 821 would implement Core Principle 4 and is closely modelled on the rules in subpart E of part 37. The Commission preliminarily believes that the CFTC has implemented Core Principle 4 for SEFs in an appropriate way, and that closely harmonizing with the CFTC rule would yield comparable regulatory benefits while imposing only marginal additional costs. The Commission does not observe any differences between the swap and SBS markets sufficient to warrant a different approach to how a SEF/SBSEF should monitor trading and trade processing.

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[160] The guidance pertaining to Core Principle 4 has subsections entitled "general requirements," "physical-delivery swaps," "cash-settled swaps," "ability to obtain information," and "risk controls for trading."

As noted above, the Commission preliminarily believes, in attempting to harmonize with the CFTC's regulatory regime for SEFs, that it would be preferable to adapt the CFTC's guidance and acceptable practices from appendix B to part 37 into formal rules, where appropriate. Although the Commission considered proposing a stand-alone rule that adapts the guidance pertaining to Core Principle 4, the Commission is proposing instead to weave concepts—and, in some cases, specific language—from the guidance together with the CFTC's original rule text, as the guidance itself follows the structure of the rule. The Commission illustrates its approach in the following proposed rules, where the analogous CFTC rule language is in plain text and language adapted from the guidance is italicized:

- Proposed Rule 821(b)(3): An SBSEF shall: "Demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities. *A security-based swap execution facility shall employ automated alerts to detect abnormal price movements and unusual trading volumes in real time and instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis. The T+1 detection and analysis should incorporate any additional data that becomes available on a T+1 basis, including the trade reconstruction data*."
- Proposed Rule 821(d)(2): "For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price is formulated and computed by the security-based swap execution facility, the security-based swap execution facility shall demonstrate that it monitors the continued appropriateness of its methodology for deriving that price *and shall promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions*."
- Proposed Rule 821(d)(3): "For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price relies on a third-

party index or instrument, including an index or instrument traded on another venue, the security-based swap execution facility shall demonstrate that it monitors for pricing abnormalities in the index or instrument used to calculate the reference price *and shall conduct due diligence to ensure that the reference price is not susceptible to manipulation*."

- Proposed Rule 821(e)(1): "A security-based swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in security-based swaps listed on its market, in the index or instrument used as a reference price, or in the underlying asset for its listed security-based swaps is being used to affect prices on its market. *The security-based swap execution facility shall demonstrate that it can obtain position and trading information directly from members that conduct substantial trading on its facility or through an information-sharing agreement with other venues or a third-party regulatory service provider. If the position and trading information is not available directly from its members but is available through information-sharing agreements with other trading venues or a third-party regulatory service provider, the security-based swap execution facility should cooperate in such information-sharing agreements*."
- Proposed Rule 821(e)(2): "A security-based swap execution facility shall have rules that require its members to keep records of their trading, including records of their activity in the underlying asset, and related derivatives markets, and make such records available, upon request, to the security-based swap execution facility or, if applicable, to its regulatory service provider and the Commission. *The security-based swap execution facility may limit the application of this requirement to only those members that conduct substantial trading on its facility*."
- Proposed Rule 821(f): "A security-based swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of market

disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the security-based swap execution facility. *Such risk control mechanisms shall be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The security-based swap execution facility may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, daily price limits, and intraday position limits related to financial risk to the clearing member, or design other types of controls, as well as clear error-trade and order-cancellation policies. Within the specific array of controls that are selected, the security-based swap execution facility shall set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions*."

The Commission also is proposing a stand-alone provision derived from the appendix B guidance as Rule 821(b)(5), which would provide than an SBSEF must have rules in place that allow it to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the security-based swap execution facility shall take steps to prevent the market disruption or reduce its severity.

Finally, in several instances in subpart E of part 37, the CFTC uses the term "commodity" with respect to the swap underlier. In proposed Rule 821, the Commission is proposing instead to use the more generic term "asset" to refer to the underlier.

The Commission seeks comment on the following:

122. Do you agree in general with the Commission's approach to implementing Core Principle 4? Why or why not? In particular, do agree with how the Commission is proposing to adapt the CFTC guidance on Core Principle 4 by converting appropriate parts of it into a formal rule? Why or why not?

123. In particular, is there any language that the Commission is proposing to adapt

from subpart E of part 37 into proposed Rule 821 that you believe is not appropriate? If so, how would you revise it?

124. Are there any aspects of proposed Rule 821 that derive from the guidance that you believe are inappropriate for the Commission to incorporate into its own rules, or that you believe the Commission is proposing to incorporate inappropriately? If so, please discuss.

125. Are there any aspects of the CFTC's guidance that you believe should also be incorporated into the SEC rule but are not present in proposed Rule 821? If so, please describe.

E. Rule 822—Core Principle 5—Ability to obtain information

Core Principle 5[161] requires an SBSEF to establish and enforce rules that will allow the SBSEF to obtain any necessary information to perform any of the functions described in the Core Principles, provide the information to the Commission on request, and have the capacity to carry out such international information-sharing agreements as the Commission may require. CEA Core Principle 5 for SEFs[162] is substantively identical.

The CFTC implemented Core Principle 5 in subpart F of part 37. Section 37.500 of subpart F repeats the statutory text of Core Principle 5. Section 37.501 requires a SEF to establish and enforce rules that will allow the SEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under the rule, including the capacity to carry out international information-sharing agreements as the Commission may require. Section 37.502 requires a SEF to have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its market participants, and allow for its examination of books and records kept by the market participants on its facility. Section 37.503 requires a SEF

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161 Section 3D(d)(5) of the SEA, 15 U.S.C. 78c-4(d)(5).

162 Section 5h(f)(5) of the CEA, 7 U.S.C. 7b-3(f)(5).

to provide information in its possession to the CFTC upon request, in a form and manner that the CFTC approves. Section 37.504 requires a SEF to share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the CFTC or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. Section 37.504 further provides that appropriate information-sharing agreements can be established with such entities or the CFTC can act in conjunction with the SEF to carry out such information sharing.

Proposed Rule 822 would implement Core Principle 5 and is substantively identical to subpart F of part 37. Paragraph (a) of proposed Rule 822 repeats the statutory text of Core Principle 5. Paragraph (b), modelled on § 37.501, would require that an SBSEF establish and enforce rules that will allow the SBSEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under Regulation SE. Paragraph (c), like § 37.502, would require an SBSEF to have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its members, and allow for its examination of books and records kept by members on its facility.[163] Paragraph (d), like § 37.503, would require that an SBSEF provide information in its possession to the Commission upon request, in a form and manner specified by the Commission. Finally, paragraph (e), like § 37.504, would require an SBSEF to share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its regulatory and reporting responsibilities, and that appropriate information-sharing agreements can be established with such entities, or the Commission can act in conjunction with the SBSEF to carry out such information sharing.

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[163] While § 37.502 of subpart F uses the term "market participant," proposed Rule 822 substitutes the term "member" in these places, since the rule pertains to market participants who are acting as members of the SEF/SBSEF. *See supra* note 53.

The Commission preliminarily believes that closely harmonizing with the CFTC's rules associated with CEA Core Principle 5 would appropriately implement SEA Core Principle 5. By harmonizing with the CFTC's approach, a SEF/SBSEF could have the same information-collection rules and information-sharing agreements. The Commission could thus obtain comparable regulatory benefits while imposing few if any additional costs on SEF/SBSEFs.

The Commission seeks comment on the following:

126. Do you agree generally with how the Commission is proposing to implement Core Principle 5? Why or why not?

127. In particular, do you believe that closely harmonizing with subpart F of the CFTC's rules is appropriate? Why or why not? If not, please identify any provision(s) in the CFTC rules that you believe should not be adapted for SBSEFs and explain your reasoning.

F. Rule 823—Core Principle 6—Financial integrity of transactions

SEA Core Principle 6[164] requires an SBSEF to establish and enforce rules and procedures for ensuring the financial integrity of SBS entered on or through the facilities of the SBSEF, including the clearance and settlement of SBS pursuant to section 3C(a)(1) of the SEA.[165] CEA Core Principle 7 for SEFs[166] is substantively identical to SEA Core Principle 6.

The CFTC implemented CEA Core Principle 7 in subpart H of part 37. Section 37.700 of subpart H repeats the statutory text of Core Principle 7. Section 37.701 provides that transactions executed on or through the SEF that are required to be cleared or are voluntarily cleared by the counterparties shall be cleared through a registered or exempt DCO. Section 37.702 requires a SEF to provide for the financial integrity of its transactions by establishing minimum financial standards for its members, which shall at a minimum require members to be

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164 Section 3D(d)(6) of the SEA, 15 U.S.C. 78c-4(d)(6).

165 15 U.S.C. 78c-3(a)(1). *See supra* note 94 and accompanying text (discussing mandatory clearing provisions).

166 Section 5h(f)(7) of the CEA, 7 U.S.C. 7b-3(f)(7).

ECPs. Section 37.702 further requires a SEF to provide for the financial integrity of its transactions by ensuring that the SEF, for transactions cleared by a DCO, has the capacity to route transactions to the DCO in a manner acceptable to the DCO; and by coordinating with each DCO to which it submits transactions for clearing in the development of rules and procedures to facilitate prompt and efficient transaction processing. Section 37.703 requires a SEF to monitor its members to ensure that they continue to qualify as ECPs.

Proposed Rule 823 would implement SEA Core Principle 6 and is substantively identical to subpart H of part 37. Paragraph (a) of proposed Rule 823 repeats the statutory text of the Core Principle. Paragraph (b), like § 37.701, would require that transactions executed on or through the SBSEF that are required to be cleared under section 3C(a)(1) of the SEA or are voluntarily cleared by the counterparties shall be cleared through a registered clearing agency[167] or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for SBS. Paragraph (c), like § 37.702, would require an SBSEF to provide for the financial integrity of its transactions by establishing minimum financial standards for its members, which shall, at a minimum, require that each member qualify as an ECP. In addition, for transactions cleared by a registered clearing agency, an SBSEF must provide for the financial integrity of its transactions by ensuring that it has the capacity to route transactions to the registered clearing agency in a manner acceptable to the clearing agency for purposes of clearing, and by coordinating with each registered clearing agency to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing. Finally, paragraph (d), like § 37.703, would require that an SBSEF monitor its members to ensure that they continue to qualify as ECPs.

The Commission preliminarily believes that closely harmonizing with the CFTC's rules

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[167] While subpart H of part 37 uses the term "derivatives clearing organization," proposed Rule 823 substitutes the term "registered clearing agency" in these places, the analogous term under the SEA.

associated with CEA Core Principle 7 would appropriately implement SEA Core Principle 6. By harmonizing with the CFTC's approach, a SEF/SBSEF could have the same financial standards and requirements for its members, and develop the same processes for submitting swaps and SBS for clearing, thus promoting efficiency among its respective SEF and SBSEF operations. The Commission could thus obtain comparable regulatory benefits while imposing few if any additional costs on SEF/SBSEFs.

The Commission seeks comment on the following:

128. Do you agree generally with how the Commission is proposing to implement Core Principle 6? Why or why not?

129. In particular, do you believe that closely harmonizing with subpart H of the CFTC's rules is appropriate? Why or why not? If not, please identify any provision(s) in the CFTC rules that you believe should not be adapted for SBSEFs and explain your reasoning.

130. Are there any differences in the SBS market relative to the swap market that warrant imposing different or additive requirements with respect to the rules for implementing SEA Core Principle 6? If so, please explain.

G. Rule 824—Core Principle 7—Emergency authority

SEA Core Principle 7[168] requires an SBSEF to adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any SBS or to suspend or curtail trading in an SBS. CEA Core Principle 8 for SEFs[169] is substantively identical.

The CFTC implemented Core Principle 8 for SEFs in subpart I of part 37. Section 37.800 of subpart I repeats the statutory text of the Core Principle. Section 37.801 provides that

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[168] Section 3D(d)(7) of the SEA, 15 U.S.C. 78c-4(d)(7).

[169] Section 5h(f)(8) of the CEA, 7 U.S.C. 7b-3(f)(8).

a SEF "may refer" to the guidance in appendix B to part 37 "to demonstrate to the Commission compliance with [Core Principle 8]." Paragraph (a)(1) of that guidance states that a SEF should have rules that authorize it to take certain actions in the event of an emergency. Furthermore, a SEF should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the SEF's market or as part of a coordinated, cross-market intervention. A SEF should have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the SEF are made in good faith to protect the integrity of the markets. However, the SEF should also have rules that allow it to take market actions as may be directed by the CFTC. Additionally, in situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest shall be as directed, or agreed to, by the CFTC or its staff. The SEF's rules should include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest, and include alternate lines of communication and approval procedures to address emergencies associated with real time events. To address perceived market threats, the SEF should have rules that allow it to take emergency actions, including imposing or modifying position limits, imposing or modifying price limits, imposing or modifying intraday market restrictions, imposing special margin requirements, ordering the liquidation or transfer of open positions in any contract, ordering the fixing of a settlement price, extending or shortening the expiration date or the trading hours, suspending or curtailing trading in any contract, transferring customer contracts and the margin, or altering any contract's settlement terms or conditions, or, if applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

Paragraph (a)(2) of the guidance provides that a SEF should promptly notify the CFTC of its exercise of emergency action, explaining its decision-making process, the reasons for using its

emergency authority, and how conflicts of interest were minimized, including the extent to which the SEF considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. Furthermore, information on all regulatory actions carried out pursuant to a SEF's emergency authority should be included in a timely submission of a certified rule pursuant to part 40.

Proposed Rule 824 would implement SEA Core Principle 7 and is closely modelled on subpart I of part 37 and the guidance for CEA Core Principle 8 in appendix B to part 37. Paragraph (a) of proposed Rule 824 would repeat the statutory text of the Core Principle. Paragraph (b) of proposed Rule 824 would incorporate much of the language in paragraph (a)(1) of the CFTC's guidance on CEA Core Principle 8. Under paragraph (b), an SBSEF would be required to adopt rules that are reasonably designed to:

(1) Allow the SBSEF to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the SBSEF's market or as part of a coordinated, cross-market intervention;

(2) Have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the SBSEF are made in good faith to protect the integrity of the markets;

(3) Take market actions as may be directed by the Commission, including, in situations where an SBS is traded on more than one platform, emergency action to liquidate or transfer open interest as directed, or agreed to, by the Commission or the Commission's staff;

(4) Include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest;

(5) Include alternate lines of communication and approval procedures to address emergencies associated with real-time events;

(6) Allow the SBSEF, to address perceived market threats, to impose or modify position limits, impose or modify price limits, impose or modify intraday market restrictions, impose special margin requirements, order the liquidation or transfer of open positions in any contract, order the fixing of a settlement price, extend or shorten the expiration date or the trading hours, suspend or curtail trading in any contract, transfer customer contracts and the margin, or alter any contract's settlement terms or conditions, or, if applicable, provide for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

Paragraph (c) of proposed Rule 824 is based on paragraph (a)(2) of the CFTC's guidance on CEA Core Principle 8 and would require an SBSEF to promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the SBSEF considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. In addition, proposed Rule 824(c) would require information on all regulatory actions carried out pursuant to an SBSEF's emergency authority to be included in a timely submission of a certified rule pursuant to Rule 807.

The Commission preliminarily believes that adapting the CFTC's guidance associated with CEA Core Principle 8 into proposed Rule 824 would appropriately implement SEA Core Principle 7. In particular, the Commission preliminarily agrees with the CFTC's principles-based approach to emergency situations, requiring SEF/SBSEFs to establish rules *ex ante* that generally would facilitate emergency actions but providing flexibility and independence with regard to specific actions that might be necessary. The Commission also preliminarily believes, as reflected in proposed Rule 824(c), that an SBSEF that exercises its emergency authority should be required to promptly notify the Commission of such exercise and to explain the basis for its actions. By harmonizing with the CFTC's approach, the Commission's intent is that, in

many or even all instances, the SEF/SBSEF could file the same information regarding the situation to both agencies, rather than having to prepare one submission for the SEC and a different submission for the CFTC.

The Commission seeks comment on the following:

131. Do you agree generally with the Commission's approach to implementing SEA Core Principle 7? Why or why not?

132. In particular, do you agree with how the Commission is proposing to adapt the guidance from appendix B to part 37 regarding CEA Core Principle 8? Is there language adapted from the guidance into proposed Rule 824 that you believe should be omitted or revised? If so, please describe.

H. Rule 825—Core Principle 8—Timely publication of trading information

SEA Core Principle 8[170] requires an SBSEF to make public timely information on price, trading volume, and other trading data on SBS to the extent prescribed by the Commission, and to have the capacity to electronically capture and transmit and disseminate trade information with respect to transactions executed on or through the facility. CEA Core Principle 9[171] is substantively identical to SEA Core Principle 8.

The CFTC implemented CEA Core Principle 9 in subpart J of part 37. Section 37.900 of subpart J repeats the statutory language of the Core Principle. § 37.901 provides that, with respect to swaps traded on or through a SEF, the SEF shall report specified swap data as provided in parts 43 and 45 of the CFTC's rules. Section 37.901 also requires the SEF to comply with part 16 of the CFTC's rules, which requires a "reporting market" (which term includes a SEF) to provide certain reports to the CFTC regarding trading activity on the SEF and to make certain of that information publicly available without charge.

Proposed Rule 825 would implement SEA Core Principle 8 and is closely modelled on

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[170] Section 3D(d)(8) of the SEA, 15 U.S.C. 78c-4(d)(8).

[171] Section 5h(f)(9) of the CEA, 7 U.S.C. 7b-3(f)(9).

subpart J of part 37. Paragraph (a) of proposed Rule 825, like § 37.900, repeats the statutory language of the Core Principle. While § 37.901 provides that a SEF shall report swap transaction data pursuant to Parts 43 and 45 of the CFTC's rules, paragraph (b) of proposed Rule 825 would direct SBSEFs to report SBS transaction data in a manner specified in the SEC's Regulation SBSR.[172]

In addition, the Commission preliminarily believes that it would be appropriate to incorporate requirements for SBSEFs that are modelled on the requirements for SEFs in the CFTC's part 16. Unlike part 16, however, the Commission is *not* proposing to require SBSEFs to submit any information directly to the Commission.[173] Rather, the Commission is proposing in paragraph (c) of Rule 825 to require only the publication, on an SBSEF's website, of a "Daily Market Data Report." The data fields that the Commission is proposing to require for the Daily Market Data Report approximate, although they are not the same as, those required by part 16. The Commission preliminarily believes that the differences in the product markets (*i.e.*, SBS vs. swaps and futures products) necessitate certain adaptations in the data fields so as to render the reports published by SBSEFs meaningful to SBS market participants and market observers.

Under proposed Rule 825(c)(1), the Daily Market Data Report for a business day would be required to contain the following information for each tenor of each SBS traded on that SBSEF during that business day:

(i) The trade count (including block trades but excluding error trades, correcting trades, and offsetting trades);

(ii) The total notional amount traded (including block trades but excluding error trades,

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172 Section 13(m)(1) of the SEA, 15 U.S.C. 78m(m)(1), authorizes the Commission to make SBS transaction, volume, and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery. The Commission has adopted rules relating to the reporting and public dissemination of SBS transaction and pricing data as Regulation SBSR. Rule 901(a)(1) of Regulation SBSR, 17 CFR 242.901(a)(1), imposes certain reporting duties on SBSEFs.

173 *Contra* § 16.00(a) (requiring a reporting market to submit clearing member reports to the CFTC for each business day).

correcting trades, and offsetting trades[174]);

(iii) The number of block trades;

(iv) The total notional amount of block trades;

(v) The opening and closing price;

(vi) The price that is used for settlement purposes, if different from the closing price; and

(vii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the SBSEF reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

Paragraph (c)(2) of proposed Rule 825 would require an SBSEF to provide certain explanatory information regarding data presented on the Daily Market Data Report:

(i) The method used by the SBSEF in determining nominal prices and settlement prices; and

(ii) If discretion is used by the SBSEF in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the SBSEF and a description of the manner in which that discretion may be employed. Discretionary authority would have to be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

Paragraph (c)(3) of proposed Rule 825 would set out various requirements regarding the form and manner by which an SBSEF makes available its Daily Market Data Report. Paragraph (c)(3)(i) would require the SBSEF to post on its website its Daily Market Data Report in a downloadable and machine-readable format using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website. This proposed

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174 Each of these terms is defined in proposed Rule 802 and also used in proposed Rule 815.

requirement is similar to existing Commission requirements for broker-dealer reports on order routing and execution[175] and is designed to allow the Daily Market Data Report to be automatically recognized and processed by a variety of software applications, thus making it immediately available for users to search, aggregate, compare, and analyze.[176] This should enable SBS market participants and other market observers to obtain timely and consistent information on price, trading volume, and other SBSEF trading data in a manner that would facilitate search capabilities, and statistical and comparative analyses across SBSEFs and date ranges. In addition, requiring SBSEFs to use a PDF renderer as specified by the Commission would provide a corresponding human-readable version of the machine-readable data, allowing end users without access to analytical software to read the disclosed information.

Paragraph (c)(3)(ii) of proposed Rule 825 would require the SBSEF to make available its Daily Market Data Report without fees or other charges. Paragraph (c)(3)(iii) would prohibit the SBSEF from imposing any encumbrances on access or usage restrictions with respect to the Daily Market Data Report. Paragraph (c)(3)(iv) would prohibit the SBSEF from requiring a user to agree to any terms before being allowed to view or download the Daily Market Data Report, such as by waiving any requirements of proposed Rule 825(c)(3). Paragraph (c)(3)(iv) would further provide that any such waiver agreed to by a user would be null and void.[177] The Commission preliminarily believes that proposed Rule 825(c)(3) could be subverted if an SBSEF

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175 *See* 17 CFR 242.606.

176 XML (eXtensible Markup Language) is an open standard that defines, or "tags," data using standard definitions. The tags establish a consistent structure of identity and context, which allows for automatic recognition and processing by software applications.

177 The presence of any such waiver requirements on a click-through screen could chill use of the Daily Market Data Report, because the user would be compelled to agree to the waiver even to view the report. The Commission recognizes that individual users may not have the time or the incentive to contest the appropriateness of any such waiver provisions in order to secure access. Proposed Rule 825(c)(3)(iv) is designed to assure such users that, even if an SBSEF were to insist on the waiver click-through as a condition of access, users would not in fact be sacrificing their ability to use the data free of charges and usage restrictions because the waiver would be null and void.

could, for example, require that users—as a condition to viewing or downloading the Daily Market Data Report—waive any of the protections afforded under proposed Rule 825(c)(3).

Proposed Rule 825(c)(3) is designed to promote wide use of the SBS trading information contained in the Daily Market Data Report by prohibiting an SBSEF from imposing any financial, legal, or operational burdens on that use. The approach taken in proposed Rule 825(c)(3) is similar to the approach taken by the Commission in Regulation SBSR, which uses the term "widely accessible"[178] to prohibit registered SDRs from charging fees for or imposing usage restrictions on the SBS transaction data that they are required to publicly disseminate under Regulation SBSR.[179] When adopting the definition of "widely accessible," the Commission noted that a registered SDR has a monopoly position over the SBS transaction information that it publicly disseminates and stated that "there would be no other source from which the user could freely obtain this transaction information."[180] The Commission preliminarily believes that a registered SBSEF is similarly situated, because it is the sole source of information about SBS trading activity on its market. The Commission also stated that the prohibition on usage restrictions encompasses an SDR-imposed restriction on bulk redistribution by third parties of the regulatorily mandated transaction data that the registered SDR publicly disseminates.[181] For the same reasons, the proposed prohibition against an SBSEF imposing any usage restrictions on its Daily Market Data Report necessarily would encompass a prohibition on

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178 *See* Rule 900(tt) of Regulation SBSR, 17 CFR 242.900(tt) (defining "widely accessible").

179 *See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, SEA Release No. 78321 (July 14, 2016), 81 FR 53546, 53586-89 (August 12, 2016) ("Regulation SBSR Adopting Release II").

180 *Id.* at 53587.

181 *Id.* (stating that: "The Commission continues to believe that allowing unencumbered redistribution best serves the policy goals of wide availability of the data and minimization of information asymmetries in the [SBS] market. Because the Commission is prohibiting registered SDRs from imposing a restriction on bulk redistribution, third parties . . . will be able to take in the full data set and scrub, reconfigure, aggregate, analyze, repurpose, or otherwise add value to those data, and potentially sell that value-added product to others").

bulk redistribution of the Daily Market Data Report or any information contained therein. The Commission seeks to encourage market observers to access the Daily Market Data Report and scrub, reconfigure, aggregate, analyze, repurpose, or otherwise add value to the information contained in the report as they see fit.

Paragraph (c)(4) of proposed Rule 825 would require the SBSEF to publish the Daily Market Data Report on its website no later than the SBSEF's commencement of trading on the next business day after the day to which the information pertains. Proposed Rule 825(c)(4) is designed to require an SBSEF to provide its market data in a timely fashion so that it can be assessed and utilized by the next business day. Finally, paragraph (c)(5) would require the SBSEF to keep each Daily Market Data Report available on its website in the same location as all other Daily Market Data Reports for no less than one year after the date of first publication. Proposed Rule 825(c)(5) is designed to allow market observers to consult a reasonable number of previous reports on the SBSEF's website; the reports would be of less utility if an SBSEF could take down reports shortly after they are posted.

The Commission seeks comment on the following:

133. Do you agree in general with the Commission's approach for implementing SEA Core Principle 8? Why or why not?

134. Do you agree with the adaptions that the Commission is proposing to the CFTC's part 16 for inclusion in proposed Rule 825(c)? In particular, do you concur with the Commission's proposal to require only the Daily Market Data Report (to be published on the SBSEF's website) and not to require any daily reports to the Commission? Why or why not? If not, what market data do you believe should be reported directly to the Commission, and why?

135. Do you agree with the fields proposed by the Commission for the Daily Market Data Report in paragraphs (c)(1) and (2) of proposed Rule 825? If not, which fields do you believe are not appropriate, and why?

136. Do you believe that any of the fields should be defined differently or more precisely? If so, please explain.

137. Do you believe that the Commission should require additional fields? If so, what fields and why?

138. Do you agree with the proposed requirement in Rule 825(c)(3) that the Daily Market Data Report should be available free of charge and without usage restrictions or encumbrances? Why or why not? Are there any clarifications that you would recommend to help promote free and unencumbered access to and use of the Daily Market Data Report and any information contained therein? If so, please discuss.

139. Do you agree with the proposed requirement that the Daily Market Data Report should be made available in a downloadable and machine-readable format using the most recent version of the associated XML schema and PDF renderer as published on the Commission's website? Why or why not? Is there some other format that the Commission should require? If so, what format and why?

140. Do you agree with the proposed requirement in Rule 825(c)(4) that an SBSEF must publish the Daily Market Data Report on its website no later than the SBSEF's commencement of trading on the next business day after the day to which the information pertains? Why or why not? What is the current practice for the approximate time of day at which CFTC reporting markets make available their daily market data?

141. Do you agree with the proposed requirement in Rule 825(c)(5) that an SBSEF keep each Daily Market Data Report available on its website in the same location as all other Daily Market Data Reports for no less than one year after the date of first publication? Why or why not? Do you believe that a longer or shorter period would be appropriate? If so, please explain.

I. Rule 826—Core Principle 9 – Recordkeeping and reporting

SEA Core Principle 9[182] sets forth recordkeeping and reporting obligations for SBSEFs. Core Principle 9 requires an SBSEF to maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years. The Core Principle further requires an SBSEF to report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform its duties. Finally, under Core Principle 9, the Commission must adopt data collection and reporting requirements for SBSEFs that are comparable to requirements for clearing agencies and SBS data repositories.[183] CEA Core Principle 10 for SEFs, although it includes an additional clause not present in the equivalent SEA Core Principle 9,[184] is substantively identical.

The CFTC implemented Core Principle 10 for SEFs in subpart K of part 37. Section 37.1000 of subpart K repeats the statutory language of the Core Principle. Section 37.1001 requires a SEF to maintain records of all activities relating to the business of the facility, in a form and manner acceptable to the CFTC, for a period of at least five years, and that a SEF shall maintain such records, including a complete audit trail for all swaps executed on or subject to the rules of the SEF, investigatory files, and disciplinary files. Section 37.1001 does not itself set forth detailed record retention requirements. Instead, § 37.1001 directs SEFs to maintain the required records in accordance with § 1.31 and part 45 of the CFTC's rules.

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182 Section 3D(d)(9) of the SEA, 15 U.S.C. 78c-4(d)(9).

183 As discussed below in this section, the Commission is proposing Rule 826 to require an SBSEF to maintain records of all activities relating to the business of the SBSEF for a period of not less than five years. Similarly, Rule 17a-1 under the SEA, 17 CFR 240.17a-1, requires a clearing agency to keep and preserve one copy of all documents made or received in the course of its business and conduct of its self-regulatory activities for a period of not less than five years. In addition, Rule 13n-7(b) under the SEA, 17 CFT 240.13n-7(b), requires an SBS data repository to keep and preserve a copy of all documents made or received by it in the course of its business for at least five years.

184 CEA Core Principle 10 includes a clause stating that a SEF shall keep any records relating to certain swaps open to inspection and examination by the SEC. *See* 7 U.S.C. 7b-3(f)(10)(A)(iii).

Section 1.31 imposes on "records entities" (which term includes SEFs) various requirements relating to record retention and production. Section 1.31(a) sets out definitions of terms used throughout § 1.31. Section 1.31(b) sets out the duration of retention for different types of records. In particular, a records entity must keep regulatory records of any swap from the date that the regulatory record was created until at least five years after the termination, maturity, expiration, transfer, assignment, or novation of such swap. Section 1.31(c) sets out the required form and manner of retention. Section 1.31(d) provides that a records entity must, at its own expense, produce or make regulatory records accessible for inspection to CFTC staff or to the U.S. Department of Justice, and includes other details regarding production requests.

Section 45.2 imposes various recordkeeping, retention, and retrieval requirements applicable to SEFs (among others) to support trade reporting. Section 45.2(a), among other things, requires a SEF to keep all records required by part 37. Section 45.2(c) sets out a record retention requirement.[185] Section 45.2(d) imposes requirements on the form of retention. § 45.2(e) imposes requirements on record retrievability. Section 45.2(h)[186] imposes requirements for record inspection; in particular, all records required to be kept by § 45.2 shall be open to inspection upon request by any representative of the CFTC, the U.S. Department of Justice, the SEC, or by any representative of a prudential regulatory as authorized by the CFTC.

To implement SEA Core Principle 9, the Commission is proposing Rule 826, which would roughly approximate §§ 1.31 and 45.2 while also drawing on concepts from the books and records requirements applicable to brokers, SEC-registered SROs, and other SEC-registered

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185 *See* 7 CFR 45.2(c) ("All records required to be kept pursuant to this section shall be retained with respect to each swap throughout the life of the swap and for a period of at least five years following the final termination of the swap"). Section 45.2(b) imposes duties on certain swap counterparties and is not germane to SEFs; therefore, the Commission is not considering adapting it into proposed Rule 826.

186 Section 45.2(f) and (g) are marked as "reserved."

entities.[187]

Paragraph (a) of proposed Rule 826 repeats the statutory text of the Core Principle. Paragraph (b) would require an SBSEF to keep full, complete, and systematic records,[188] together with all pertinent data and memoranda, of all activities relating to its business with respect to SBS. Under paragraph (b), such records would be required to include, without limitation, the audit trail information required under proposed Rule 819(f) and all other records that an SBSEF is required to create or obtain under Regulation SE.

Paragraph (c) of proposed Rule 826 would require an SBSEF to keep records of any SBS from the date of execution until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of not less than five years, the first two years in an easily accessible place, after such date. Paragraph (c) also would require an SBSEF to keep each record (other than a record of an SBS noted in the previous sentence) for a period of not less than five years, the first two years in an easily accessible place, from the date on which the record was created. The proposed five-year retention requirements are consistent with section 3D(d) of the SEA[189] and are modelled on the requirements for SEFs in §§ 1.31 and 45.2. The proposed requirement that the records be kept "in an easily accessible place" for the first two years derives from an analogous requirement in the Commission's principal books and records

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187 *See infra* section XIII (discussing in the context of proposed new Rule 15a-12 that an SBSEF registered with the Commission is also a registered broker and, as such, is subject to the SEA's recordkeeping and reporting requirements applicable to brokers).

188 While § 1.31(a) defines the terms "regulatory records" and "electronic regulatory records" and utilizes them throughout § 1.31, the Commission is utilizing instead the term "records," which is defined in section 3(a)(37) of the SEA, 15 U.S.C. 78c(a)(37). In doing so, the Commission seeks to avoid any ambiguities or inconsistencies that could arise by using variants of a term that is defined in the Commission's governing statute. The Commission is including a definition of "records" in proposed Rule 802 that cross-references section 3(a)(37) of the SEA.

189 *See* 15 U.S.C. 78c-4(d)(9)(A)(i) (requiring an SBSEF to "maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission, *for a period of five years*") (emphasis added).

rule for exchange members, brokers, and dealers.[190]

Paragraph (d)(1) of proposed Rule 826 would require an SBSEF to retain all records in a form and manner that ensures the authenticity and reliability of such records in accordance with the Act and the Commission's rules thereunder. Paragraph (d)(2) would require an SBSEF, upon request of any representative of the Commission, to promptly[191] furnish to the representative legible, true, complete, and current copies of any records required to be kept and preserved under Rule 826. Paragraph (d)(3) would provide that an electronic record shall be retained in a form and manner that allows for prompt production at the request of any representative of the Commission. Paragraph (d)(3) also would include provisions modelled on § 1.31(c)(2) requiring an SBSEF that maintains electronic records to establish appropriate systems and controls that ensure the authenticity and reliability of electronic records, including, without limitation:

(A) Systems that maintain the security, signature, and data as necessary to ensure the authenticity of the information contained in electronic records and to monitor compliance with the SEA and the Commission's rules thereunder;

(B) Systems that ensure that the SBSEF is able to produce electronic records in accordance with Rule 826, and ensure the availability of such electronic records in the event of an emergency or other disruption of the SBSEF's electronic record retention systems; and

(C) The creation and maintenance of an up-to-date inventory that identifies and describes each system that maintains information necessary for accessing or producing electronic records.

Sections 1.31 and 43.2 include provisions that govern inspection and production of records. While the Commission believes that its rules for SBSEFs also should address those topics, the Commission does not believe that adapting a CFTC rule would be the most

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190 *See* Rule 17a-4(b) under the SEA, 17 CFR 240.17a-4(b).

191 In this context, "prompt" or "promptly" means making reasonable efforts to produce records that are requested by the staff during an examination without delay. The Commission believes that, in many cases, an SBSEF could, and therefore would be required to, furnish records immediately or within a few hours of a request. An SBSEF should produce records within 24 hours unless there are unusual circumstances.

appropriate way to do so. Paragraph (e) of proposed Rule 826 would provide instead that, because a registered SBSEF is also a registered broker, all records required to be kept by an SBSEF pursuant to Rule 826 would be subject to examination by any representative of the Commission pursuant to section 17(b) of the SEA. As noted above, section 17(b) is the source of the Commission's examination authority for registered brokers (among other types of registered entities). Proposed Rule 826(e) is designed only to remind SBSEFs of this statutory authority and does not seek to limit or expand that authority using the Commission's powers over SBSEFs in section 3D of the SEA.

Proposed Rule 826 includes a paragraph (f) that is not modelled on any provision of § 1.31 or 43.2, but rather on § 1.37(c) of the CFTC's rules, which provides: "Each designated contract market and swap execution facility shall keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market or swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader." Proposed Rule 826(f) is modelled closely on § 1.37(c), except that it uses the term "non-U.S. member" rather than "foreign trader."[192]

The recordkeeping and reporting requirements proposed in Rule 826 are designed to be generally consistent with the requirements applicable to SEFs and with the Commission's requirements under section 17(a) of the SEA. The Commission preliminarily believes that proposed Rule 826 would therefore achieve similar regulatory benefits as the CFTC rules applicable to SEFs while imposing only marginal costs, since dually registered SEF/SBSEFs are

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[192] Since a "foreign trader" in § 1.37(c) is executing transactions on the SEF, it must be a member of the SEF. Because the term "member" is used elsewhere in the CFTC rules pertaining to SEFs, the Commission is proposing to use the term "member" throughout Regulation SE and would define "member" in Rule 802. The term "non-U.S. member," also found in proposed Rule 802, would be defined as "a member of a security-based swap execution facility that is not a U.S. person."

familiar with the CFTC requirements and have invested in systems, policies, and procedures to comply with them. The Commission intends that the same systems, policies, and procedures could be used to comply with parallel SEC requirements.

The Commission seeks comment on the following:

142. Do you agree in general with the Commission's approach to implementing SEA Core Principle 9? Why or why not?

143. Do you believe that the Commission should subject registered SBSEFs to section 17(a) of the SEA and the Commission's rules thereunder? Why or why not? If not, are there nevertheless specific provisions of the Commission's rules under section 17(a) that you believe should nevertheless be incorporated into Rule 826 using the Commission's statutory authority over SBSEFs in section 3D of the SEA? If so, which provision(s) and why?

144. Are there any provisions of proposed Rule 826 that are significantly different from, or even in conflict with, any recordkeeping requirements imposed on SEFs by any CFTC rule? If so, please discuss and suggest how you would resolve any such conflict.

145. Are there any provisions of § 1.31 or § 45.2 that the Commission has *not* proposed to incorporate into proposed Rule 826 that you believe should be applied to SBSEFs? If so, which provision(s) and why?

146. Are there any recordkeeping provisions elsewhere in the CFTC rules that the Commission has *not* proposed to incorporate into proposed Rule 826 that you believe should be applied to SBSEFs? If so, which provision(s) and why?

147. Do you believe that the Commission should adapt § 1.37 into proposed Rule 826(f)? Why or why not? Do you believe that the Commission's proposed term "non-U.S. member" used in Rule 826(f) is an appropriate substitute for "foreign trader" used in § 1.37? Why or why not?

J. Rule 827—Core Principle 10—Antitrust considerations

SEA Core Principle 10[193] provides that, unless necessary or appropriate to achieve the purposes of the SEA, an SBSEF shall not: (1) adopt any rules or take any actions that result in any unreasonable restraint of trade, or (2) impose any material anticompetitive burden on trading or clearing. CEA Core Principle 11[194] is substantively identical.

The CFTC implemented CEA Core Principle 11 in subpart L of part 37. Section 37.1100 of subpart L repeats the statutory text of Core Principle 11. Section 37.1101 provides that a SEF "may refer" to the guidance in appendix B to part 37 to demonstrate compliance with Core Principle 11. The guidance states that an entity seeking registration as a SEF may request that the CFTC consider, under the provisions of section 15(b) of the CEA,[195] any of the entity's rules—including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading—at the time of registration or thereafter. The guidance further states that the CFTC intends to apply CEA section 15(b) to its consideration of issues under CEA Core Principle 11 in a manner consistent with that previously applied to contract markets.

Proposed Rule 827 would implement SEA Core Principle 10 and, like § 37.1100, reiterates the statutory text of the Core Principle. The Commission is not adapting the guidance from appendix B pertaining to CEA Core Principle 11 into a proposed rule.[196]

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193 Section 3D(d)(10) of the SEA, 15 U.S.C. 78c-4(d)(10).

194 Section 5h(f)(11) of the CEA, 7 U.S.C. 7b-3(f)(11).

195 7 U.S.C. 19(b) (providing that the CFTC shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter of the CEA, as well as the policies and purposes of this chapter of the CEA, in issuing any order or adopting any CFTC rule or regulation (including any exemption), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association).

196 The guidance in appendix B of part 37 pertaining to CEA Core Principle 10 for SEFs states: "An entity seeking registration as a [SEF] may request that the [CFTC] consider under the provisions of section 15(b) of the [CEA], any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or

The Commission seeks comment on the following:

148. Do you agree with how the Commission is proposing to implement SEA Core Principle 10? Why or why not?

K. Rule 828—Core Principle 11—Conflicts of interest

SEA Core Principle 11[197] requires an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and to establish a process for resolving the conflicts of interest. CEA Core Principle 12[198] is substantively identical.

The CFTC implemented CEA Core Principle 12 in subpart M of part 37. Section 37.1200 of subpart M repeats the statutory text of Core Principle 12. There are no other provisions in subpart M, nor is there any guidance or acceptable practices associated with Core Principle 12 in appendix B to part 37.[199]

Proposed Rule 828 would implement SEA Core Principle 11. Paragraph (a) of proposed

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conditions of products listed for trading, at the time of registration or thereafter. The [CFTC] intends to apply section 15(b) of the [CEA] to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets." Section 15(b) of the CEA, 7 U.S.C. 19(b) states: "The [CFTC] shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any [CFTC] rule or regulation (including any exemption under section 6(c) or 6c(b) of this title), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 21 of this title." The Commission does not believe that it is appropriate to adapt this guidance into a rule that applies to SBSEFs because the SEA (which applies to SBSEFs) does not have a provision that is closely comparable to section 15(b) of the CEA (which applies to SEFs). Furthermore, the guidance pertaining to CEA Core Principle 10 for SEFs sets out only a general approach to how the CFTC addresses antitrust issues applying to SEFs and does not include provisions that can readily be adapted into rule text.

197 Section 3D(d)(11) of the SEA, 15 U.S.C. 78c-4(d)(11).

198 7 U.S.C. 7b-3(f)(12).

199 The CFTC has proposed additional rules regarding the mitigation of conflicts of interest but has not adopted any such rules. *See* CFTC, *Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest*, 75 FR 63732 (October 18, 2010); CFTC, *Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest*, 76 FR 722 (January 6, 2011).

Rule 828, like § 37.1200, repeats the statutory text of the Core Principle. Paragraph (b) would direct an SBSEF to comply with the requirements of proposed Rule 834, which, as discussed below, would implement section 765 of the Dodd-Frank Act for both SBSEFs and SBS exchanges.[200]

The Commission seeks comment on the following:

149. Do you agree with how the Commission is proposing to implement SEA Core Principle 11 in Rule 828? Why or why not?

150. The Commission is proposing to subject SBS exchanges and SBSEFs to the same conflicts-of-interest requirements, in Rule 834. Therefore, proposed Rule 828 cross-references proposed Rule 834 rather than enumerating conflicts-of-interest requirements for SBSEFs separate from those for SBS exchanges. Do you believe that this is an appropriate way to structure the proposed rules? Why or why not? Are there any conflicts-of-interest requirements that you believe should be applied to SBSEFs *but not* to SBS exchanges? If so, what requirement(s) and why?

L. Rule 829—Core Principle 12—Financial resources

SEA Core Principle 12[201] has a paragraph (A) that requires an SBSEF to have adequate financial, operational, and managerial resources to discharge each responsibility of the SBSEF, as determined by the Commission. Paragraph (B) of SEA Core Principle 12 provides that the financial resources of an SBSEF shall be considered to be adequate if the value of the financial resources: (i) enables the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and (ii) exceeds the amount that would enable the SBSEF to cover operating costs of the SBSEF for a one-year

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200 *See infra* section X.

201 Section 3D(d)(12) of the SEA, 15 U.S.C. 78c-4(d)(12).

period, as calculated on a rolling basis. CEA Core Principle 13 for SEFs[202] is substantively identical with respect to paragraphs (A) and (B)(ii) of SEA Core Principle 12, but lacks an equivalent to paragraph (B)(i) of SEA Core Principle 12.

The CFTC implemented CEA Core Principle 13 for SEFs in subpart N of part 37. Section 37.1300 of subpart N repeats the statutory text of CEA Core Principle 13. Section 37.1301 provides that financial resources shall be considered adequate if their value exceeds the total amount that would enable a SEF to cover its projected operating costs necessary for the SEF to comply with section 5h of the CEA and applicable CFTC regulations for a one-year period, calculated on a rolling basis. Section 37.1302 describes the types of financial resources that may satisfy the requirements of § 37.1301. Section 37.1303 provides that the financial resources allocated by the SEF to meet the financial resources requirements shall include unencumbered, liquid financial assets equal to at least the greater of three months of projected operating costs or the projected costs needed to wind down the SEF's operations. If a SEF lacks sufficient unencumbered, liquid financial assets, it may satisfy this obligation by obtaining a committed line of credit in an amount at least equal to the deficiency. Section 37.1304 requires a SEF, each fiscal quarter, to make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under this section. It further provides that the SEF shall have reasonable discretion in determining the methodology used to compute such amounts, provided that the CFTC may review the methodology and require changes as appropriate. Section 37.1305 provides that, no less than each fiscal quarter, a SEF must compute the current market value of each financial resource used to meet its obligations under §§ 37.1301 and 37.1303 and that reductions in value to reflect market and credit risk ("haircuts") shall be applied as appropriate.

Section 37.1306 addresses reporting to the CFTC. Paragraph (a) of § 37.1306 provides

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[202] Section 5h(f)(13) of the CEA, 7 U.S.C. 7b-3(f)(13).

that, each fiscal quarter, or at any time upon CFTC request, a SEF shall report the amount of financial resources necessary to meet the requirements of §§ 37.1301 and 37.1303 and the market value of each financial resource available, and provide the CFTC with financial statements, including the balance sheet, income statement, and statement of cash flows of the SEF, prepared in accordance with U.S. generally acceptable accounting principles ("GAAP"). Paragraph (a) further provides that the financial statements of a SEF that is not domiciled in the United States and is not otherwise required to prepare financial statements in accordance with U.S. GAAP may instead prepare its financial statements in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board or a comparable international standard as the CFTC may otherwise accept in its discretion. Paragraph (b) provides that the calculations required under paragraph (a) shall be made as of the last business day of the SEF's fiscal quarter. Paragraph (c) requires the SEF to provide the CFTC with sufficient documentation to explain its methodology for computing its financial requirements under §§ 37.1301 and 37.1303. Further, paragraph (c) of § 37.1306 requires that the documentation must allow the CFTC to reliably determine, without additional requests for information, that the SEF has made reasonable calculations pursuant to § 37.1304. Paragraph (d) of § 37.1306 provides that these reports and supporting documentation shall be filed within 40 calendar days of the end of the SEF's first three fiscal quarters, and within 90 calendar days of the end of the SEF's fourth fiscal quarter, or at such later time as the CFTC may permit. Paragraph (e) requires a SEF to provide notice to the CFTC no later than 48 hours after it knows or reasonably should know that it no longer meets its obligations under §§ 37.1301 and 37.1303.

Proposed Rule 829 would implement SEA Core Principle 12 and is based closely on subpart N of part 37.[203] Because this Core Principle relates to the business operations of the

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[203] However, paragraph (a)(2)(i) of proposed Rule 829 would include the additional language in SEA Core Principle 12 that is not present in CEA Core Principle 13. As noted above, this language relates to an SBSEF meeting financial obligations to members

trading venue, very few modifications are necessary to adapt the CFTC rule to apply to SBSEFs. Therefore, proposed Rule 829 is closely modelled on the rules in subpart N.

However, one slight difference in the rule text stems from the Commission's global approach to adapting the CFTC's guidance and acceptable practices from appendix B to part 37 into formal rules, where appropriate. Although the Commission considered proposing a separate rule that adapts the guidance in appendix B pertaining to CEA Core Principle 13, the Commission is proposing instead to weave the concepts and some of the specific language from the CFTC guidance relating to financial resources into paragraph (e) of proposed Rule 829, as the guidance relates only to that portion of the proposed rule. Proposed Rule 829(e) begins by incorporating the provisions of § 37.1304 regarding computation of costs to meet the financial resources requirement. Proposed Rule 829(e) then appends language based on the CFTC guidance concerning the following topics, all of which relate to computation of costs: (i) reasonableness of calculating projected operating costs and what may be excluded from such calculation; (ii) proration of expenses; and (iii) allocation of expenses among affiliates.

Another non-substantive difference between proposed Rule 829 and subpart N of part 37 is the requirement in proposed Rule 829(g)(6) for an SBSEF to submit reports and documentation to the Commission using the EDGAR system as an Interactive Data File, in accordance with Rule 405 of Regulation S-T. The Commission is proposing this requirement here and in other locations to implement the Inline XBRL and EDGAR electronic filing requirements for various documents that would have to be provided to the Commission under proposed Regulation SE.

The Commission preliminarily believes that the CFTC has implemented its equivalent Core Principle in an appropriate way, and that closely harmonizing with the CFTC rule would provide comparable regulatory benefits while imposing only marginal additional costs. Given

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and participants notwithstanding a default by the member or participant creating the largest financial exposure for the SBSEF in extreme but plausible market conditions.

that most if not all entities that will seek to register with the SEC as SBSEFs are already registered with the CFTC as SEFs, these entities already have in place the processes and controls to designed to comply with subpart N. Furthermore, the Commission recognizes that the swap business of a dually registered SEF/SBSEF is likely to be much larger than its SBS business. Therefore, the greatest risk to a dually registered entity is likely to arise from the swap business rather than the SBS business, so it would be logical for the SEC to defer to the CFTC's approach for ensuring that SEFs have adequate financial resources. Different or additive requirements imposed by the SEC could increase costs for SEF/SBSEFs while generating benefits that are marginal at best. The Commission does not observe any differences in the SBS market relative to the swap market that warrant imposing different or additive financial resource requirements on SBSEFs.

The Commission seeks comment on the following:

151. Do you agree in general with the Commission's approach to implementing SEA Core Principle 12? Why or why not?

152. In particular, do you agree with how the Commission is proposing to adapt the language of subpart N of part 37 into proposed Rule 829? If not, how would you revise that language?

153. How does the anticipated size of the SBS trading business on dually registered SEF/SBSEFs relative to the size of swap trading business affect your view of the financial resource requirements that the SEC should impose on dually registered entities? Do you agree that there would be only marginal additional costs imposed on dually registered entities to provide the same financial information at the same times to both the SEC and CFTC (pursuant to proposed Rule 829 and subpart N, respectively)? Why or why not?

154. Are there provisions of subpart N that the SEC should *not* incorporate, even if you believe that the SEC should harmonize with the majority of subpart N? In other

words, are there areas where omitting a subpart N provision would reduce burdens on SBSEFs and/or their members without lessening any regulatory benefits? If so, please explain, with particular regard to the economic impacts and/or PRA burdens.

155. Should the Commission adopt different or additive financial resource requirements for SBSEFs, even if there are no analogous provisions in subpart N? If so, please explain, with particular regards to the economic impacts and/or PRA burdens. For example, do you believe that the SEC-specific provision *would impose* additional costs or burdens on SBSEFs and/or their members that are *nevertheless appropriate* in view of new and additional benefits? Or do you believe that the SEC-specific provision would be appropriate *because it would relieve costs or burdens* that are imposed on SEFs by subpart N that, in your view, are unnecessary or inappropriate for SBSEFs?

156. Do you agree with how the Commission is proposing to adapt the CFTC guidance pertaining to its equivalent Core Principle by converting it into formal rule text? Why or why not? Would adapting the CFTC guidance into the Commission's rules necessitate any changes in how financial resources are calculated?

M. Rule 830—Core Principle 13—System safeguards

Paragraph (A) of SEA Core Principle 13[204] provides that an SBSEF must establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that are reliable and secure and that have adequate scalable capacity. Paragraph (B) requires that an SBSEF also must establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations; and the fulfillment of the responsibilities and obligations of the SBSEF. Finally, paragraph (C) of SEA

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[204] Section 3D(d)(13)(A) of the SEA, 15 U.S.C. 78c-4(d)(13).

Core Principle 13 requires an SBSEF to periodically conduct tests to verify that the backup resources of the SBSEF are sufficient to ensure continued order processing and trade matching; price reporting; market surveillance; and maintenance of a comprehensive and accurate audit trail. CEA Core Principle 14[205] is substantively identical to SEA Core Principle 13.

Subpart O of part 37 is entitled "System Safeguards" and implements CEA Core Principle 14. Section 37.1400 of subpart O repeats the statutory text of the Core Principle. § 37.1401 sets forth detailed requirements for a SEF to comply with the Core Principle. Paragraph (a) of § 37.1401 requires a SEF's program of risk analysis and oversight to address enterprise risk management and governance, information security, business continuity-disaster recovery planning and resources, capacity and performance planning, systems operations, systems development and quality assurance, and physical security and operational controls. Paragraph (b) provides that, in addressing the categories of risk analysis and oversight required under paragraph (a), a SEF shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems. Paragraph (c) requires a SEF to maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities that satisfy several enumerated criteria. Paragraph (d) explains how a SEF that is not determined by the CFTC to be a critical financial market may satisfy its requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations.

Paragraph (e) of § 37.1401 requires a SEF to notify the CFTC promptly of all electronic trading halts and material system malfunctions; cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and activations of SEF's business continuity-disaster recovery plan. Paragraph (f) requires the

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[205] Section 5h(f)(14) of the CEA, 7 U.S.C. 7b-3(f)(14).

SEF to provide CFTC staff timely advance notice of all material planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and planned changes to the SEF's program of risk analysis and oversight. Paragraph (g) sets forth recordkeeping requirements related to the SEF's system safeguards. Paragraph (h) requires the SEF to conduct testing and review of its automated systems and business continuity-disaster recovery capabilities and provides several definitions for terms used in paragraph (h). Paragraph (h) also requires the SEF to conduct "vulnerability testing," "external penetration testing," "internal penetration testing," "controls testing," "security incident response plan testing," and "enterprise technology risk assessment" subject to various enumerated criteria.

Paragraph (i) of § 37.1401 provides that the SEF, to the extent practicable, shall coordinate its business continuity-disaster recovery plan with those of the market participants that it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the SEF's business continuity-disaster recovery plan. Paragraph (i) also requires the SEF to initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity; and to ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

Paragraph (j) of § 37.1401 provides that part 40 of the CFTC's rules shall govern the obligations of those registered entities that the CFTC has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Paragraph (k) sets forth criteria for the scope for all system safeguard testing and assessment required under the rule. Paragraph (*l*) requires that both the senior management and the board of directors of the SEF shall receive and review reports setting forth the results of the testing and assessment required by the rule. Paragraph (m) requires the SEF to identify and document the

vulnerabilities and deficiencies in its systems revealed by testing and assessment, conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, and remediate in a timely manner given the nature and magnitude of the associated risk.

Proposed Rule 830 is closely modelled on subpart O of part 37 of the CFTC's rules, except in one aspect. Subpart O includes language relating to "critical financial markets,"[206] which is a designation applied by the CFTC to certain of its registrants that would subject them to more stringent requirements, although the CFTC has not yet adopted any such requirements.[207] A similar concept in the SEC's rules is "SCI entity."[208] When adopting Regulation SCI, the Commission considered whether it should apply Regulation SCI to SBSEFs, among other entities, and determined not to do so.[209] Because SBSEFs are not SCI entities and the corresponding CFTC rule has not imposed additional requirements on critical financial markets, the Commission preliminarily believes that it is not necessary or appropriate to adapt into Rule 830 the language of subpart O applicable to critical financial markets.[210]

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206 *See* § 37.1401(c) (providing that SEFs determined by the CFTC to be critical financial markets are subject to more stringent requirements); § 37.1401(d); § 37.1401(j) (providing that part 40 governs the obligations of registered entities that the CFTC has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption).

207 The provisions in subpart O relating to "critical financial markets" reference § 40.9 of the CFTC's rules, which is marked as "Reserved."

208 *See* Rule 1000 of Regulation SCI (defining "SCI entity"). In November 2014, the Commission adopted Regulation Systems Compliance and Integrity ("SCI") to strengthen the technology infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and establish an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems. *See Regulation Systems Compliance and Integrity*, SEA Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014).

209 *See id.*, 79 FR at 72363-64 (reviewing comments received regarding the potential application of Regulation SCI to SBSEFs, among others).

210 The Commission also notes that, while subpart O frequently uses the term "market participant," proposed Rule 830 substitutes the term "member" in these places, since the rule pertains to market participants who are engaging as members of the SEF/SBSEF. *See supra* note 53.

The Commission preliminarily believes that subpart O is reasonably designed to promote SEF operational capability, and that the most appropriate way to implement SEA Core Principle 13 would be to closely harmonize with the CFTC's rules that implement the corresponding Core Principle. As with SEA Core Principle 12 (Financial resources), the Commission recognizes that the swap business of a dually registered SEF/SBSEF is likely to be much larger than its SBS business. Therefore, the greatest operational risk to a dually registered entity is likely to arise from the swap business rather than the SBS business, so it would be logical for the SEC to defer to the CFTC's approach for ensuring that SEFs have adequate system safeguards and business continuity protocols. Different or additive requirements imposed by the SEC could increase costs for SEF/SBSEFs while generating benefits that are marginal at best. The Commission does not observe any differences in the SBS market relative to the swap market that warrant imposing different or additive operational capability requirements on SBSEFs.

The Commission seeks comment on the following:

157. Do you agree in general with how the Commission is proposing to implement SEA Core Principle 13 in proposed Rule 830? Why or why not?

158. In particular, do you believe that close harmonization with subpart O of the CFTC's rules is appropriate? If not, is there another framework for system safeguards that would be more appropriate for SBSEFs? What would be the economic impact of the SEC adopting different or additive system safeguard requirements in the case of dually registered SEF/SBSEFs?

159. As noted above,[211] the Commission previously determined not to subject SBSEFs to Regulation SCI. Do you see any changes in the SBS market that should cause the Commission to revisit that decision?

160. Do you believe it is appropriate to omit from Rule 830 the provisions of subpart O

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[211] *See supra* note 209 and accompanying text.

relating to critical financial markets? Why or why not?

161. Are there provisions of subpart O that the SEC should *not* incorporate, even if the SEC opts to harmonize with most of subpart O? In other words, are there areas where omitting a subpart O provision would reduce burdens on SBSEFs and/or their members without lessening any regulatory benefits? If so, please explain, with particular regard to the economic impacts and/or PRA burdens.

162. Should the Commission adopt different or additive system safeguard requirements for SBSEFs, even if there is no analog to such provisions in subpart O? If so, please explain, with particular regards to the economic impacts and/or PRA burdens. For example, do you believe that the SEC-specific provision *would impose* additional costs or burdens on SBSEFs and/or their market participants that are *nevertheless appropriate* in view of new and additional benefits? Or do you believe that the SEC-specific provision would be appropriate *because it would relieve costs or burdens* that are imposed on SEFs by subpart O that, in your view, are unnecessary or inappropriate for SBSEFs?

N. Rule 831—Core Principle 14—Designation of chief compliance officer

SEA Core Principle 14[212] requires each registered SBSEF to designate a chief compliance officer ("CCO"), and requires the CCO to review the SBSEF's compliance with the Core Principles, resolve conflicts of interest, be responsible for establishing and administering policies and procedures required under the Core Principles, establish procedures for the remediation of noncompliance, prepare and sign an annual report that describes the SBSEF's compliance, certify that the report is accurate and complete, and submit the report to the Commission. CEA Core Principle 15 for SEFs[213] is substantively identical.

The CFTC implemented CEA Core Principle 15 in subpart P of part 37. Section 37.1500

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212 Section 3D(d)(14) of the SEA, 15 U.S.C. 78c-4(d)(14).

213 Section 5h(f)(15) of the CEA, 7 U.S.C. 7b-3(f)(15).

of subpart P repeats the statutory text of CEA Core Principle 15. Section 37.1501(a) sets forth definitions for the terms "board of directors" and "senior officer." Section 37.1501(b)(1) provides that the position of CCO shall carry with it the authority and resources to develop, in consultation with the board of directors or senior officer, and enforce the SEF's policies and procedures, and that the CCO shall have supervisory authority over all staff acting at the direction of the CCO. Section 37.1501(b)(2) through (4) include provisions relating to the qualifications of the CCO, appointment and removal of the CCO, and compensation of the CCO. Section 37.1501(b)(5) through (6) state that the CCO must meet with the SEF's board of directors or senior officer at least annually, and the CCO must provide any information regarding the SEF's self-regulatory program as requested by the board of directors or the senior officer.

Section 37.1501(c) sets out the duties of the CCO, including overseeing and reviewing the SEF's compliance with the Core Principles; taking reasonable steps, in consultation with the board of directors or senior officer, to resolve any material conflicts of interest; establishing and administering written policies and procedures reasonably designed to prevent violations of the CEA and the rules of the CFTC; taking reasonable steps to ensure compliance with the CEA and CFTC rules; establishing procedures reasonably designed to handle, respond, remediate, retest, and resolve noncompliance issues identified by the CCO; establishing and administering a compliance manual and a written code of ethics for the SEF; supervising the self-regulatory program of the SEF with respect to trade practice surveillance, market surveillance, real-time market monitoring, compliance with audit trail requirements, enforcement and disciplinary proceedings, audits, examinations, and other regulatory responsibilities; and supervising the effectiveness and sufficiency of any regulatory services provided to the SEF by a regulatory service provider.

Section 37.1501(d) requires the CCO to prepare and sign an annual compliance report that covers the prior fiscal year. The report must contain, at a minimum: a description and self-assessment of the effectiveness of the SEF's written policies and procedures, code of ethics, and

conflict of interest policies; any material changes made to compliance policies and procedures during the coverage period for the report and any areas of improvement or recommended changes to the compliance program; a description of the financial, managerial, and operational resources set aside for compliance with the CEA and applicable CFTC regulations; any material non-compliance matters identified and an explanation of the corresponding action taken to resolve them; and CCO certification that the annual compliance report is accurate and complete.

Section 37.1501(e) requires the CCO to provide the annual compliance report to the SEF's board of directors or a senior officer for review before submitting it to the CFTC, and the board or the senior office may not require the CCO to make any changes to the report. Section 37.1501(e) further provides that the annual compliance report shall be submitted electronically to the CFTC not later than 90 calendar days after the end of the SEF's fiscal year and concurrently with the fourth-quarter financial report pursuant to § 37.1306. Section 37.1501(e) also addresses amendments to and requests for extensions for the annual compliance report.

Section 37.1501(f) requires the SEF to maintain all records demonstrating compliance with the duties of the CCO and the preparation and submission of annual compliance report, consistent with §§ 37.1000 and 37.1001. Finally, appendix B to part 37 includes "acceptable practices" regarding the qualifications of a CCO and the SEF's discretion in choosing one, as well as the need to be vigilant regarding conflicts of interest when appointing a CCO.

Proposed Rule 831 would implement SEA Core Principle 14 and is closely modelled on subpart P of part 37, with two minor substantive exceptions.[214] The first relates to disqualification of the CCO. Section 37.1501(b)(2)(ii) states: "No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the [CEA] may serve as a chief compliance

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[214] In addition, the requirement in proposed Rule 831 that the CCO's annual compliance report be submitted electronically to the Commission, based on § 37.1501(e)(2), includes an added clause to provide that the submission must be made using the EDGAR system and must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T, in conformance with other rules in Regulation SE requiring electronic submissions. *See* proposed Rule 831(j)(2); *supra* note 55.

officer." The Commission preliminarily believes that SBSEFs, like SEFs, should be subject to a rule setting out criteria for disqualification of the CCO. However, the SEC cannot cross-reference provisions of the CEA, since the CEA does not apply to SBSEFs. The Commission consulted Sections 8a(2) and 8a(3) of the CEA,[215] but believes they are not easily adaptable into a rule applicable to SBSEFs and their CCOs. The Commission is proposing instead, in Rule 831(c)(2), that no individual that would be disqualified from serving on an SBSEF's governing board[216] or committees pursuant to the criteria set forth in § 242.819(i) may serve as the CCO. As noted above,[217] the disqualification criteria in proposed Rule 819(i) are adapted from § 1.63 of the CFTC's rules. Second, the Commission has adapted the acceptable practices pertaining to CEA Core Principle 15 into paragraph (c) of proposed Rule 831.[218]

The Commission preliminarily believes that the CFTC has implemented CEA Core Principle 14 for SEFs in an appropriate way, and that closely harmonizing with subpart P of part 37 would yield comparable regulatory benefits while imposing only marginal additional costs. The Commission recognizes that the swap business of a dually registered SEF/SBSEF is likely to be much larger than its SBS business. Therefore, the greatest compliance risks to a dually registered entity are likely to arise from the swap business rather than the SBS business, so it would be logical for the SEC to harmonize with the CFTC's rules regarding the CCO. There are strong economic incentives for a dually registered entity to appoint the same individual to serve as the CCO for both the swap and SBS businesses, and for the CCO to carry out their functions

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215 7 U.S.C. 12a(2) and 12a(3).

216 The Commission notes that subpart P uses the term "board of directors," while the Commission is proposing to use the term "governing board" instead throughout proposed Regulation SE. *See supra* note 29.

217 *See supra* section VIII(B)(2)(b).

218 Proposed Rule 831(c) provides that, in determining whether the background and skills of a potential CCO are appropriate for fulfilling the responsibilities of the role of the CCO, an SBSEF has the discretion to base its determination on the totality of the qualifications of the potential CCO, including, but not limited to, compliance experience, related career experience, training, potential conflicts of interest, and any other relevant factors.

under a similar set of rules. Different or additive requirements imposed by the SEC could increase costs for SEF/SBSEFs while generating benefits that are marginal at best. The Commission does not observe any differences in the SBS market relative to the swap market that warrant imposing different or additive CCO requirements on SBSEFs relating to the CCO.

The Commission seeks comment on the following:

163. Do you agree in general with how the Commission is proposing to implement SEA Core Principle 14? Why or why not?

164. In particular, do you agree that close harmonization with subpart P is appropriate? Are there provisions of subpart P that the SEC should *not* incorporate, even if the SEC opts to harmonize with most of subpart P? In other words, are there areas where omitting a subpart P provision would reduce burdens on SBSEFs and/or their members without lessening any regulatory benefits? If so, please explain, with particular regard to the economic impacts and/or PRA burdens.

165. Should the Commission adopt different or additive CCO requirements for SBSEFs, even if there is no analog to such provisions in subpart P? If so, please explain, with particular regards to the economic impacts and/or PRA burdens. For example, do you believe that the SEC-specific provision *would impose* additional costs or burdens on SBSEFs and/or their members that are *nevertheless appropriate* in view of new and additional benefits? Or do you believe that the SEC-specific provision would be appropriate *because it would relieve costs or burdens* that are imposed on SEFs by subpart P that, in your view, are unnecessary or inappropriate for SBSEFs?

166. Do you agree with how the Commission is proposing to adapt the acceptable practices from appendix B relating to CEA Core Principle 15 into proposed Rule 831(c)? Why or why not?

167. Do you agree with proposed Rule 831(c)(2) using a cross-reference to proposed

Rule 819(i) to incorporate disqualification criteria for the CCO? Why or why not? If not, what alternate standard would you suggest for the disqualification criteria, and why?

IX. Cross-Border Rules

A. Rule 832—Cross-border mandatory trade execution

As noted above,[219] section 3C(h) of the SEA provides that an SBS that is subject to mandatory clearing can become subject to the trade execution requirement.[220] The trade execution requirement, like other provisions of the SEA, is subject to jurisdictional constraints which are particularly germane in light of the global nature of the SBS market, where there is frequent interaction among counterparties domiciled in different jurisdictions. Proposed Rule 832 of Regulation SE is designed to address when the SEA's trade execution requirement applies to a cross-border SBS transaction.

Paragraph (a) of proposed Rule 832 would provide that the trade execution requirement set forth in section 3C(h) of the SEA shall not apply to an SBS unless at least one counterparty to the SBS is a "covered person" as defined in paragraph (b). Paragraph (b) of proposed Rule 832 would define the term "covered person," with respect to a particular security-based swap, as any person that is a U.S. person; a non-U.S. person whose performance under an SBS is guaranteed by a U.S. person; or a non-U.S. person who, in connection with its SBS dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute a transaction.[221]

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219 *See supra* note 106 and accompanying text.

220 Even if an SBS is subject to mandatory clearing, it will not be subject to the trade execution requirement if no exchange or SBSEF makes the SBS available to trade or the SBS is subject to an exception from the clearing requirement under section 3C(g) of the SEA. In addition, as discussed above in section VII(F)(2), proposed Rule 816(e) would provide certain additional exemptions from the trade execution requirement.

221 The proposed term "covered person" is designed to apply on a transaction-by-transaction basis. In other words, if a non-U.S. person were guaranteed by a U.S. person on a

Thus, a particular SBS would fall within the jurisdictional reach of section 3C(h) of the SEA if at least one side had a connection to the United States of a type specified in paragraph (b)(1), (2), or (3) of proposed Rule 832. The trade execution requirement would not apply to an SBS transaction—even if the SBS were subject to mandatory clearing and MAT—if neither side had a connection to the United States of a type specified in proposed Rule 832.

Proposed Rule 832 is consistent with the Commission's territorial approach to applying Title VII requirements in other contexts. The Commission previously has stated that Title VII requirements "apply to all SBS transactions that exist in whole or in part within the United States, unless an exception applies."[222] Relevant activity need not occur wholly within the United States or solely between U.S. persons in order for Title VII requirements to apply.[223] For example, under Rule 908(a)(1) of Regulation SBSR,[224] the Title VII requirements for regulatory reporting and public dissemination apply to an SBS transaction even if only one counterparty to the transaction is a U.S. person. As the Commission previously stated, "any security-based swap executed by a U.S. person exists at least in part within the United States."[225] This is true even if a transaction is effected through the foreign branch of a U.S. person, because "a foreign branch

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specific SBS or utilized U.S. personnel in connection with its dealing activities to arrange, negotiate, or execute a specific SBS, that person would be a covered person with respect to that SBS, but not necessarily with respect to other SBS. Because domicile is generally static, a person who is a U.S. person would be a covered person with respect to all of its SBS transactions.

222 Regulation SBSR Adopting Release I, 80 FR at 14652 (discussing cross-border application of Title VII requirements for regulatory reporting and public dissemination of SBS transactions).

223 *See* SEA Release No. 72472 (June 25, 2014), 79 FR 47278, 47286 ("Cross-Border Adopting Release") (stating that applying Title VII only to persons incorporated, organized, or established within the United States or only to SBS activity occurring entirely within the United States would inappropriately exclude from regulation a majority of SBS activity that involves U.S. persons or otherwise involves conduct within the United States, even though such activity raises the types of concerns that the Commission believed Congress intended to address through Title VII).

224 17 CFR 242.908(a)(1).

225 Regulation SBSR Adopting Release I, 80 FR at 14652.

has no separate existence from the U.S. person itself."[226]

The Commission also has found it consistent with the territorial approach to apply Title VII requirements where one counterparty of an SBS transaction is a non-U.S. person whose performance under an SBS is guaranteed by a U.S. person.[227] As the Commission stated when applying this criterion to Title VII reporting: "A security-based swap with a U.S.-person indirect counterparty [*i.e.*, guarantor] is economically equivalent to a security-based swap with a U.S.-person direct counterparty, and both kinds of security-based swaps exist, at least in part, within the United States . . . [T]he presence of a U.S. guarantor facilitates the activity of the non-U.S. person who is guaranteed and, as a result, the security-based swap activity of the non-U.S. person cannot reasonably be isolated from the U.S. person's activity in providing the guarantee."[228]

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226 *Id. See also* Cross-Border Adopting Release, 79 FR at 47289 (discussing the Commission's rationale for viewing a foreign branch of an SBS dealer as an integral part of the SBS dealer).

227 *See, e.g.*, Regulation SBSR Adopting Release I, 80 FR at 14653. *See also* Cross-Border Adopting Release, 79 FR at 47290 ("the guarantee provided by a U.S. person poses risk to U.S. persons and potentially to the U.S. financial system, and both the non-U.S. person whose dealing activity is guaranteed and its counterparty rely on the creditworthiness of the U.S. guarantor when entering into a security-based swap transaction and for the duration of the security-based swap. The economic reality of this transaction, even though entered into by a non-U.S. person, is substantially identical, in relevant respects, to a transaction entered into directly by a U.S. person. Accordingly, in our view, it is consistent with both the statutory text and with the purposes of the statute to identify such transactions as occurring within the United States for purposes of Title VII").

228 Regulation SBSR Adopting Release I, 80 FR at 14653. In addition, section 30(c) of the SEA, 15 U.S.C. 78dd(c), authorizes the Commission to apply Title VII requirements to persons transacting a business "without the jurisdiction of the United States" if they contravene rules that the Commission has prescribed as "necessary or appropriate to prevent the evasion of any provision" of Title VII. For the reasons described above, the Commission does not believe that applying the trade execution requirement to non-U.S. persons whose performance under an SBS is guaranteed by a U.S. person would cause the trade execution requirement to apply to persons that are "transact[ing] a business in security-based swaps without the jurisdiction of the United States." The Commission nonetheless preliminarily believes that applying the trade execution requirement to such persons is also necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the SEA that were added by the Dodd-Frank Act, and thus help prevent the relevant purposes of the Dodd-Frank Act from being undermined. *See*

Finally, the Commission also has found it consistent with the territorial approach to apply Title VII requirements where one counterparty is a non-U.S.-person who, in connection with its SBS dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute ("ANE") the transaction. As the Commission previously stated when applying the ANE criterion to Title VII requirements for regulatory reporting and public dissemination: "when a foreign dealing entity uses U.S. personnel to arrange, negotiate, or execute a transaction in a dealing capacity, that transaction occurs at least in part within the United States and is relevant to the U.S. security-based swap market."[229] Declining to apply Title VII requirements to SBS transactions of foreign dealing entities that use U.S. personnel to engage in ANE transactions would allow such entities "to exit the Title VII regulatory regime without exiting the U.S. market."[230]

The Commission recognizes the difficulties that can arise when a binary requirement, such as the trade execution requirement, applies in two separate jurisdictions. In other words, if

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Cross-Border Adopting Release, 79 FR at 47291-92 (interpreting the anti-evasion provisions of SEA section 30(c)). Without this rule, U.S. persons could have an incentive to evade the trade execution requirement by engaging in SBS via a guaranteed affiliate, while the economic reality of transactions arising from that activity—including the risks these transactions introduce to the U.S. market—would be no different in most respects than transactions entered into directly by U.S. persons.

229 Regulation SBSR Adopting Release II, 81 FR at 53591. *See also* SEA Release No. 87780 (December 18, 2019), 85 FR 6270, 6271-76 (February 4, 2020) (discussing other Title VII rules that incorporate ANE criteria and providing guidance on the meaning of the terms "arranged" and "negotiated" for purposes of these rules).

230 Regulation SBSR Adopting Release II, 81 FR at 53591. The Commission does not believe that applying the trade execution requirement to persons that satisfy the ANE criterion would cause the trade execution requirement to apply to persons that are "transact[ing] a business in security-based swaps without the jurisdiction of the United States," within the meaning of section 30(c) of the SEA. *See supra* note 228. The Commission also believes that applying the trade execution requirement to such persons is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the SEA that were added by the Dodd-Frank Act, and thus help prevent the relevant purposes of the Dodd-Frank Act from being undermined. Without this rule, non-U.S. persons could retain the benefits of operating in the United States while avoiding compliance with the trade execution requirement.

the counterparties to a cross-border SBS are subject to a trade execution requirement under the rules of each of their jurisdictions, the counterparties could violate the rules of one jurisdiction by executing the SBS in one jurisdiction but not the other, or in a manner that is consistent with the rules of one jurisdiction but potentially not of the other jurisdiction. The following section, regarding proposed Rule 833, will discuss conditions for allowing an SBS to trade on foreign venues not registered with the Commission, notwithstanding the SBS being subject to the SEA's trade execution requirement and proposed Rule 832.

The Commission seeks comment on the following:

168. Of the SBS products that, in your view, are plausible candidates for mandatory clearing and mandatory trade execution under the SEA, how frequently do these products trade on foreign SBS trading venues? Do you believe that the SBS market is sufficiently regionalized such that cross-border application of the trade execution requirement might not be a significant issue?

169. Do you believe that the proposed text of Rule 832 is sufficiently clear? If not, what aspects do you believe require clarification?

B. Rule 833—Cross-border exemptions

1. Exemptions for foreign SBS trading venues

As noted above in discussing proposed Rule 832, the swap and SBS markets are global in nature, and counterparties domiciled in different jurisdictions frequently trade with each other.[231] Proposed Rule 832 is designed to answer the question of when the trade execution requirement would apply to an individual cross-border SBS transaction. There might be instances where covered persons (as defined in proposed Rule 832) wish to be members of a foreign trading venue for SBS (a "foreign SBS trading venue"). Having members who are covered persons, as defined in Rule 832, with respect to SBS transacted on that venue, whether or not the SBS that they trade are subject to the SEA's trade execution requirement, could require the foreign SBS

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[231] *See supra* section IX(A).

trading venue to register with the Commission as a national securities exchange or SBSEF.[232] In addition, because a foreign SBS trading venue would be facilitating the execution of SBS between persons, the foreign SBS trading venue also might be required to register with the Commission as a broker.[233]

A foreign SBS trading venue with members who are covered persons, as defined in Rule 832, with respect to SBS transacted on that venue and that wishes to avoid having to register in one or more of these capacities could request that the Commission grant it an exemption under section 36(a)(1) of the SEA[234] by submitting an application pursuant to SEA Rule 0-12.[235] Proposed Rule 833(a) would provide that such an application, relating to the status of the foreign SBS trading venue under the SEA, may state that the application also is submitted pursuant to Rule 833(a).[236] In such case, the Commission would consider the submission as an application to exempt the foreign SBS trading venue, with respect to its providing a market place for SBS, from the definition of "exchange" in section 3(a)(1) of the SEA;[237] the definition of "security-based

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232 *See* 15 U.S.C. 78c-4(a)(1) (stating that no person may operate a facility for the trading or processing of SBS, unless the facility is registered as an SBSEF or national securities exchange).

233 A "broker" is generally defined as a person engaged in the business of effecting transactions in securities for the account of others. *See* section 3(a)(4) of the SEA, 15 U.S.C. 78c(a)(4). Section 15(a)(1) of the SEA, 15 U.S.C. 78o(a)(1), generally provides that it shall be unlawful for any broker to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker is registered in accordance with SEA section 15(b). *See also infra* section XIII (discussing proposed new Rule 15a-12).

234 15 U.S.C. 78mm(a)(1).

235 17 CFR 240.0-12 (setting forth procedures for filing applications for orders for exemptive relief under section 36 of the SEA).

236 An application for an exemption under proposed Rule 833(a) could be submitted by a foreign SBS trading venue itself or another interested party. For example, a financial regulatory authority in a foreign jurisdiction could submit an application under proposed Rule 833(a) on behalf of one or more SBS trading venues licensed and regulated in that jurisdiction.

237 15 U.S.C. 78c(a)(1).

swap execution facility" in section 3(a)(77) of the SEA;[238] the definition of "broker" in section 3(a)(4) of the SEA;[239] and section 3D(a)(1) of the SEA.[240] Because a foreign SBS trading venue that obtains an order under SEA section 36 and proposed Rule 833(a)[241] would be exempt from these definitions and from section 3D(a)(1) of the SEA, the foreign SBS trading venue would not be required to register with the Commission as a national securities exchange, SBSEF, or broker, or comply with other requirements applicable to such entities under the SEA or Commission rules thereunder.[242]

Under section 5h(g) of the CEA,[243] the CFTC may exempt, conditionally or unconditionally, a SEF from registration if the CFTC finds that the SEF is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the SEC, a prudential regulator, or the appropriate governmental authorities in the home country of the facility. The CFTC has exercised this authority to grant exemptions from SEF registration to swap trading venues in the European Union, Japan, and Singapore.[244]

Proposed Rule 833(a) would set forth how interested parties could make similar requests

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238 15 U.S.C. 78c(a)(77).

239 15 U.S.C. 78c(a)(4).

240 15 U.S.C. 78c-4(a)(1) (stating that no person may operate a facility for the trading or processing of SBS, unless the facility is registered as an SBSEF or national securities exchange).

241 For the remainder of this discussion, an exemption under SEA section 36 and Rule 833(a) will be referred to simply as a "Rule 833(a) exemption." In addition, the Commission will use the term "trading venue covered by an exemption order under Rule 833" (or a similar formulation) rather than "exempt exchange," "exempt SBSEF" or "exempt broker" because, pursuant to an exemption granted under proposed Rule 833(a), the covered trading venue would no longer be an exchange, SBSEF, or broker (as defined by the SEA).

242 However, as discussed further below, the Rule 833(a) exemption is designed to address only activities related to providing a market place for SBS. An entity that engages in other SBS-related activity or any activity involving non-SBS securities would need other authority under the SEA.

243 7 U.S.C. 7b-3(g).

244 *See https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs* (listing all exemption orders issued by the CFTC under section 5h(g) of the CEA and subsequent amendments to those orders).

for exemptive relief with respect to foreign SBS trading venues. For example, Rule 833(a) lists four separate provisions of the SEA that the Commission believes generally would have to be addressed in an exemption request relating to a foreign SBS trading venue's status under the SEA. A foreign SBS trading venue that was exempted solely from section 3D(a)(1) of the SEA, for example, might still be subject to various requirements under the SEA by virtue of falling within one or more of the above-noted definitions.[245] The exemptive framework set out in proposed Rule 833(a) is designed to avoid this result.

As with applications for other exemptive relief under section 36 of the SEA, an applicant requesting a Rule 833(a) exemption would be required to submit a complete application pursuant to SEA Rule 0-12. To issue a Rule 833(a) exemption, like any other exemption issued pursuant to section 36, the Commission would be required to find that the exemption is necessary or appropriate in the public interest, and consistent with the protection of investors.[246] As contemplated by section 36(a)(1), the Commission may subject a Rule 833(a) exemption to any conditions that it deems appropriate.

Proposed Rule 833(a) is designed to address only activities relating to providing a market place for SBS and would not extend to trading in any other type of security or to other activities with respect to SBS.[247] A foreign SBS trading venue covered by an exemption order under Rule

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245 Furthermore, section 5 of the SEA generally prohibits any broker, dealer, or exchange from using U.S. jurisdictional means to effect or report a transaction in a security on an exchange, unless the exchange is registered as a national securities exchange or has received a low-volume exemption from registration as a national securities exchange. *See* 15 U.S.C. 78e. Absent an exemption from the definition of "exchange," this provision would apply to a foreign SBS trading venue (and brokers and dealers who are members of that trading venue) to the extent that it uses U.S. jurisdictional means.

246 *See* 15 U.S.C. 78mm(a)(1). Unlike the CFTC which has exemptive authority under section 5h(g) of the CEA, the Commission would not be required to find that the foreign trading venue is subject to comparable, comprehensive supervision and regulation by a U.S. or foreign regulator.

247 For example, although a foreign trading venue covered by a Rule 833(a) exemption would be exempt from the definition of "broker," that exemption would extend only to the operation of a market place for SBS and would not permit the foreign trading venue to otherwise act as a securities broker using U.S. jurisdictional means.

833(a) might offer trading in other types of securities; however, the exemption order would permit covered persons to trade only SBS on that trading venue without causing the trading venue to have to register with the Commission as an exchange or SBSEF. The exemption order would not address any registration obligations that might arise from any other type of exchange activity by the foreign trading venue.[248]

The Commission also emphasizes that a Rule 833(a) exemption would not have any impact on section 6(*l*) of the SEA,[249] which makes it unlawful for any person to effect a transaction in an SBS with or for a person that is not an ECP, unless such transaction is effected on a national securities exchange registered pursuant to section 6(b) of the SEA. Because a foreign SBS trading venue covered by a Rule 833(a) exemption would not be registered as a national securities exchange, the foreign SBS trading venue would not be permitted to effect SBS transactions with or for a covered person that is not an ECP.

2. Exemptions relating to the trade execution requirement

Proposed Rule 833(b) would address requests for exemptive relief relating to the application of the trade execution requirement under section 3C(h) of the SEA to transactions executed on a foreign SBS trading venue. Pursuant to section 3C(h) of the SEA, an SBS that is subject to the trade execution requirement must be executed on an exchange, on an SBSEF registered under section 3D of the SEA, or on an SBSEF that is exempt from registration under

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248 The Commission considered the alternative of requiring that a Rule 833(a) exemption could apply to a foreign SBS trading venue *only if* it traded SBS and no other type of security. The Commission preliminarily believes, however, that this alternative is unnecessary. Other jurisdictions might have market structures where it is common to trade SBS and other types of securities on the same trading venue. The Commission preliminarily believes that it would be inequitable to disqualify such jurisdictions *ex ante* from qualifying for a Rule 833(a) exemption. Nevertheless, a foreign SBS trading venue that benefits from a Rule 833(a) exemption and that offers trading in both SBS and non-SBS securities would have to take appropriate steps to prevent covered persons from trading non-SBS securities on that trading venue, because the Rule 833(a) exemption would not cover the trading activity in non-SBS securities.

249 15 U.S.C. 78f(*l*).

section 3D(e) of the SEA.[250] As a result, a covered person (as defined in proposed Rule 832) would not be permitted to execute an SBS that is subject to the trade execution requirement on a foreign SBS trading venue unless that venue has registered with the Commission as a national securities exchange or an SBSEF, or has received an exemption under section 3D(e) of the SEA.

A covered person seeking to execute such an SBS on a foreign SBS trading venue that does not fall within one of these categories could request that the Commission grant an exemption from this requirement under section 36(a)(1) of the SEA by submitting an application, as with Rule 833(a), pursuant to SEA Rule 0-12. Proposed Rule 833(b)(1) would provide that such an application, relating to the application of the trade execution requirement to SBS executed on a foreign SBS trading venue, may state that the application also is submitted pursuant to proposed Rule 833(b).[251] Proposed Rule 833(b) is intended to clarify how interested parties could make requests for exemptive relief from the trade execution requirement for SBS traded on one or more foreign SBS trading venues.[252]

To issue a Rule 833(b) exemption, like with any other section 36 exemption, the Commission would be required to find that the exemption is necessary or appropriate in the public interest, and consistent with the protection of investors. Furthermore, as contemplated by section 36(a)(1), the Commission may subject a Rule 833(b) exemption to any conditions that it deems appropriate.

Proposed Rule 833(b)(2) would provide that, in considering whether to issue a Rule 833(b) exemption, the Commission may consider: (i) the extent to which the SBS traded in the

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250 Section 3D(e) of the SEA gives the Commission authority to exempt an SBSEF from registration if it is subject to comparable, comprehensive supervision and regulation by the CFTC. *See* 15 U.S.C. 78c-4(e).

251 For the remainder of this discussion, an exemption under SEA section 36 and Rule 833(b) will be referred to simply as a "Rule 833(b) exemption."

252 An SBS can be subject to the SEA's trade execution requirement only if it first becomes subject to the clearing requirement in section 3C(h) of the SEA, 15 U.S.C. 78c-3(h). A Rule 833(b) exemption would not have any impact on this clearing requirement, unless otherwise explicitly addressed in the exemption order.

foreign jurisdiction covered by the request are subject to a trade execution requirement comparable to that in section 3C(h) of the SEA and the Commission's rules thereunder; (ii) the extent to which trading venues in the foreign jurisdiction covered by the request are subject to regulation and supervision comparable to that under the SEA, including section 3D of the SEA, and the Commission's rules thereunder; (iii) whether the foreign trading venue or venues where covered persons intend to trade SBS have received an exemption order contemplated by proposed Rule 833(a); and (iv) any other factor that the Commission believes is relevant for assessing whether the exemption is in the public interest and consistent with the protection of investors.

The first factor listed above is intended to highlight the Commission's preliminary belief that, to grant an exemption from the SEA's trade execution requirement to allow SBS subject to that requirement to trade in a foreign jurisdiction on one or more venues not registered with the Commission, there should be a comparable trade execution requirement in that jurisdiction. As part of any analysis regarding the comparability of the trade execution requirement, the Commission could consider not only whether the relevant SBS must be executed on a trading venue in the foreign jurisdiction, but also the permissible execution means for mandatory trade execution in the foreign jurisdiction. In general, the Commission preliminarily believes that a trade execution requirement in a foreign jurisdiction would not be comparable to the trade execution requirement under the SEA if the foreign jurisdiction's rules did not require SBS products subject to that requirement to be executed through means comparable to Required Transactions as described in proposed Rule 815 (*e.g.*, if the foreign jurisdiction allowed the use of single-dealer platforms to discharge any mandatory trading execution requirement in that jurisdiction).

Under the second factor listed above, the Commission could consider whether the trading venues in the foreign jurisdiction are subject to regulation and supervision comparable to that under the SEA, including section 3D of the SEA and the Commission's rules thereunder. The

Commission preliminarily believes that the goals of Title VII regarding trade execution[253] could be subverted if it were to allow covered persons to trade SBS subject to the SEA's trade execution requirement on foreign trading venues that are not subject to rules designed to foster comparable levels of pre- and post-trade transparency, access, and liquidity.

The Commission also believes that it would be important to consider whether the foreign trading venue or venues where covered persons intend to trade SBS have received an exemption order contemplated by proposed Rule 833(a). The fact that covered persons are executing SBS on a foreign trading venue typically would require the venue to register with the Commission as a national securities exchange or SBSEF.[254]

Finally, the fourth factor listed above would emphasize that these considerations are not exhaustive. The Commission may consider any other factor that it believes is relevant for assessing whether the Rule 833(b) exemption is in the public interest and consistent with the protection of investors.

The Commission seeks comment on the following:

170. Do you believe in general that the Commission should establish a rule for granting exemptions regarding a foreign SBS trading venue's status under the SEA and mandatory trade execution of cross-border SBS transactions? Why or why not?

171. Do you disagree with any of the specific language proposed in Rule 833? If so, how would you revise it?

172. Do you expect that there are foreign SBS trading venues that would seek an

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253 *See supra* notes 94-96 and accompanying text.

254 A request for an exemption under proposed Rule 833(a) could be submitted at the same time—and by the same person(s)—as a request for an exemption under proposed Rule 833(b). For example, a financial regulatory authority in a foreign jurisdiction could combine a request for an exemption under proposed Rule 833(a) on behalf of one or more SBS trading venues licensed and regulated in that jurisdiction with a request for an exemption under proposed Rule 833(b) that would allow covered persons to trade on those venues SBS that would, absent an exemption, be subject to the SEA's trade execution requirement.

exemption under proposed Rule 833(a)? If so, how many?

173. Do you agree with the factors that the Commission is proposing to consider for a Rule 833(b) exemption? Are there are any that you would eliminate or revise? If so, which ones and why? Are there any criteria that you believe should be added? If so, what and why?

174. Are there any conditions or limitations that should be included in the rule? If so, what conditions or limitations would you suggest, and why?

X. Rule 834—Implementation of Section 765 of the Dodd-Frank Act and Governance of SBSEFs and SBS exchanges

Section 765(a) of the Dodd-Frank Act[255] provides in relevant part that, to mitigate conflicts of interest, the Commission "shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to" any clearing agency that clears SBS, or on the control of any SBSEF or SBS exchange by certain bank holding companies, certain nonbank financial companies, an affiliate of such a bank holding company or nonbank financial company, an SBS dealer, major SBS participant, or person associated with an SBS dealer or major SBS participant. Section 765(b) states that the purpose of the statutory provision is "to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with" an SBS dealer or major SBS participant's conduct of business with, a clearing agency, SBSEF, or SBS exchange and in which such SBS dealer or major SBS participant "has a material debt or equity investment." Finally, section 765(c) provides in relevant part that, in adopting rules pursuant to section 765, the Commission shall consider any conflicts of interest arising from the amount of equity owned by a single investor, the ability to vote, cause the vote of, or withhold votes entitled to be cast on any matters by the holders of the ownership interest.

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[255] 15 U.S.C. 8343.

In 2010, the Commission proposed Regulation MC to implement section 765.[256] In view of the significant amount of time that has elapsed and the significant evolution in the swap and SBS markets since the proposal of Regulation MC, the Commission hereby withdraws that proposal. The Commission is now proposing Rule 834 of Regulation SE to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges.

The Commission, in accordance with section 765 of the Dodd-Frank Act, has reviewed the potential for conflicts of interest arising from an SBS dealer or major SBS participant having voting rights in an SBSEF or SBS exchange in which it is a member. The Commission preliminarily believes that, to satisfy the requirements of section 765, it is appropriate to impose a cap on the size of the voting rights that an individual member of an SBSEF or SBS exchange may own or direct. Accordingly, paragraph (b) of proposed Rule 834 would bar an SBSEF or SBS exchange from permitting any of its members, either alone or together with any officer, principal, or employee of the member, to:

(1) Own, directly or indirectly, 20% or more of any class of voting securities or of other voting interest in the SBSEF or SBS exchange; or

(2) Directly or indirectly vote, cause the voting of, or give any consent or proxy with respect to the voting of, any interest that exceeds 20% of the voting power of any class of securities or of other ownership interest in the SBSEF or SBS exchange.

The 20% cap in proposed Rule 834(b) attempts to balance competing policy interests. On the one hand, execution venues need capital, expertise, and liquidity to establish and grow. Historically, market participants who become members of an execution venue are a source of all three components, and any person contributing capital to a new venture might reasonably expect to have a voting interest commensurate with the amount of capital contributed. The Commission

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256 *See* Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Security-Based Swaps Under Regulation MC, SEA Release No. 63107 (October 14, 2010), 75 FR 65882 (October 26, 2010).

considered proposing a cap in voting interest below 20%, but preliminarily believes that too low of a cap, even if imposed in the name of eliminating conflicts of interest, could have the unintended effect of retarding the development of execution venues for SBS altogether, if market participants who become members have no (or substantially limited) ability to vote their equity interest.

On the other hand, allowing a member of an SBSEF or SBS exchange too large of a voting interest could undermine the public policy benefits of having transparent, fair, and regulated markets for the trading of SBS. A member of an SBSEF or SBS exchange with a sufficiently large voting interest could exercise undue influence over the rules and policies applicable to members, the venue's access criteria, decisions regarding access, and disciplinary matters, among other things. In particular, members who are SBS dealers and conduct a significant amount of business in the bilateral OTC market have incentives to restrict the scope of SBS that an SBSEF or SBS exchange makes eligible for trading. Trading in a market with robust order competition and pre-trade transparency reduces search costs for end users and liquidity seekers, and reduces the information and bargaining asymmetry of end users and liquidity seekers relative to SBS dealers. An SBS dealer with a large voting interest in an SBSEF or SBS exchange, if it perceived that trading on the regulated venue was diminishing the rents obtained from its bilateral OTC business, might seek to utilize its voting influence in a number of ways to degrade the capability of the regulated venue, thus making the OTC market by comparison a more attractive option.

The Commission preliminarily believes that capping a member's voting interest at 20% strikes a reasonable balance between these competing interests. It would allow a single member to make an investment in an SBSEF or SBS exchange significant enough to give it a 20% voting interest, while reserving at least 80% to unrelated parties. The Commission preliminarily believes that the 20% cap would still afford an SBS dealer or major SBS participant that has made an investment in an SBSEF or SBS exchange a reasonable commercial means of

monitoring and protecting that investment. But requiring 80% of the voting power to reside with unrelated parties would reduce the likelihood that the large member could tilt the playing field in its favor. In proposing this 20% threshold in Rule 834, the Commission is informed by long experience with handling questions of member influence over national securities exchanges raised in applications to register with the Commission on Form 1 and in governance rule filings made on SEA Form 19b-4.[257]

Proposed Rule 834(b) would cover both direct and indirect voting interests. The 20% cap could be circumvented if, for example, a member placed its voting interest in an SBSEF or SBS exchange of 20% or more in a shell company or other affiliate and directed how the shell company or affiliate casts those votes. Accordingly, proposed Rule 834(b) would look through the non-member entities holding interests in SBSEFs and SBS exchanges to consider whether any member could indirectly control 20% or more of the voting interest through the non-member entity having the direct interest. Furthermore, proposed Rule 834(b) would look through the corporate structure of the SBSEF or SBS exchange to consider whether any member could indirectly have 20% or more of the voting interest in the underlying trading venue. For example,

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[257] *See* SEA Release No. 49718 (May 17, 2004), 69 FR 29611, 29624 (May 24, 2004) (approving PCX limitation of trading permit holder ownership to 20% and stating that "a member who trades securities through the facilities of an exchange can have an ownership interest in the exchange. However, a member's interest could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that also directly or indirectly controls an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently surveilling the member's conduct or from punishing any conduct that violates the rules of the exchange or the Federal securities laws. An exchange also might be reluctant to surveil and enforce its rules zealously against a member that the exchange relies on as its largest source of capital"). *See also*, *e.g.*, SEA Release No. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (approving Long Term Stock Exchange's registration as a national securities exchange with a 20% limit on LTSE ownership by members); SEA Release No. 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (approving BATS-Y Exchange's registration as a national securities exchange with a 20% limit on exchange ownership by members); SEA Release No. 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (approving a voting collar on members that hold interests in BOX in excess of 20%); SEA Release No. 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (approving ISE's limitation of a member's ownership interest to 20%).

an SBSEF or SBS exchange could be wholly owned by a holding company. In such a case, the voting restriction in proposed Rule 834(b) would apply to the voting interest in the parent holding company held by a member of the child SBSEF or SBS exchange, since a direct voting interest of 20% or more in the parent would equate to an indirect voting interest of 20% or more in child trading venue.

Similar to its approach to indirect voting interest, proposed Rule 834(b) would aggregate the voting interest of the member itself with the voting interest held by any officer, principal, or employee of the member for purposes of determining compliance with the 20% cap. Without this provision, the member—or an officer, principal, or employee of the member—could split the voting interest held in the SBSEF or SBS exchange across multiple persons who would likely be voting that interest in concert.

Paragraph (c) of proposed Rule 834 would include requirements designed to reinforce the 20% cap in paragraph (b). Paragraph (c) would require the rules of each SBSEF and SBS exchange to be reasonably designed, and have an effective mechanism, to:

(1) Deny effect to the portion of any voting interest held by a member in excess of the 20% limitation;

(2) Compel a member who possesses a voting interest in excess of the 20% limitation to divest enough of that voting interest to come within that limit; and

(3) Obtain information relating to its ownership and voting interests owned or controlled, directly or indirectly, by its members.

Under paragraph (c)(1) of proposed Rule 834, if a member of an SBSEF or SBS exchange managed to evade the 20% voting restriction (*e.g.*, by disguising its voting interest through one or more shell companies), the SBSEF or SBS exchange would be required to deny the effect of any part of the vote in excess of the 20% restriction when the evasion is discovered. This could, in close cases, cause the SBSEF or SBS exchange to have to reverse the outcome of a vote because of the invalidation of the part of the vote in excess of the 20% threshold. In

addition, the Commission preliminarily believes—as reflected in paragraph (c)(2) of proposed Rule 834—that an SBSEF or SBS exchange should, if it discovers that a member has managed to evade the 20% voting restriction, compel the member to divest enough of that voting interest to come within the 20% limit. Finally, the Commission preliminarily believes—as reflected in paragraph (c)(3) of proposed Rule 834—that an SBSEF or SBS exchange must have an effective means of obtaining information about the ownership and voting interests owned or controlled, directly or indirectly, by its members. Proposed Rule 834(c)(3) is designed to promote compliance with proposed Rule 834(b) by requiring an SBSEF or SBS exchange to actively obtain information about the ownership and voting interests owned or controlled, directly or indirectly, by its members. The Commission preliminarily believes that ignorance of a member holding a voting interest in excess of the proposed 20% limitation should not excuse a violation of Rule 834(b). Furthermore, the information obtained by an SBSEF or SBS exchange under proposed Rule 834(c)(3) should assist with any remedial actions necessary under proposed Rules 834(c)(1) and (c)(2).

Paragraph (d) of proposed Rule 834 is designed to mitigate conflicts of interest in the disciplinary process of an SBSEF or SBS exchange and would provide as follows: "Each security-based swap execution facility and SBS exchange shall ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process. Each major disciplinary committee or hearing panel thereof shall include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel." Proposed Rule 834(d) recognizes that one way that a conflict of interest could manifest itself is in the disciplinary process. Therefore, the Commission is proposing, as the first sentence of proposed Rule 834(d), that each SBSEF and SBS exchange should "preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process."

The second sentence of proposed Rule 834(d) is adapted from § 1.64 of the CFTC's rules, which addresses the composition of various SRO governing boards and major disciplinary committees.[258] Section 1.64(c)(4) requires an SRO (which term, under the CEA, includes a SEF) to maintain in effect rules that "each major disciplinary committee or hearing panel [of the SRO] include sufficient different membership interests so as to ensure fairness and to prevent special treatment or preference for any person in the conduct of a committee's or the panel's responsibilities." Proposed Rule 834(d) reflects the Commission's preliminary belief that an SBSEF or SBS exchange should be mindful of its different membership interests, and how they are represented on disciplinary committees and hearing panels in particular matters, to avoid potential conflicts of interest.

To further implement section 765 and promote good governance generally for SBSEFs and SBS exchanges, the Commission is proposing additional requirements in Rule 834 that are closely modelled on §§ 1.64 and 1.69 of the CFTC's rules.

Section 1.64(b) requires an SRO to maintain in effect standards and procedures that ensure that 20% or more of the regular voting members of the SRO's governing board are persons who are knowledgeable of futures trading or financial regulation or are otherwise capable of contributing to governing board deliberations. Section 1.64(b) also requires an SRO to maintain in effect standards and procedures that ensure that 20% or more of the regular voting members of the governing board are not: members of the SRO; currently salaried employees of the SRO; primarily performing services for the SRO in a capacity other than as a member of the SRO's governing board; or officers, principals, or employees of a firm which holds a membership at the SRO either in its own name or through an employee on behalf of the firm.

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258 Proposed Rule 834(a) would define "major disciplinary committee" as a committee of persons who are authorized by an SBSEF to conduct disciplinary hearings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the SBSEF except those which are related to decorum or attire, financial requirements, or reporting or recordkeeping and do not involved fraud, deceit, or conversion.

Paragraph (e) of proposed Rule 834 is closely modelled on § 1.64(b). Paragraph (e)(1)(i) would require each SBSEF and SBS exchange to ensure that 20% or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) are persons who are knowledgeable of SBS trading or financial regulation, or otherwise capable of contributing to governing board deliberations. Paragraphs (e)(1)(ii) through (v) of proposed Rule 834 are based on four of the prongs in § 1.64(b)(1)(ii) which provide that 20% or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) must not be: members of the SBSEF or SBS exchange;[259] salaried employees of the SBSEF or SBS exchange; primarily performing services for the SBSEF or SBS exchange in a capacity other than as a member of the governing board; or officers, principals, or employees of a firm which holds a membership at the SBSEF or SBS exchange, either in its own name or through an employee on behalf of the firm.

Paragraph (e)(2) of proposed Rule 834, modelled on § 1.64(b)(3), would require each SBSEF and SBS exchange to ensure that membership of its governing board includes a diversity of groups or classes of its members.[260]

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[259] Proposed Rule 834(e)(1)(ii), read together with proposed Rule 834(b), would have the effect of allowing four members of an SBSEF or SBS exchange to control up to 80% of the voting interest (assuming that each of the four holds 20%). Under proposed Rule 834(e)(1)(ii), at least 20% of the voting interest would have to be held by non-members.

[260] Section 1.64(b)(3) provides in relevant part that the governing board of an SRO must include "a diversity of membership interests." Section 1.64(a)(4) provides a definition of "membership interest" that lists six classes of members, each of which is considered a different membership interest. Many of these specifically enumerated classes—*e.g.*, "floor traders," "floor brokers," "futures commission merchants," "producers, consumers, processors, distributors, and merchandisers of commodities traded on the particular contract market"—might not be relevant to SBSEFs and SBS exchanges. Rather than crafting its own definition of "membership interest," the Commission is opting for a principles-based approach to incorporating § 1.64(b)(3) into Rule 834, by proposing that an SBSEF or SBS exchange must be able to demonstrate that the board membership fairly represents the diversity of interests at such SBSEF or SBS exchange. *See* proposed Rule 834(e)(2).

The Commission is not adapting the detailed provisions of § 1.64(c) into proposed Rule 834. However, the key principle of § 1.64(c)—that each major disciplinary committee or hearing panel should include sufficient different membership interests so as to ensure fairness and to prevent special treatment or preference in the conduct of the committee's or panel's responsibilities, which is located in paragraph § 1.64(c)—is being adapted into proposed Rule 834(d), as discussed above.

Paragraph (f) of proposed Rule 834 is based closely on § 1.64(d) and would require each SBSEF and SBS exchange to submit to the Commission, within 30 days after each governing board election, a list of the governing board's members, the groups or classes of members that they represent, and how the composition of the governing board otherwise meets the requirements of Rule 834. This provision would provide the Commission information to help it assess an SBSEF's compliance with Rule 834.

Paragraph (g) of proposed Rule 834 is modelled on § 1.69, which requires an SRO to further address the avoidance of conflicts of interest in the execution of its self-regulatory functions. Section 1.69(b)(1)(i) requires an SRO to maintain in effect rules that require a member of its governing board, disciplinary committee, or oversight panel to abstain from such body's deliberations and voting on any matter involving a named party in interest, where such member: is a named party in interest; is an employer, employee, or fellow employee of a named party in interest; is associated with a named party in interest through a "broker association"; has any other significant, ongoing business relationship with a named party in interest; or has a family relationship[261] with a named party in interest.

Section 1.69(b)(1)(ii) requires an SRO to maintain in effect rules that require each

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[261] *See* proposed Rule 834(a) (defining "family relationship" of a person to be person's spouse, former spouse, parent, step-parent, child, step-child, sibling, step-brother, step-sister, grandparent, grandchild, uncle, aunt, nephew, niece, or in-law). The Commission's proposed definition is adapted from the CFTC's definition of "family relationship" in § 1.69(a)(2).

member of its governing board, disciplinary committee, or oversight panel to disclose to the appropriate SRO staff, before consideration of any matter involving a named party in interest, whether the member has one of the relationships listed in § 1.69(b)(1)(i) with a named party in interest. Section 1.69(b)(1)(iii) requires the SRO to establish procedures for determining whether a member of its governing board, disciplinary committees, or oversight committees is subject to a conflicts restriction in any matter involving a named party in interest.[262]

Section 1.69(b)(2)(i) requires a member of the SRO's governing board, disciplinary committee, or oversight committee to abstain from such body's deliberations and voting on any significant action, if the member knowingly has a direct and substantial financial interest in the result of the vote based upon either exchange or non-exchange positions that could reasonably be expected to be affected by the action. Section 1.69(b)(2)(ii) requires a member of the SRO's governing board, disciplinary committee, or oversight committee, before consideration of any significant action, to disclose to the appropriate SRO staff that position information, although this requirement does not apply to members who choose to abstain from deliberations and voting on the subject significant action. Section 1.69(b)(2)(iii) requires an SRO to establish procedures for determining whether any member of its governing board, disciplinary committees, or oversight committees is subject to a conflicts restriction under § 1.69 in any significant action. Such determination is required to include a review of various types of positions enumerated in the rule, including: "Any other types of positions, whether maintained at that self-regulatory organization or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm that the self-regulatory organization reasonably expects could be affected by the significant action." Section 1.69(b)(2)(iv) sets out the sources that the SRO should review in determining a member's positions, including a catch-all provision in paragraph

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[262] Proposed Rule 834(a) would define "named party in interest" as a person or entity that is identified by name as a subject of any matter being considered by a governing board, disciplinary committee, or oversight panel.

(b)(2)(iv)(C) for "[a]ny other source of information that is held by and reasonably available to the self-regulatory organization."

Section 1.69(b)(3)(i) provides that an SRO governing board, disciplinary committee, or oversight panel may permit a member to participate in deliberations prior to a vote on a significant action for which that member otherwise would be required to abstain, if such participation would be consistent with the public interest and the member recuses from voting on such action. Section 1.69(b)(3)(ii) requires the deliberating body, when determining whether to permit the exception contemplated in paragraph (b)(3)(i), to consider whether the member's participation in deliberations is necessary for the deliberating body to achieve a quorum in the matter; and whether the member has unique or special expertise, knowledge, or experience in the matter under consideration. Section 1.69(b)(3)(iii) requires the deliberating body also to consider, when determining whether to permit an exception to "fully consider the position information which is the basis for the member's direct and substantial financial interest in the result of a vote on a significant action."

Section 1.69(b)(4) requires an SRO's governing board, disciplinary committees, and oversight panels to reflect in their minutes or otherwise document that the conflicts determination procedures required under § 1.69 have been followed. Such records also must include: the names of all members who attended the meeting in person or who otherwise were present by electronic means; the name of any member who voluntarily recused himself or herself or was required to abstain from deliberations and/or voting on a matter and the reason for the recusal or abstention, if stated; and information on the position information that was reviewed for each member.

Proposed Rule 834(g) closely follows the paragraph structure and language of § 1.69, with a few minor exceptions (beyond modifying the rule's application to SBSEFs and SBS exchanges, rather than, in the CFTC original, all SROs). First, paragraph (g)(1)(i)(A) of proposed Rule 834 is based closely on § 1.69(b)(1)(i) and would set out the types of relationships

with the named party of interest that would create a conflict of interest for a member of the governing board, disciplinary committee, or oversight panel. Paragraph (g)(1)(i)(A), however, would incorporate only four of the five prongs in § 1.69(b)(1)(i).[263] Second, § 1.69(b)(2)(iii) sets out five types of financial positions that could be held by a member of the governing board, disciplinary committee, or oversight panel that an SRO must review to ascertain if there is a conflicts restriction in a significant action. Proposed Rule 834(g)(1)(ii)(C) is a simplified version of § 1.69(b)(2)(iii); it would not include the five prongs set forth in § 1.69(b)(2)(iii), but rather would incorporate only the final, catch-all prong ("Such determination must include a review of any positions, whether maintained at that security-based swap execution facility, SBS exchange, or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm[264] that the security-based swap execution facility or SBS exchange reasonably expects could be affected by the significant action").[265] Third, proposed Rule 834(g)(1)(ii)(C) would omit a requirement in § 1.69(b)(2)(iv) that an SRO, when making a determination of whether a conflict of interest exists, must take into consideration "[t]he most recent large trader reports and clearing records available to the self-regulatory organization." These types of reports may not be as prevalent in the securities and SBS markets as the swaps markets. The Commission believes that the final, catch-all prong in § 1.69(b)(2)(iv)—"Any other source of information that is held by and reasonably available to the self-regulatory organization"—would suffice, and is proposing it as Rule 834(g)(1)(ii)(C)(*2*).

Proposed Rule 834(h) would require each SBSEF and SBS exchange to maintain in effect

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263 The Commission is not proposing to include a prong about being associated with a named party of interest through a "broker association," as defined in § 156.1 of the CFTC's rules, as that concept does not exist under the SEA.

264 Proposed Rule 834(a) would define a "member's affiliated firm" as a firm in which the member is a principal or an employee.

265 Proposed Rule 834(a) would define "significant action" to include several types of actions or rule changes by an SBSEF or SBS exchange that could be implemented without the Commission's prior approval related to addressing an emergency and certain changes in margin levels.

various rules that would be required under proposed Rule 834. An SBSEF would be required to file such rules under proposed Rule 806 or 807 of Regulation SE; an SBS exchange would be required to file such rules under existing SEA Rule 19b-4.[266] Proposed Rule 834(h) is loosely modelled on various provisions in §§ 1.64 and 1.69 providing that the SRO rules required under those CFTC rules must be filed with the CFTC pursuant to relevant provisions of the CEA and the CFTC's rules thereunder.

The Commission preliminarily believes that §§ 1.64 and 1.69 are reasonably designed to promote good governance of trading venues and is therefore proposing to adapt them into Rule 834. These CFTC rules identify various instances of potential conflicts of interest that might involve a member of the governing board or an important committee of a SEF, and require proactive measures to address those conflicts. The Commission preliminarily believes that SBSEFs and SBS exchanges should have the same types of rules because the same types of conflicts that arise with SEFs could arise with SBS trading venues. Furthermore, various provisions of §§ 1.64 and 1.69 would further the policy goals of section 765 of the Dodd-Frank Act. For example, proposed Rule 834(e)(1)(ii), modelled on § 1.64(b)(1)(ii)(A), would require that at least 20% of the regular voting members of the governing board of an SBSEF or SBS exchange not be members, and proposed Rule 834(e)(1)(v), which is modelled on § 1.64(b)(1)(ii)(D), would require that at least 20% of the regular voting members of the governing board not be persons affiliated with members. These requirements, by reserving at least 20% of the governing board's seats for persons not associated with any member of an SBSEF or SBS exchange, would reduce the possibility that a combination of members who are SBS dealers or major SBS participants could create a conflict of interest for the SBSEF or SBS exchange.

In addition, proposed Rule 834(d), which incorporates language from § 1.64(c), would

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[266] 17 CFR 240.19b-4.

require each major disciplinary committee or hearing panel thereof to include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member. The Commission preliminarily believes that it is appropriate to impose such a requirement on SBSEFs and SBS exchanges to further lessen the potential for members of an SBSEF or SBS exchange who are SBS dealers or major SBS participants from benefitting from a conflict of interest. Furthermore, proposed Rule 834(e), which is modelled on § 1.64(d), would require an SBSEF or SBS exchange to submit to the Commission, within 30 days after each governing board election, a list of the governing board's members, the groups or classes of members that they represent, and how the composition of the governing board otherwise meets the requirements of Rule 834. Proposed Rule 834(e) is designed to reinforce the other requirements of the rule by causing each SBSEF and SBS exchange to actively consider how the composition of its governing board comports with Rule 834, and to make an accurate representation to the Commission regarding such compliance.

The Commission preliminarily believes that § 1.69 also includes provisions that would further the policy goals of section 765 and is, therefore, proposing to adapt them into Rule 834. Under proposed Rule 834(b), an SBSEF or SBS exchange generally may not permit any member to hold 20% or more of the voting interest in that trading venue. Nothing in proposed Rule 834, however, would prohibit a member—including an SBS dealer or major SBS participant (or a person associated with such a member, such as a firm principal)—from serving on a governing board, disciplinary committee, or oversight panel of an SBSEF or SBS exchange. Section 1.69 is designed to address various types of conflicts of interest that might involve members of a governing board, disciplinary committee, or oversight panel. For example, § 1.69 specifies when a member must abstain from the body's deliberations and voting because the member has a relationship to the named party in interest or because the member has "a direct and substantial financial interest in the result of the vote." Furthermore, § 1.69 requires a member to disclose its relationships to a named party in interest and provide position information to the SRO so that the

SRO can assess whether the member has a conflict, and also requires the SRO to follow its own procedures for determining whether a conflict exists. Because these provisions further the goals of section 765—to mitigate conflicts of interest created by an SBS dealer or major SBS participant that holds an interest in an SBSEF or SBS exchange—and because they are reasonably designed to promote good governance more generally, the Commission is proposing to incorporate them into Rule 834.

The Commission recognizes that promulgating rules under section 765 alone will not result in a highly competitive market for SBS. There could be other ways for anticompetitive forces to impede the growth of SBS trading on transparent, regulated platforms other than by misuse of a large voting interest in the trading venue. For example, a large SBS dealer or coalition of SBS dealers, even absent any voting interest in any SBSEF or SBS exchange, could threaten to move their business elsewhere unless given an unfair advantage by the trading venue. A large SBS dealer or coalition of SBS dealers also could conspire to shut out end users who sought to trade more actively on these transparent, regulated venues rather than continuing to trade in the bilateral OTC markets. The Commission will be alert to any such anticompetitive practices and consider appropriate prophylactic measures. At present, the Commission believes that adopting rules under section 765 is a necessary and appropriate first step to guard against conflicts of interest arising on SBSEFs and SBS exchanges.

The Commission seeks comment on the following:

175. In general, do you agree with how the Commission is proposing to implement section 765 of the Dodd-Frank Act? Why or why not?

176. In particular, do you believe that the 20% ownership cap in proposed Rule 834(b) is appropriate? Why or why not? Do you believe that a different numerical threshold would be appropriate? If so, what numerical threshold and why?

177. Do you believe that there are other means (such as ownership of non-voting equity, holding a sizeable amount of the debt issuance, *etc.*) by which an SBS dealer

or major SBS participant could exercise an undue influence over an SBSEF or SBS exchange of which it is a member? If so, please discuss whether and how these other means should be incorporated into Rule 834.

178. Do you believe that proposed Rule 834(b) is sufficiently clear about when a member would be deemed to have an indirect 20% voting interest in an SBSEF or SBS exchange? If not, please provide other scenarios where you believe the Commission should offer clarification.

179. Do you agree in general with the Commission's proposal to adapt the major provisions of § 1.64 into Rule 834? Why or why not?

180. Are there provisions of § 1.64 that the Commission has incorporated into proposed Rule 834 that you think inappropriate? If so, what provisions and why?

181. Conversely, are there provisions of § 1.64 that the Commission has *not* incorporated into proposed Rule 834 that you think should be incorporated? If so, what provisions and why? Specifically, do you believe that the Commission should incorporate a definition of "membership interest"—as the CFTC does in § 1.64(a)(4)—to more precisely delineate the different interests that an SBSEF or SBS exchange should take into account?

182. Do you agree in general with the Commission's proposal to incorporate the major provisions of § 1.69 into Rule 834? Why or why not?

183. Are there provisions of § 1.69 that the Commission has incorporated into proposed Rule 834 that you think inappropriate? If so, what provisions and why?

184. Do you believe generally that the same rules for mitigating conflicts of interest should apply to both SBSEFs and SBS exchanges, or should different restrictions apply to each type of trading venue? If you believe different restrictions should apply, please explain why and what different restrictions you believe should be incorporated into Rule 834?

185. Are there any proposed requirements in Rule 834 that existing national securities exchanges, which could in the future elect to list SBS and thereby become SBS exchanges, would find difficult to comply with? Would any of the requirements proposed in Rule 834 conflict with their existing rules? If so, please describe.

186. Are there other types of conflict of interest that SBS dealers and major SBS participants might enjoy as members of an SBSEF or SBS exchange? If so, discuss how any such conflict could be addressed via Commission rulemaking.

187. Do you believe that SBS dealers and major SBS participants can exercise anticompetitive influence over one or more SBSEFs or SBS exchanges even if not members of those trading venues? If so, what additional measures would you recommend to combat that anticompetitive influence?

XI. Rule 835—Notice to Commission by SBSEF of final disciplinary action, denial or conditioning of membership, or denial or limitation of access

The Commission is also proposing new Rule 835 to require an SBSEF to provide the Commission notice of a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access. Such notice is designed to ensure that the Commission is kept aware of significant disciplinary actions, denials or conditionings of membership, or denials or limitations on access by SBSEFs that could be the subject of an aggrieved person's request for review by the Commission. The requirement to provide notice to the Commission also would obligate an SBSEF to be cognizant of, and make records for, each such instance, and such records would become a necessary part of the record should the aggrieved person seek Commission review of the SBSEF's action.

Specifically, paragraph (a) of proposed Rule 835 would provide that, if an SBSEF issues a final disciplinary action against a member, or takes a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person. Proposed Rule 835(a)

uses the phrase "final disciplinary action against a *member*" (emphasis added) because an SBSEF may utilize its disciplinary authority under Core Principle 2 (Compliance with Rules) in section 3D of the SEA[267] only with respect to its members; but uses the phrase "denies or limits access of a *person*" (emphasis added) because the person whose access is denied or limited might not be a member. For example, a person that is denied membership by an SBSEF would fall under this category.

Paragraph (b)(1) of proposed Rule 835 would provide that, for purposes of paragraph (a), a disciplinary action would not be considered final unless: (1) the affected person has sought an adjudication or hearing with respect to the matter, or otherwise exhausted their administrative remedies at the SBSEF; and (2) the disciplinary action is not a summary action permitted under proposed Rule 819(g)(13)(ii).[268] In addition, paragraph (b)(2) of proposed Rule 835 would provide that, for purposes of paragraph (a), a disposition of a matter with respect to a denial or conditioning of membership, or a denial or limitation of access, would not be considered final unless such person has sought an adjudication or hearing, or otherwise exhausted their administrative remedies at the SBSEF with respect to such matter. The Commission preliminarily believes that it is appropriate to exclude disciplinary actions that are summary actions under an SBSEF's summary fine schedule[269] because the Commission expects such summary actions, if applicable, to comprise lesser disciplinary actions that do not warrant appeal.

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[267] 15 U.S.C. 78c-4(d)(2).

[268] As discussed above, *see supra* section VIII(B)(1), proposed Rule 819(g)(13)(ii) would permit an SBSEF to adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions, which may be summarily imposed against persons within the SBSEF's jurisdiction for violating such rules. Furthermore, an SBSEF's summary fine schedule could allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule would be required by proposed Rule 819(g)(13)(ii) to provide for progressively larger fines for recurring violations.

[269] A summary fine schedule, if an SBSEF elects to adopt one, would have to be part of the SBSEF's rules, and thus would need to be submitted to the Commission. *See* proposed Rule 819(g)(13)(ii).

The CFTC has parallel procedures relating to review of SEF disciplinary actions also excludes summary actions under an SEF's summary fine schedule.[270]

Paragraph (c) of proposed Rule 835 would provide that the notice required under Rule 835(a) must include the name of the member or the associated person and last known address, as reflected in the SBSEF's records, of the member or associated person, as well as the name of the person, committee, or other organizational unit of the SBSEF that initiated the disciplinary action or access restriction. In the case of a final disciplinary action, the notice would be required to include a description of the acts or practices, or omissions to act, upon which the sanction is based, including, as appropriate, the specific rules that the SBSEF has found to have been violated; a statement describing the respondent's answer to the charges; and a statement of the sanction imposed and the reasons for such sanction. In the case of a denial or conditioning of membership or a denial or limitation of access, the notice would be required to include: the financial or operating difficulty of the prospective member or member (as the case may be) upon which the SBSEF determined that the prospective member or member could not be permitted to do, or continue to do, business with safety to investors, creditors, other members, or the SBSEF; the pertinent failure to meet qualification requirements or other prerequisites for membership or access and the basis upon which the SBSEF determined that the person concerned could not be permitted to have membership or access with safety to investors, creditors, other members, or the SBSEF; or the default of any delivery of funds or securities to a clearing agency by the member. Finally, the notice must include the effective date of such final disciplinary action, denials or conditioning of membership, or denial or limitation of access, as well as any other information that the SBSEF may deem relevant.

The Commission seeks comment on the following:

188. Do you agree with the proposed definition of "final disciplinary action" in

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[270] *See* 17 CFR 9.1(b)(2).

proposed Rule 835? Why or why not? If not, how would you revise the definition? Do you think it would be appropriate to exclude disciplinary actions that are summary actions under an SBSEF's summary fine schedule from such definition? Why or why not?

189. Do you agree with how the proposed rules and rule amendments address when an aggrieved party may seek Commission review of a denial or conditioning of membership, or a denial or limitation of access? Why or why not? If not, how would you revise those provisions?

190. In particular, do the proposed rules contain sufficient detail to address all types of denials or conditionings of membership or denials or limitations on access? Are there particular scenarios that commenters believe the Commission should address in Rule 835? If so, please describe in detail.

191. Are the contents of the required notice to the Commission in proposed Rule 835 appropriate? Do you believe these would provide the Commission with enough detail regarding final disciplinary actions, denials or conditionings of membership, and denials or limitations on access? If not, what other information should be required in the notice?

XII. Amendments to existing Rule 3a1-1 under the SEA—Exemptions from the definition of "exchange"

An entity that meets the definition of "security-based swap execution facility" also would likely meet the definition of "exchange" set forth in section 3(a)(1) of the SEA[271] and the interpretation of that definition set forth in Rule 3b-16 thereunder.[272] Thus, absent an exemption,

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[271] 15 U.S.C. 78c(a)(1).

[272] 17 CFR 240.3b-16 (providing that an entity generally is considered to meet the definition of "exchange" if it brings together the orders for securities of multiple buyers and sellers and uses established, non-discretionary methods—whether by providing a trading facility or by setting rules—under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade).

an entity needing to register with the Commission as an SBSEF also would likely need to register with the Commission as a national securities exchange.[273] The Commission previously has stated that it "believes that Congress specifically provided a comprehensive regulatory framework for SBSEFs in the [SEA], as amended by the Dodd Frank Act, and therefore that such entities that are registered as SBSEFs should not also be required to register and be regulated as national securities exchanges."[274]

Therefore, the Commission is proposing to exercise its authority under section 36(a)(1) of the SEA[275] to exempt an SBSEF from the definition of "exchange"—and thus the obligation to register as a national securities exchange— if it provides a market place solely for the trading of SBS (and no other securities) and has registered with the Commission as an SBSEF. To effect this exemption, the Commission is proposing to amend Rule 3a1-1 under the SEA[276] by adding new paragraph (a)(4).[277]

The proposed amendment provides that an entity that has registered with the Commission as an SBSEF pursuant to proposed Rule 803 and provides a market place for no securities other than SBS would not fall within the definition of "exchange," and thus would not be subject to the requirement in section 5 of the SEA to register as a national securities exchange or obtain a low-volume exemption. Section 5 also provides that a broker or dealer may not "us[e] any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national

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273 *See* section 3D(a)(1) of the SEA, 15 U.S.C. 78c-4(a)(1) ("No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section").

274 2011 SBSEF Proposal, 76 FR at 10958.

275 15 U.S.C. 78mm(a)(1).

276 17 CFR 240.3a1-1.

277 The amended rule would provide that an organization, association, or group of persons shall be exempt from the definition of the term "exchange" if such organization, association, or group of persons has registered with the Commission as an SBSEF pursuant to Rule 803 and provides a market place for no securities other than SBS.

securities exchange . . . or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange." Brokers and dealers who are members of a registered SBSEF would not be in violation of section 5 by effecting or reporting any SBS transactions on that SBSEF, because an SBSEF that qualifies for the exemption under proposed Rule 3a1-1(a)(4) would not be an exchange within the meaning of section 5.

In addition, the Commission is proposing a new paragraph (a)(5) to existing Rule 3a1-1 under the SEA which would provide that an organization, association, or group of persons shall be exempt from the definition of the term "exchange" if such organization, association, or group of persons has registered with the Commission as a clearing agency pursuant to section 17A of the SEA and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations. As noted above, this provision would codify a series of exemptions that the Commission has granted over several years to SBS clearing agencies that operate "forced trading" sessions.[278] As part of the clearing and risk management processes, an SBS clearing agency must establish an end-of-day valuation for any SBS in which any of its members has a cleared position. Certain SBS clearing agencies utilize a valuation mechanism whereby they require clearing members to submit indicative quotes for those SBS products, and can require them to trade as a way to promote accurate submissions. The precise means by which the clearing agency matches quotes from different clearing members could cause the clearing agency to fall within the definition of "exchange" in section 3(a)(1) of the SEA. The Commission previously has found that it was necessary or appropriate in the public interest and consistent with the protection of investors to exempt clearing agencies that engage in this activity from the definition of "exchange."[279] The Commission is now proposing to codify this exemption. This exemption would cover only the forced-trading session of an SBS clearing agency; any other exchange activity that a clearing agency might engage in could remain subject

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278 *See supra* note 37.

279 *See id.*

to the SEA provisions and the Commission's rules thereunder applying to exchanges.

Finally, the Commission is proposing to amend the introductory language of existing paragraph (b) of Rule 3a1-1, which states: "Notwithstanding paragraph (a) of this rule, an organization, association, or group of persons shall not be exempt under this rule from the definition of 'exchange' if . . ." Paragraph (b) then sets out procedural and substantive criteria for the Commission to retract an exemption under paragraph (a) of Rule 3a1-1 if an exchange's share of the market in any one of the specified classes of securities exceeds a defined threshold. The Commission is proposing to amend the introductory language of paragraph (b) of Rule 3a1-1 to cover only paragraphs (a)(1) through (3), not paragraph (a) as a whole.

The changed language is designed to clarify that the retraction provisions would not apply to organizations, associations, or groups of persons who fall within proposed Rule 3a1-1(a)(4) or (a)(5). Thus, even if a registered SBSEF were to grow very large, Rule 3a1-1(b), as proposed to be amended, would not afford a basis for the Commission to retract an SBSEF's exemption from the definition of "exchange" under proposed Rule 3a1-1(a)(4), which would force the SBSEF to register as a national securities exchange (to avoid being a registered exchange). The Commission preliminarily believes that, in adopting section 3D of the SEA, Congress gave the Commission a mechanism to regulate SBSEFs of any size. Nothing in section 3D suggests that, if an SBSEF were to grow above a certain size, the Commission should be able to withdraw that entity's ability to operate as an SBSEF and instead compel it to register as a national securities exchange.

Finally, the Commission preliminarily believes that it is not necessary to apply the retraction provisions in Rule 3a1-1(b) to registered clearing agencies that engage in forced trading sessions and are covered by proposed Rule 3a1-1(a)(5). SBS transactions effected using this functionality are designed to facilitate the clearance and settlement process by rendering more accurate the daily valuation that is used to calculate margin requirements. The entities that utilize this functionality are already registered with the Commission—as clearing agencies—and

carry out these operations under rules that have been approved by the Commission. This trading functionality is not effected for the purpose of conducting open-market transactions between parties who are seeking to increase or decrease their positions for investment or hedging purposes. Therefore, the Commission preliminarily believes that it would not be appropriate to apply the retraction provisions of Rule 3a1-1(b) to clearing agencies that would be covered by proposed Rule 3a1-1(a)(5), as this would force these clearing agencies also to register as national securities exchanges.

The Commission seeks comment on the following:

192. Do you agree in general with the Commission's proposal to exempt from the statutory definition of "exchange" any registered SBSEF that provides a market place for no securities other than SBS and any SBS clearing agency that engages in forced trading sessions? Why or why not?

193. Do you agree with the particular language of proposed paragraphs (a)(4) and (a)(5) of Rule 3a1-1? If not, how would you amend the language?

194. Do you agree with the Commission's preliminary view, reflected in the proposed new introductory language to paragraph (b) of Rule 3a1-1, that entities qualifying for an exemption from the definition of "exchange" under proposed paragraphs (a)(4) and (a)(5) of Rule 3a1-1 should not be subject to the retraction provisions of Rule 3a1-1(b)? Why or why not?

XIII. Rule 15a-12—SBSEFs as registered brokers; relief from certain broker requirements

An SBSEF, by facilitating the execution of SBS between persons, also is engaged in the business of effecting transactions in securities for the account of others and therefore meets the SEA definition of "broker."[280] Absent an exception or exemption, an SBSEF—in addition to being subject to the registration and regulatory requirements for SBSEFs—also would be

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[280] *See* section 3(a)(4) of the SEA, 15 U.S.C. 78c(a)(4).

required to register with the Commission as a broker pursuant to sections 15(a) and 15(b) of the SEA[281] and would be subject to all regulatory requirements applicable to brokers.[282] For example, brokers and dealers must comply with a number of rules that govern their conduct, including those relating to customer confirmations and disclosure of credit terms in margin transactions.[283]

The Commission is proposing a new Rule 15a-12 under the SEA that would deem registration with the Commission as an SBSEF also to constitute registration as a broker, and would exempt a registered SBSEF from many broker requirements in light of the SBSEF regulatory regime to which it would also be subject.

One statutory provision from which a registered SBSEF would be exempted is section 17(a) of the SEA,[284] which requires a registered broker (among other types of registered entity) to make and keep records as prescribed by Commission rule. Because SBSEFs are required to make and keep records as prescribed by Commission rule under section 3D(d)(9) of the SEA, imposing section 17(a) on SBSEFs would be redundant. By contrast, one statutory provision that would continue to apply to registered SBSEFs in their dual capacity as registered brokers would be section 17(b) of the SEA.[285]

In addition, under section 15(b)(8) of the SEA, it is unlawful for any registered broker or

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281 15 U.S.C. 78o(a) and 78o(b). Section 15(a)(1) generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission. Section 15(b) generally provides the manner of registration of brokers and dealers and other requirements applicable to registered brokers and dealers.

282 As discussed in note 43 *supra*, a person that is acting as a broker solely because it is acting as an SBSEF is currently exempt from the requirement to register with the Commission as a broker and the Commission's rules under the SEA that apply to brokers. This exemption will expire upon the compliance date for the Commission's final SBSEF rules.

283 *See* 17 CFR 240.10b-10 and 240.10b-16.

284 15 U.S.C. 78q(a).

285 15 U.S.C. 78q(b) (providing that the records of registered brokers, among other types of registered entity, are subject to examination by representatives of the Commission).

dealer to effect transactions in securities unless it is a member of an SRO.[286] Brokers and dealers also must comply with a number of financial responsibility regulations, such as the net capital and customer protection rules.[287] A registered broker or dealer also must make and keep current books and records relating to its business and detailing, among other things, securities transactions, money balances, and securities positions; keep records for required periods and furnish copies of those records to the Commission on request; and file certain financial reports with the Commission.[288]

The Commission preliminarily believes that Congress did not intend to subject SBSEFs that act only as SBSEFs to a dual regulatory regime.[289] Therefore, using its authority under section 36(a)(1) of the SEA and its authority to establish procedures regarding the registration of brokers, the Commission is proposing new Rule 15a-12 under the SEA that would allow an SBSEF that is a broker, solely due to its activity with respect to SBS executed on or through the SBSEF, to satisfy the requirement to register as a broker by registering as an SBSEF.[290] Proposed Rule 15a-12(b) would provide that such an entity, if it registered as an SBSEF pursuant proposed Rule 803, would be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the SEA. The Commission is *not* proposing to exempt SBSEFs from registration as brokers; rather, given the registration and regulatory requirements being proposed for SBSEFs through Regulation SE, it is proposing to eliminate a separate registration process for broker/SBSEFs and much of the additive layer of regulation for brokers that the Commission

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286 *See* 15 U.S.C. 78o(b)(8) and 240.15b9-1.

287 *See* 17 CFR 240.15c3-1 and 240.15c3-3.

288 *See* 17 CFR 240.17a-3, 240.17a-4, and 240.17a-5.

289 *See* 2011 SBSEF Proposal, 76 FR at 10959 (noting that this framework indicates that Congress did not intend for entities that meet the definition of SBSEF also to be subject to all of the requirements set forth in the SEA and the rules and regulations thereunder applicable to brokers).

290 A foreign SBS trading venue covered by an exemption under proposed Rule 833(a) would be exempt from the SEA's definition of "broker" and, as a result, would not need rely on proposed Rule 15a-12.

preliminarily believes is not necessary in light of the regulatory regime for SBSEFs.

Proposed Rule 15a-12 could not be utilized by an SBSEF that engaged in other types of brokerage activity. Paragraph (a) of proposed Rule 15a-12 would define the term "SBSEF-B" to mean an SBSEF that does not engage in any securities activity other than facilitating the trading of SBS on or through the SBSEF. Thus, an SBSEF that acts as agent to SBS counterparties or that acts in a discretionary manner with respect to the execution of SBS transactions, could not avail itself of proposed Rule 15a-12. Also, if an inter-dealer broker elects not to separate its inter-dealer broker functions from its SBSEF (by, for example, housing them in separate legal entities), and instead chooses to operate the SBSEF in the same legal entity as the inter-dealer broker, the entity could not avail itself of proposed Rule 15a-12 because it would not be an SBSEF-B under the rule.

Paragraphs (c) to (e) of proposed Rule 15a-12 would set out the scope of broker requirements from which an SBSEF-B would be exempted and which broker requirements would continue to apply. Paragraph (c) would provide that an SBSEF-B would be exempt from any provision of the SEA or the Commission's rules thereunder applicable to brokers that by its terms requires, prohibits, restricts, limits, conditions, or affects the activities of a broker, unless such provision specifies that it applies to an SBSEF. Paragraph (d) of proposed Rule 15a-12 would provide that, notwithstanding paragraph (c), an SBSEF-B would still be subject to sections 15(b)(4),[291] 15(b)(6),[292] and 17(b) of the SEA.[293]

Sections 15(b)(4) and 15(b)(6) of the SEA serve as the basis for enforcing the Federal securities laws against registered brokers. Section 15(b)(4) provides that the Commission, upon the making of specified findings, shall censure; place limitations on the activities, functions, or operations of; suspend for a period not exceeding 12 months; or revoke the registration of any

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[291] 15 U.S.C. 78o(b)(4).

[292] 15 U.S.C. 78o(b)(6)

[293] 15 U.S.C. 78q(b).

broker or dealer. Similarly, section 15(b)(6) of the SEA requires the Commission, upon the making of specified findings, to censure, place limitations on, suspend, or bar such person an associated person. Section 17(b) of the SEA is the legal basis under which the Commission may examine registered brokers for compliance with the Federal securities laws. Section 17(b) authorizes the Commission to conduct reasonable periodic, special, or other examinations of all records maintained by entities described in section 17(a), including registered brokers. These examinations may be conducted at any time, or from time to time, as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the SEA.[294] Proposed Rule 15a-12 would specify that these examination and statutory disqualification provisions pertaining to registered brokers continue to apply, despite Rule 15a-12 exempting an SBSEF-B from other broker requirements under the SEA.

Finally, paragraph (e) of proposed Rule 15a-12 would exempt an SBSEF-B from the Securities Investor Protection Act ("SIPA"). SIPA established the Securities Investor Protection Corporation ("SIPC"), which oversees the liquidation of member firms that close when a member firm is bankrupt or in financial trouble, and customer assets are missing.[295] SIPC protection is funded by assessments made on member firms.[296]

Section 2 of SIPA[297] states that, unless otherwise provided, the SEA shall apply as if SIPA constituted an amendment to, and was included as a section of, the SEA. An SBSEF-B, by definition, would operate only as an SBSEF. The Commission preliminarily believes that it

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294 *Id.*

295 *See https://www.sipc.org/about-sipc/sipc-mission* ("In a liquidation under the Securities Investor Protection Act, SIPC and the court-appointed Trustee work to return customers' securities and cash as quickly as possible. Within limits, SIPC expedites the return of missing customer property by protecting each customer up to $500,000 for securities and cash (including a $250,000 limit for cash only)").

296 *See* 15 U.S.C. 78ddd(d).

297 15 U.S.C. 78bbb.

would not be equitable to require an SBSEF-B to become a member of SIPC and pay SIPC assessments, since the SBSEF-B would not have brokerage customers and would not hold any customer funds or securities. Accordingly, under section 36(a)(1) of the SEA,[298] the Commission preliminarily believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt SBSEF-Bs from any requirement under SIPA, including the requirement to pay assessments to the SIPC insurance fund. The Commission is proposing to codify this exemption as Rule 15a-12(e).

The Commission seeks comment on the following:

195. Do you agree in principle with proposed Rule 15a-12? Why or why not?

196. Do you agree with the specific language of proposed Rule 15a-12? If not, how would you revise the rule language, and why?

197. Are there any provisions listed in paragraph (d) of proposed Rule 15a-12 to which an SBSEF-B should not be subject? If so, what provisions and why? Are there any other provisions or broker requirements to which an SBSEF-B *should* be subject (and thus added to paragraph (d) of proposed Rule 15a-12)? If so, what provisions or requirements and why?

198. Do you believe that it is appropriate to exempt SBSEF-Bs from SIPA, as reflected in proposed Rule 15a-12(e)? Why or why not?

XIV. Proposed Sunsetting of Temporary Exemption from SEA Definition of "Clearing Agency" for Unregistered SBSEFs

In 2020, the Commission adopted Rule 17Ad-24 under the SEA[299] to exempt from the definition of "clearing agency" in section 3(a)(23) of the SEA[300] certain entities, including a

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298 15 U.S.C. 78mm(a)(1) (giving the Commission broad exemptive authority, including the ability to exempt any person or classes of persons from any provision of the SEA or any rules thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors).

299 17 CFR 240.17Ad-24.

300 15 U.S.C. 78c(a)(23).

registered SBSEF, that would be deemed to be a clearing agency solely by reason of (a) functions performed by such institution as part of customary dealing activities or providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered SBSEF, respectively; or (b) acting on behalf of a clearing agency or participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.[301] In adopting the rule, the Commission explained that an entity performing such functions that triggers the requirement to register as a clearing agency—but that is not yet registered with the Commission as an SBSEF—could rely on a temporary exemption from the requirement to register as a clearing agency that the Commission issued in 2011.[302] The Commission preliminarily believes that, if it adopts a framework for the registration of SBSEFs, the 2011 Temporary Exemption would no longer be necessary because entities carrying out the functions of SBSEFs would be able to register with the Commission as such, thereby falling within the exemption from the definition of "clearing agency" in existing Rule 17Ad-24.

The Commission seeks comment on the following:

199. Should the Commission sunset the 2011 Temporary Exemption to coincide with the compliance date for Regulation SE, if adopted? If not, what timeline for sunsetting the 2011 Temporary Exemption would be appropriate?

XV. Electronic Filings Under Regulation SE

Various provisions of proposed Regulation SE would require registered SBSEFs (or SBSEF applicants) to file specified information electronically with the Commission using the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system in Inline XBRL, a structured, machine-readable data language. Such provisions include:

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301 *See* SEA Release No. 90667 (December 16, 2020), 86 FR 7637 (February 1, 2021).

302 *See id.*, 86 FR at 7650; SEA Release No. 64796 (July 1, 2011), 76 FR 39963, 39964 (July 7, 2011) ("2011 Temporary Exemption").

- Proposed Rule 803(b)(1)(i) and (b)(3), regarding filings of, and amendments to, a Form SBSEF application.
- Proposed Rules 803(e) and 803(f), regarding requests to withdraw or vacate an application for registration.
- Proposed Rule 804(a)(1), regarding filings for listing products for trading by certification.
- Proposed Rule 805(a)(1), regarding filings for voluntary submission of new products for Commission review and approval.
- Proposed Rule 806(a)(1), regarding filings for voluntary submission of rules for Commission review and approval.
- Proposed Rule 807(a)(1), regarding filings for self-certification of rules.
- Proposed Rule 807(d), regarding filings of weekly notifications to the Commission of rules and rule amendments that were not required to be certified.
- Proposed Rule 829(g)(6), regarding submission to the Commission of reports related to financial resources and related documentation.
- Proposed Rule 831(j)(2), regarding submission to the Commission of the annual compliance report of SBSEF's CCO.

Requiring SBSEFs to file this information in EDGAR would provide the Commission and the public with a centralized, publicly accessible electronic database for the information, thereby facilitating its use. EDGAR would also enable technical validation of the disclosures, thus potentially reducing the incidence of non-discretionary errors (*e.g.*, including text for a disclosure that should contain only numbers). Moreover, requiring Inline XBRL tagging of the reported disclosures, which would specifically comprise Inline XBRL block text tags for any narrative disclosures, as well as detail tags for individual data points, would make the disclosures more easily available and accessible to, and reusable by, market participants and the Commission for retrieval, aggregation, and comparison across different SBSEFs and time periods, as

compared to an unstructured PDF, HTML, or ASCII format requirement for the reports.[303]

The Commission seeks comment on the following:

200. Would EDGAR be an appropriate system for these filings? Or should the Commission use its Electronic Form Filing System/SRO Rule Tracking System ("EFFS/SRTS") or another file transfer system instead?[304] Would requiring these materials to be filed in EDGAR, EFFS/SRTS, or another file transfer system be more beneficial for SBSEFs and other market participants? If so, why? How would the use of these different systems impact the usability and accessibility of the materials for data users? Is there another method of electronic submission that is preferable? If so, please identify that method, why you believe it should be used, and the estimated costs of such system for filers.

201. Should all filings be made through the same electronic system, or would different filing systems be appropriate for different types of filings? If the latter, please discuss.

202. Would Inline XBRL be an appropriate data language for these filings? Or should the Commission use a different structured data language? If so, which data language should be required, and why? Would requiring a different structured data language be more beneficial for SBSEFs and other market participants? How would the use of a different data language impact the usability and accessibility of the materials for data users? What time or expense is associated with your recommended structured data language? Would a particular structured data language require any filers or users

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303 *See* Release No. 33-10514 (June 28, 2018), 83 FR 40846, 40847 (August 16, 2018). Inline XBRL allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit. *See id.*, 83 FR at 40851.

304 The Commission's EFFS/SRTS system was not designed to support filings using an open structured data language such as Inline XBRL. As a result, requiring registrants to submit filings via the EFFS/SRTS system may not be compatible with a requirement to use Inline XBRL or any other open structured data language for the filings.

to license commercial software they otherwise would not, and, if so, at what expense?

XVI. Amendments to Commission's Rules of Practice for Appeals of SBSEF Actions

As noted above,[305] SEA Core Principle 2 directs an SBSEF to exercise regulatory powers over its market.[306] Under proposed Rule 819 of Regulation SE, an SBSEF could take a variety of disciplinary actions against a member that is found to violate the SBSEF's rules, including fining the member, limiting the member's access, or barring the member entirely.[307] SEA Core Principle 2 also requires an SBSEF to establish rules governing access to its market.[308] An SBSEF could apply those rules in such a way as to limit a person's access to the SBSEF or to deny access entirely. The Commission preliminarily believes that general principles of due process necessitate an appeals procedure for final disciplinary actions taken by an SBSEF, for denials or conditionings of membership, and for limitations or denials of access. Accordingly, the Commission is proposing a number of amendments to its Rules of Practice to allow for such appeals, and notes that the CFTC has similar procedures with respect to SEFs.[309]

A. Amendment to Rule 101

Existing Rule 101 of the Commission's Rules of Practice[310] sets out definitions for

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305 *See supra* section VIII(B).

306 *See*, *e.g.*, 15 U.S.C. 78c-4(d)(2)(A) (directing an SBSEF to "establish and *enforce* compliance" with its rules) (emphasis added); 15 U.S.C. 78c-4(d)(2)(C) (directing an SBSEF to "establish and *enforce* trading, trade processing, and participation rules that will *deter abuses and have the capacity to detect, investigate, and enforce those rules*") (emphasis added).

307 *See supra* section VIII(B). *See also* proposed Rule 819(c)(3) (relating to limitations on access, including suspensions and permanent bars); proposed Rule 819(g) (relating to disciplinary procedures and sanctions).

308 *See* 15 U.S.C. 78c-4(d)(2)(A)(ii) (directing an SBSEF to establish and enforce compliance with any rule that imposes any limitation on access to the facility); 15 U.S.C. 78c-4(d)(2)(B)(i) (requiring an SBSEF to provide market participants with impartial access to the market).

309 *See* part 9 of the CFTC's rules (Rules Relating to Review of Exchange Disciplinary, Access Denial or Other Adverse Actions). For purposes of part 9, the term "exchange" includes a SEF.

310 17 CFR 201.101.

several terms used in the Rules of Practice. In particular, existing Rule 101(a)(9) defines "proceeding" with respect to applications of review of actions by a variety of entities that are subject to the Commission's jurisdiction. The Commission is proposing a new paragraph (a)(9)(ix) of Rule 101 that would provide that an application for a review of a determination (such as a final disciplinary action or a limitation or denial of access to any service) by an SBSEF would be a "proceeding" and thereby trigger applicability of the Rules of Practice.

B. Amendment to Rule 202

Existing Rule 202 of the Commission's Rules of Practice[311] permits a party in certain proceedings before the Commission to make a motion to specify certain procedures with respect to such proceeding. Rule 202(a) excludes certain types of proceedings, including enforcement or disciplinary proceedings, proceedings to review a determination by an SRO, and proceedings to review a determination of the PCAOB. Because the Commission is proposing new Rules 442 and 443, which set out specific procedures with respect to proceedings to review a determination of an SBSEF,[312] the Commission is proposing to revise Rule 202(a) to add such SBSEF-related proceedings to the list of exclusions.

C. Amendment to Rule 210

Existing Rule 210 of the Commission's Rules of Practice[313] sets out Commission rules with respect to parties, limited participants, and *amici curiae* in various proceedings before the Commission. Paragraph (a)(1) of Rule 210 states that persons shall not be granted leave to become a party or non-party participant on a limited basis in an enforcement or disciplinary proceeding, a proceeding to review a determination by an SRO, or a proceeding to review a determination by the PCAOB, except as authorized by paragraph (c) of Rule 210 (which permits limited instances in which persons may participate for Commission disciplinary and enforcement

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311 17 CFR 201.202.

312 *See infra* sections XVI(E) and (F).

313 17 CFR 201.210.

proceedings). Because the Commission is proposing new Rules 442 and 443, which set out specific procedures with respect to proceedings to review a determination of an SBSEF,[314] the Commission is proposing to revise Rule 210 to exclude proceedings to review a determination by an SBSEF among those types of proceedings from which persons may be granted leave to become a party or a non-party participant on a limited basis.

D. Amendment to Rule 401

The Commission is proposing to amend existing Rule 401 of its Rules of Practice by adding a new paragraph (f). New paragraph (f)(1) of existing Rule 401 would permit any person aggrieved by a stay of action by an SBSEF entered in accordance with proposed Rule 442(c) to make a motion to lift the stay. The Commission could also, at any time, on its own motion determine whether to lift the automatic stay. New paragraph (f)(2) would provide that the Commission may lift a stay summarily, without notice and opportunity for hearing. Finally, new paragraph (f)(3) would provide that the Commission may expedite consideration of a motion to lift a stay of action by an SBSEF, consistent with the Commission's other responsibilities. Where consideration is expedited, persons opposing the lifting of the stay could file a statement in opposition within two days of service of the motion requesting lifting of the stay unless the Commission, by written order, specifies a different period.

The Commission preliminarily believes that it is appropriate to allow persons affected by certain stays of action by an SBSEF the opportunity to make a motion to request the lifting of the stay. As discussed below, pursuant to proposed Rule 442, an aggrieved person could file an application for review with the Commission with respect to a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access. The filing of such application would operate as a stay of the SBSEF's determination. The Commission preliminarily believes that, because of this automatic

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[314] *See infra* sections XVI(E) and (F).

stay procedure, an aggrieved person or the SBSEF itself should be afforded a mechanism by which it could request the Commission to lift the stay, in addition to the Commission's ability under proposed Rule 401(f)(2) to lift a stay summarily, without notice and opportunity of hearing.

E. Rule 442—Right to appeal

Proposed new Rule 442[315] would establish the right to an appeal to the Commission of certain determinations made by an SBSEF, and set out certain procedural matters relating to any such appeal. Paragraph (a) of proposed Rule 442 would provide that an application for review by the Commission may be filed by any person who is aggrieved by a determination of an SBSEF with respect to any: (1) final disciplinary action, as defined in proposed Rule 835(b)(1); (2) final action with respect to a denial or conditioning of membership, as defined in proposed Rule 835(b)(2); or (3) final action with respect to a denial or limitation of access to any service offered by the SBSEF, as defined in proposed Rule 835(b)(2). Paragraph (b) of proposed Rule 442 would set forth the procedure in such cases. Specifically, an aggrieved person could file an application for review with the Commission (pursuant to existing Rule 151) within 30 days after the notice filed by the SBSEF with the Commission pursuant to proposed Rule 835 is received by the aggrieved person, and must serve the application on the SBSEF at the same time.[316] Paragraph (c) of proposed Rule 442 would provide that filing an application for review with the Commission pursuant to proposed Rule 835(b) would operate as a stay of the SBSEF's determination, unless the Commission otherwise orders either pursuant to a motion filed in

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315 17 CFR 201.442.

316 Such application would be required to identify the SBSEF's determination complained of, set forth in summary form a statement of alleged errors in the action and supporting reasons therefor, and state an address where the applicant can be served. The application would be expected not to exceed two pages in length, and the notice of appearance required by § 201.102(d) would have to accompany the application if the applicant is to be represented by a representative. Any exception to an action not supported in an opening brief that complies with § 201.450(b) could, at the discretion of the Commission, be deemed to have been waived by the applicant.

accordance with proposed Rule 401(f) or upon its own motion.[317] The Commission preliminarily believes that it is appropriate for the filing of an application for review to operate as an automatic stay of the SBSEF's determination, because such determination could have the effect of significantly or even permanently damaging an aggrieved person's business while the Commission was conducting a review, which could take substantial time. In addition, the Commission is proposing in Rule 401(f) a procedure whereby a person aggrieved by such stay, including the SBSEF, could request that the Commission lift the stay. The proposed rules also contain certain requirements relating to certification of the record and service of the index.[318] Specifically, within 14 days after receipt of an application for review, an SBSEF would be required to certify and file with the Commission one unredacted copy of the record upon which it took the complained-of action. The SBSEF would be required to file electronically with the Commission one copy of an index of such record, and serve one copy of the index on each party, subject to the requirements in proposed Rule 442(d)(2) relating to sensitive personal information; if applicable, such filings would have to be certified that they have complied with such requirements relating to sensitive personal information. The Commission believes these requirements are appropriate to ensure that sensitive personal information is not improperly or inadvertently disseminated by an SBSEF as part of its filing of the record relating to the appeal review.

F. Rule 443—*Sua sponte* review by Commission

New proposed Rule 443[319] would provide that the Commission, on its own initiative, could order review of any determination by an SBSEF (which would include a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access to any services) that could be subject to an

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317 17 CFR 201.442(c).

318 17 CFR 201.442(d)-(e).

319 17 CFR 201.443.

application for review pursuant to proposed Rule 442(a) within 40 days after the SBSEF filed notice thereof.

Proposed Rule 443 would further provide that the Commission could at any time before issuing its decision raise or consider any matter that it deems material, whether or not raised by the parties. If the Commission did so, under proposed Rule 443 the Commission would give notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties, where the Commission believes that such briefing could significantly aid the decisional process. The Commission preliminarily believes that it is appropriate that it have the ability to review any determination filed by an SBSEF that could be subject to an application for review under proposed Rule 442(a), even without an appeal of such determination by an aggrieved party, should it believe that further consideration is warranted. Therefore, the proposed rule would provide the Commission authority to obtain additional information through supplemental briefings, as needed.

G. Amendment to Rule 450

Existing Rule 450 of the Commission's Rules of Practice[320] sets out requirements for briefs filed with the Commission. Rule 450(a) sets out a briefing schedule, and paragraph (a)(2) provides that the briefing schedule order shall be issued within 21 days, or such longer time as provided by the Commission, of receipt by the Commission of various types of appeals. The Commission is proposing to amend Rule 450(a)(2) by adding a new paragraph (iv) providing that the 21 days would be triggered by "[r]eceipt by the Commission of an index to the record of a determination by a security-based swap execution facility filed pursuant to § 201.442(d)."

H. Amendment to Rule 460

Existing Rule 460 of the Commission's Rules of Practice[321] states that the Commission shall determine each matter on the basis of the record. Rule 460(a) defines the contents of the

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[320] 17 CFR 201.450.

[321] 17 CFR 201.460.

record with respect to various types of action. The Commission is proposing a new paragraph (a)(4) of Rule 460 that would state that, in a proceeding for a final decision before the Commission reviewing a determination of an SBSEF, the record shall consist of: (i) the record certified by the SBSEF pursuant to § 201.442(d); (ii) any application for review; and (iii) any submissions, moving papers, and briefs filed on appeal or review.

I. Request for comment

The Commission requests comment on all aspects of its proposed rules and rule amendments to provide for applications for review by the Commission of an SBSEF's final disciplinary action or denial or limitation of access. In particular:

203. Do you agree in general that final disciplinary action and denials or limitations of access by an SBSEF be afforded a review process under the Commission's Rules of Practice? Why or why not?

204. Should aggrieved parties be permitted to submit a motion for a stay of an action by an SBSEF under proposed Rule 401(f)? Do you believe that there may be instances in which a motion for a stay may be necessary? Why or why not? Are there any particular provisions that should be added or should not be included in such a process? If so, please describe.

205. Are the provisions relating to SBSEFs under proposed Rule 442 appropriate? Are there additional requirements that should be included or items that should be omitted? Are the provisions relating to sensitive personal information and exceptions under proposed paragraph (d)(2) appropriate? Why or why not?

206. Is it appropriate for the Commission to be able to review determinations of an SBSEF *sua sponte* under proposed Rule 443? Why or why not?

XVII. Conclusion

The Commission requests comment on all aspects of proposed Regulation SE, including any provision of a proposed rule about which the Commission did not ask a specific question

above. In addition, the Commission seeks commenters' views on whether Regulation SE should address any other aspects of SBSEFs or SBS execution generally where the Commission has not proposed a specific rule. In particular:

207. Are there any other CFTC rules, or provisions of the CEA itself, relating to SEFs that you believe should be adapted by the Commission to apply to SBSEFs? If so, which rules or provisions and why?

208. Are there any other requirements that the Commission should apply to SBSEF members, or which the Commission should require SBSEFs to apply to their members? If so, what requirements and why? What would be the legal basis for those additional requirements?

XVIII. Compliance Schedule

To facilitate the efficient registration of SBSEFs and compliance with Regulation SE, the Commission intends to include a compliance schedule along with any final rules, if adopted. To assist it in developing an appropriate compliance schedule, the Commission seeks comment on the following matters:

209. If the Commission were to substantially harmonize its SBSEF rules and registration procedures with those of the CFTC, as proposed, how long would respondents need to submit a Form SBSEF to the Commission after Regulation SE and Form SBSEF are adopted (assuming that the applicant is not registered as a SEF with the CFTC)?

210. Please provide your view of the optimal compliance schedule(s) and explain your rationale.

211. Should the compliance date for foreign SBS trading venues that seek an exemption order under Rule 833(a) coincide with the date by which SBSEF applicants would have to be registered by the Commission? If you believe that such foreign SBS trading venues should have a different compliance date, what date

should that be and why?

XIX. Economic Analysis

A. Introduction

To increase the transparency and oversight of the OTC derivatives market,[322] Title VII of the Dodd-Frank Act requires the Commission to undertake a number of rulemakings to implement the regulatory framework for SBS that is set forth in the legislation, including among other things, (1) the registration and regulation[323] of SBSEFs; and (2) mitigating conflicts of interest with respect to SBSEFs, SBS exchanges, and SBS clearing agencies. To satisfy these statutory mandates, the Commission is proposing Regulation SE and associated forms that would create a regime for the registration and regulation of SBSEFs and address other issues relating to SBS execution generally.[324] One of the rules being proposed as part of Regulation SE, Rule 834, would implement section 765 of the Dodd-Frank Act, which is intended to mitigate conflicts of interest at SBSEFs and SBS exchanges. Other rules being proposed as part of Regulation SE would address the cross-border application of the SEA's trading venue registration requirements and the trade execution requirement for SBS.

In addition, the Commission is proposing to amend existing Rule 3a1-1 under the SEA to exempt, from the SEA definition of "exchange," registered SBSEFs that provide a market place for no securities other than SBS and certain registered clearing agencies. The Commission also is proposing new Rule 15a-12 under the SEA that, while affirming that an SBSEF also would be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements. The Commission also is proposing certain new rules and amendments to its Rules of Practice to allow persons who are aggrieved by certain determinations by an SBSEF to apply for review by

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322 *See* Pub. L. 111-203 Preamble.

323 The regulation of SBSEFs includes, among other things, requiring SBSEFs to comply with the Core Principles set forth in section 3D(d) of the SEA. *See supra* section VIII.

324 Among other things, the Commission is proposing Form SBSEF for persons seeking to register with the Commission as an SBSEF and a submission cover sheet and instructions to be used in rule and product filings made by SBSEFs.

the Commission. The Commission also is withdrawing all previously proposed rules regarding these subjects.

Currently, SBS trade in the OTC market, rather than on regulated markets. The existing market for SBS is opaque, with little, if any, pre-trade transparency. With limited transparency, the information asymmetry between liquidity providers (*i.e.*, SBS dealers) and end users could be significant. Specifically, liquidity providers may observe information about the trading process (*e.g.*, trading interest, quotes, order flows, and trades) that end users typically cannot observe. The SBS market also is decentralized such that market participants incur search costs to locate other market participants in order to trade.

While the SBS market is decentralized, it also is interconnected and global in scope.[325] SBS dealers can have hundreds of counterparties, consisting of end users and other SBS dealers. Trading venues may serve hundreds of participants, consisting of SBS dealers and end users. SBS transactions arranged, negotiated, or executed by personnel located in the U.S. may involve wholly foreign counterparties. Furthermore, U.S. persons may choose to trade SBSs on foreign venues, which are subject to OTC derivatives regulations imposed by local regulatory authorities.

The Commission is mindful of the economic effects, including the costs and benefits, of the proposal. Section 3(f) of the SEA, 15 U.S.C. 78c(f), directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the SEA 15 U.S.C. 78w(a)(2), requires the Commission, when making rules under the SEA, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or

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[325] *See* also section IX(A) *supra* and XIX(B)(2)(c) *infra* (discussing the global nature of the SBS market).

appropriate in furtherance of the purposes of the SEA.

The analysis below addresses the likely economic effects of the proposal, including its anticipated and estimated benefits and costs and its likely effects on efficiency, competition, and capital formation. The Commission also discusses the potential economic effects of certain alternatives to the approaches taken in this release.

B. Economic baseline

To assess the economic effects of the proposed rules and amendments, the Commission is using as the baseline the SBS market as it currently exists, including applicable rules the Commission has already adopted, but excluding rules the Commission has proposed but not yet finalized. The analysis includes provisions of the SEA, as amended by the Dodd-Frank Act, that currently govern the SBS market, and rules adopted by the Commission thereunder, including in the Intermediary Definitions Adopting Release,[326] the Cross-Border Adopting Release,[327] the SDR Rules and Core Principles Adopting Release,[328] the Regulation SBSR Adopting Release I,[329] the Registration Adopting Release,[330] the ANE Adopting Release,[331] the Business Conduct

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326 *See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant,"* SEA Release No. 66868 (April 27, 2012), 77 FR 30596 (May 23, 2012) ("Intermediary Definitions Adopting Release").

327 *See Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities*, SEA Release No. 72472 (June 25, 2014), 79 FR 47278 (August 12, 2014) ("Cross-Border Adopting Release").

328 *See Security-Based Swap Data Repository Registration, Duties, and Core Principles*, SEA Release No. 74246 (February 11, 2015), 80 FR 14438 (March 19, 2015) ("SDR Rules and Core Principles Adopting Release").

329 *See supra* note 84.

330 *See Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, SEA Release No. 75611 (August 5, 2015), 80 FR 48964 (August 14, 2015) ("Registration Adopting Release").

331 *See Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer* De Minimis *Exception*, SEA Release No. 77104 (February 10, 2016), 81 FR 8598 (February 19, 2016) ("ANE Adopting Release").

Adopting Release,[332] the Trade Acknowledgement and Verification Adopting Release,[333] the Regulation SBSR Adopting Release II,[334] the Rule of Practice 194 Adopting Release,[335] the Capital, Margin, and Segregation Adopting Release,[336] the Recordkeeping and Reporting Adopting Release,[337] the Risk Mitigation Adopting Release,[338] the Cross-Border Amendments Adopting Release,[339] and the Clearing Exemption Adopting Release.[340] The baseline also includes the Temporary SBSEF Exemptions[341] and the CFTC rules that apply to CFTC-registered SEFs. The following sections discuss available data from the SBS market; SBS activity and market participants; distribution of transaction size; other markets and existing regulatory

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332 *See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, SEA Release No. 77617 (April 14, 2016), 81 FR 29960 (May 13, 2016) ("Business Conduct Adopting Release").

333 *See Trade Acknowledgment and Verification of Security-Based Swap Transactions, SEA Release* No. 78011 (June 8, 2016), 81 FR 39808 (June 17, 2016) ("Trade Acknowledgment and Verification Adopting Release").

334 *See supra* note 229.

335 *See Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons To Effect or Be Involved in Effecting Security-Based Swaps*, SEA Release No. 84858 (December 19, 2018), 84 FR 4906-47 (February 19, 2019) ("Rule of Practice 194 Adopting Release").

336 *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*, SEA Release No. 86175 (June 21, 2019), 84 FR 43872 (August 22, 2019) ("Capital, Margin, and Segregation Adopting Release").

337 *See Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers*, SEA Release No. 87005 (September 19, 2019), 84 FR 68550 (December 16, 2019) ("Recordkeeping and Reporting Adopting Release").

338 *See Risk Mitigation Techniques for Uncleared Security-Based Swaps*, SEA Release No. 87782 (December 18, 2019), 85 FR 6359 (February 4, 2020) ("Risk Mitigation Adopting Release").

339 *See Cross-Border Application of Certain Security-Based Swap Requirements*, SEA Release No. 87780 (December 18, 2019), 85 FR 6270 (February 4, 2020) ("Cross-Border Amendments Adopting Release").

340 *See Exemption from the Definition of "Clearing Agency" for Certain Activities of Security-Based Swap Dealers and Security-Based Swap Execution Facilities*, SEA Release No. 90667 (December 16, 2020), 86 FR 7637 (February 1, 2021) ("Clearing Exemption Adopting Release").

341 *See supra* section V and note 42.

frameworks; number of entities that likely will register as SBSEFs; SBS trading on platforms; global regulatory efforts; and trading models.

1. Available data from the SBS market

The Commission's understanding of the market is informed, in part, by available data on SBS transactions, though the Commission acknowledges that limitations in the data limit the extent to which it is possible to quantitatively characterize the market.[342] Since these data do not cover the entire market, the Commission has analyzed market activity using a sample of transaction data that includes only certain segments of the market. The Commission believes, however, that the data underlying this analysis provides reasonably comprehensive information regarding single-name CDS transactions and the composition of the participants in the single-name CDS market.

Specifically, the analysis of the current state of the SBS market is based on data obtained from the DTCC Derivatives Repository Limited Trade Information Warehouse ("TIW"), especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2020. Although SBS are not limited to single-name CDS,[343] single-name CDS contracts make up a majority of SBS, and we believe that the single-name CDS data are sufficiently representative of the market to inform our analysis of the current SBS market. According to data published by the Bank for International Settlements ("BIS"), as of December 2020, the global notional amount outstanding in single-name CDS was approximately $3.5 trillion,[344] in multi-name index CDS was approximately $4.5 trillion, and in multi-name,

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342 The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters and knowledge and expertise of Commission staff.

343 The Commission explains below that data related to single-name CDS provide reasonably comprehensive information for the purpose of this analysis.

344 The global notional amount outstanding represents the total face amount used to calculate payments under outstanding contracts. The gross market value is the cost of replacing all open contracts at current market prices.

non-index CDS was approximately $347 billion.[345] The total gross market value outstanding in single-name CDS was approximately $77 billion, and in multi-name CDS instruments was approximately $125 billion.[346] The global notional amount outstanding in equity forwards and swaps as of December 2020 was $3.6 trillion, with total gross market value of $321 billion.[347]

The data available from TIW does not encompass those CDS transactions that both: (i) do not involve U.S. counterparties;[348] and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, the TIW single-name CDS data should provide sufficient information to permit the Commission to identify the types of market participants active in the

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345 *See Global OTC Derivatives Market: Table D5.2 Commodity Contracts, Credit Default Swap*, BIS (updated January 13, 2022), available at *https://stats.bis.org/statx/srs/table/d5.2*.

346 *See id.*

347 These totals include swaps and SBS, as well as products that are excluded from the definition of "swap," such as certain equity forwards. *See Global OTC Derivatives Market: Table D5.1 Foreign Exchange, Interest Rate, Equity Linked Contracts*, BIS (updated January 13, 2022), *available at https://stats.bis.org/statx/srs/table/d5.1*. For the purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based index CDS and therefore do not fall within the definition of "security-based swap." *See* 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*, 77 FR 48208. The Commission also assumes that all instruments reported as equity forwards and swaps are SBS, potentially resulting in underestimation of the proportion of the SBS market represented by single-name CDS. Therefore, when measured on the basis of gross notional outstanding, single-name CDS appear to constitute roughly 49% of the SBS market. Although the BIS data reflect the global OTC derivatives market and not just the U.S. market, the Commission has no reason to believe that this ratio differs significantly in the U.S. market.

348 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 physical address is designated the registered office location by TIW. When an account reports a registered office location, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account. When an account does not report a registered office location, the Commission has assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. Thus, for purposes of this analysis, the Commission has classified accounts as "U.S. counterparties" when they have reported a registered office location in the United States. The Commission notes, however, that this classification is not necessarily identical in all cases to the definition of "U.S. person" under SEA Rule 3a71-3(a)(4).

SBS market and the general pattern of dealing within that market.[349]

In addition to the TIW single-name CDS data, the Commission uses data on SBS transactions reported to registered security-based swap data repositories (SDRs) to describe the baseline. Beginning on November 8, 2021, market participants are required to report SBS transactions to registered SDRs pursuant to Regulation SBSR. The Commission uses data on SBS transactions in the credit, equity, and interest rate asset classes that were executed between November 8, 2021 and February 28, 2022 to quantify the extent of SBS trading on platforms.

2. SBS market activity and participants

a. SBS Entities

Final SBS Entity registration rules have been adopted and compliance was required as of November 1, 2021.[350] As of January 3, 2022, 44 entities had registered with the Commission as SBS dealers and no entity had registered as a major SBS participant.[351]

Firms that act as SBS dealers play a central role in the SBS market. Based on an analysis of 2020 single-name CDS data in TIW, accounts of registered SBS dealer firms intermediated transactions with a gross notional amount of approximately $1.99 trillion, with approximately 55% of the gross notional intermediated by the top five SBS dealer accounts.[352]

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349 The challenges the Commission faces in estimating measures of current market activity stem, in part, from the absence of comprehensive reporting requirements for SBS market participants. The Commission has adopted rules regarding regulatory reporting and public dissemination of SBS transactions that are designed, when fully implemented, to provide the Commission with additional measures of market activity that will allow the Commission to better understand and monitor activity in the SBS market. *See* Regulation SBSR Adopting Release II, 81 FR at 53545.

350 *See Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, available at: *https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants*.

351 *See List of Registered Security-Based Swap Dealers and Major Security-Based Swap Participants*, available at: *https://www.sec.gov/files/list_of_sbsds_msbsps-_01-03-2022locked-final.xlsx* (providing the list of registered SBS dealers and major SBS participants that was updated as of January 3, 2022).

352 The Commission staff analysis of TIW transaction records indicates that approximately 99% of single-name CDS price-forming transactions in 2020 involved an ISDA-recognized dealer.

These SBS dealers transact with hundreds or thousands of counterparties. Approximately 8% of accounts of SBS dealer firms observable in TIW have entered into SBS with over 1,000 unique counterparty accounts as of year-end 2020.[353] Another 23% of these accounts transacted with 500 to 1,000 unique counterparty accounts; 38% transacted with 100 to 500 unique accounts; and 31% of these accounts intermediated SBS with fewer than 100 unique counterparties in 2020. The median SBS dealer account transacted with 276 unique accounts (with an average of approximately 416 unique accounts). Non-SBS dealer counterparties transacted almost exclusively with these SBS dealers. In 2020, the median non-SBS dealer counterparty transacted with 1.3 SBS dealer accounts (with an average of approximately 2.5 SBS dealer accounts).

b. Other SBS market participants

In addition to SBS dealers, thousands of other participants appear as counterparties to SBS transactions in our sample, including but not limited to: investment companies, pension funds, private funds, sovereign entities, and industrial companies. The Commission observes that most non-SBS dealer users of SBS do not engage in trading directly, but trade through banks, investment advisers, or other types of firms acting as SBS dealers or agents. Based on an analysis of the counterparties to trades reported to the TIW, there are 2,321 entities that engaged directly in trading between November 2006 and December 2020.[354]

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[353] Many dealer entities and financial groups transact through numerous accounts. Given that individual accounts may transact with hundreds of counterparties, the Commission may infer that entities and financial groups may transact with at least as many counterparties as the largest of their accounts.

[354] These 2,321 entities, which are presented in more detail in Table 1, include all DTCC-defined "firms" shown in TIW as transaction counterparties that report at least one transaction to TIW as of December 2020. The staff in the Division of Economic and Risk Analysis classified these firms, which are shown as transaction counterparties, by machine matching names to known third-party databases and by manual classification. *See, e.g.*, ANE Adopting Release, 81 FR at 8602, at n. 43. Manual classification was based in part on searches of the EDGAR and Bloomberg databases, the SEC's Investment Adviser Public Disclosure database, and a firm's public website or the public website of the account represented by a firm. The staff also referred to ISDA protocol adherence letters available on the ISDA website.

As shown in Table 1 below, close to three-quarters of these entities (DTCC-defined "firms" shown in TIW, which we refer to here as "transacting agents") were identified as investment advisers, of which approximately 40% (about 32% of all transacting agents) were registered as investment advisers under the Investment Advisers Act.[355] Although investment advisers are the vast majority of transacting agents, the transactions they executed account for only 14.2% of all single-name CDS trading activity reported to the TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.,* two transaction counterparties). The vast majority of transactions (82.1%) measured by number of transaction-sides were executed by ISDA-recognized SBS dealers.

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[355] *See* 15 U.S.C. 80b1-80b21. Transacting agents participate directly in the SBS market, without relying on an intermediary, on behalf of principals. For example, a university endowment might hold a position in SBS that is established by an investment adviser that transacts on the endowment's behalf. In this case, the university endowment is a principal that uses the investment adviser as its transacting agent.

Table 1. The number of transacting agents by counterparty type and the fraction of total trading activity, from November 2006 through December 2020, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment Advisers	1823	78.5%	14.2%
- SEC registered	*734*	*31.6%*	*9.5%*
Banks	274	11.8%	3.3%
Pension Funds	30	1.3%	0.1%
Insurance Companies	48	2.1%	0.2%
ISDA-Recognized SBS Dealers[356]	17	0.7%	82.1%
Other[357]	129	5.6%	0.2%
Total	2,321	100.0%	100%

Principal holders of CDS risk exposure are represented by "accounts" in the TIW.[358] The staff's analysis of these accounts in TIW shows that the 2,321 transacting agents classified in Table 1 represent 15,187 principal risk holders. Table 2 below classifies these principal risk holders by their counterparty type and whether they are represented by a registered or

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356 For the purpose of this analysis, the ISDA-recognized SBS dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period: J.P. 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, Crédit Agricole, Wells Fargo, and Nomura. *See*, *e.g.*, ISDA, *2010 ISDA Operations Benchmarking Survey* (2010), available at *https://www.isda.org/a/5eiDE/isda-operations-survey-2010.pdf*.

357 This category excludes clearing counterparties (CCPs). Same-day cleared trades are recorded in the DTCC dataset as two clearing legs, each between a CCP (ICE Clear Credit, ICE Clear Europe, and LCH.Clearnet) and the original counterparty in the underlying trade. As these are not price-forming trades, the counts in the last column in Table 1 are adjusted to reflect the original counterparties, excluding a CCP. Though original counterparties cannot be paired up to same-day cleared trades, to adjust for same-day clearing each leg against the CCP is counted as one half of a transaction and the notional amount of the trade is halved as well.

358 "Accounts" as defined in the TIW context are not equivalent to "accounts" in the definition of "U.S. person" in SEA Rule 3a71-3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person might have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

unregistered investment adviser.[359] For instance, banks in Table 1 allocated transactions across 370 accounts, of which 35 were represented by investment advisers. In the remaining instances, banks traded for their own accounts. Meanwhile, ISDA-recognized SBS dealers in Table 1 allocated transactions across 104 accounts. Private funds are the largest type of account holders that the Commission was able to classify, and although not verified through a recognized database, most of the funds we were not able to classify appear to be private funds.[360]

Table 2. The number and percentage of account holders—by type—who participate in the SBS market through a registered investment adviser, an unregistered investment adviser, or directly as a transacting agent, from November 2006 through December 2020.

Account Holders by Type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent[361]	
Private Funds	4,447	2,283	51%	2,089	47%	75	2%
DFA Special Entities	1,542	1,476	96%	43	3%	23	1%
Registered Investment Companies	1,382	1,295	94%	82	6%	5	0%
Banks (non-ISDA-recognized SBS dealers)	370	26	7%	9	2%	335	91%
Insurance Companies	341	210	62%	46	13%	85	25%
ISDA-Recognized SBS Dealers	104	0	0%	0	0%	104	100%
Foreign Sovereigns	93	67	72%	6	6%	20	22%
Non-Financial Corporations	125	93	74%	10	8%	22	18%

359 Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act and might include investment advisers registered with a State or a foreign authority, as well as investment advisers that are exempt reporting advisers under section 203(*l*) or 203(m) of the Investment Advisers Act.

360 For the purposes of this discussion, "private fund" encompasses various unregistered investment vehicles, including hedge funds, private equity funds, and venture capital funds. There remain over 5,800 DTCC accounts unclassified by type. Although unclassified, each account was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

361 This column reflects the number of participants who are also trading for their own accounts.

Finance Companies	59	43	73%	0	0%	16	27%
Other/Unclassified	6,724	4,081	61%	2,348	35%	295	4%
All	15,187	9,574	63%	4,633	31%	980	6%

c. SBS market participant domiciles

As depicted in Figure 1 below, domiciles of new accounts participating in the SBS market have shifted over time. It is unclear whether these shifts represent changes in the types of participants active in this market, changes in reporting, or changes in transaction volumes in particular underliers. For example, the percentage of new entrants that are foreign accounts increased from 24.4% in the first quarter of 2008 to approximately 50% in the last quarter of 2020, which might reflect an increase in participation by foreign account holders in the SBS market, though the total number of new entrants that are foreign accounts decreased from 112 in the first quarter of 2008 to 38 in the last quarter of 2020.[362] Additionally, the percentage of the subset of new entrants that are foreign accounts managed by U.S. persons increased from 4.6% in the first quarter of 2008 to 11.8% in the last quarter of 2020, and the absolute number changed from 21 to 9, which also might reflect more specifically the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other incentives.[363] At the same time, apparent changes in the percentage of new accounts with foreign domiciles might also reflect improvements in reporting by market participants to TIW, an increase in the percentage of transactions between U.S. and non-U.S. counterparties, and/or increased transactions in single-name CDS on U.S. reference entities by foreign persons.[364]

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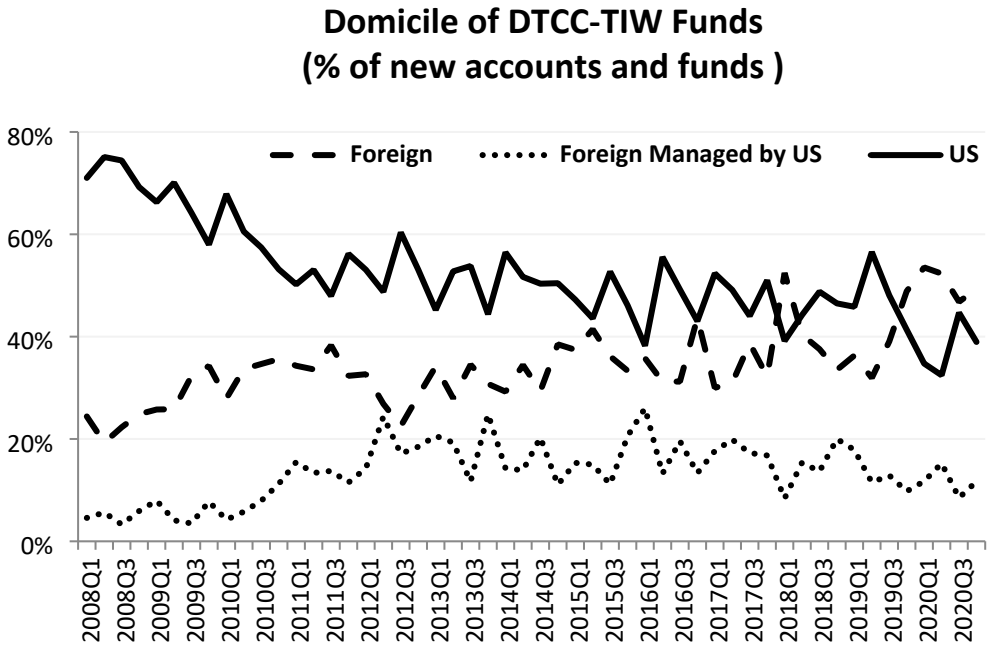
362 These estimates were calculated by Commission staff using TIW data.

363 *See* Charles Levinson, *U.S. banks moved billions in trades beyond the CFTC's reach*, REUTERS (August 21, 2015) (retrieved from Factiva database). The estimates of 21 and 25 were calculated by Commission staff using TIW data.

364 The available data do not include all SBS transactions but only transactions in single-name CDS that involve either (1) at least one account domiciled in the United States

Figure 1



SOURCE: DTCC CDS – TIW. "US" refers to the percentage of new accounts with a domicile in the United States. "Foreign" refers to the percentage of new accounts with a domicile outside the United States and not managed or affiliated with a U.S. entity. "Foreign Managed by US" refers collectively to the percentage of new accounts outside the United States that are managed by a U.S. person, new accounts outside the United States for a foreign branch of a U.S. person, and new accounts outside the United States for a foreign subsidiary of a U.S. person. Unique new accounts are aggregated each quarter and percentages are computed on a quarterly basis from January 2008 through December 2020.

Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to TIW between January 2011 and December 2020, separated by whether transactions are between two ISDA-recognized SBS dealers ("interdealer transactions") or whether a transaction has at least one non-SBS dealer counterparty. Figure 2 also shows that the portion of the notional volume of North American corporate single-name CDS represented by interdealer transactions has remained fairly constant through 2015, before falling from approximately 68% in 2015 to under 40% in 2020. This fall

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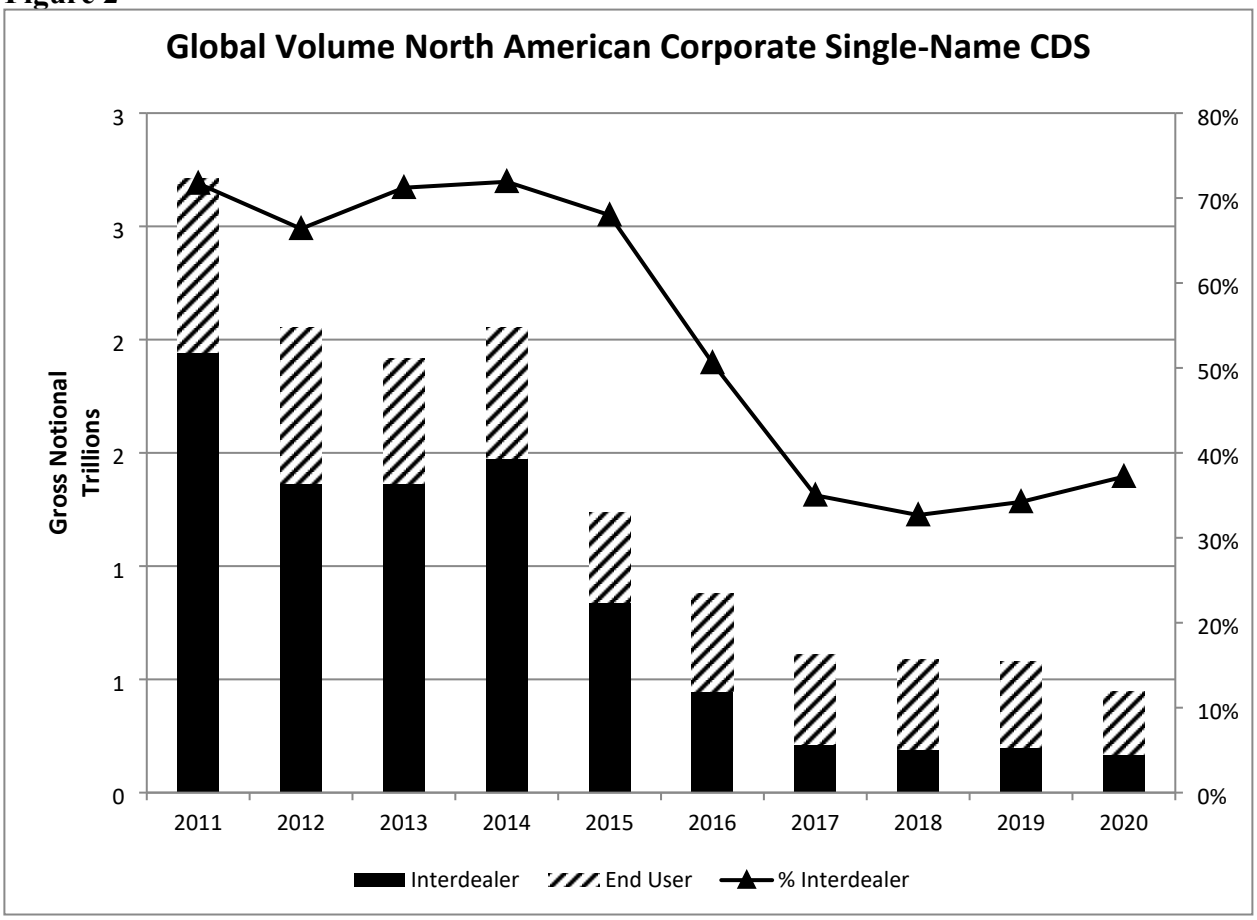
(regardless of the reference entity); or (2) single-name CDS on a U.S. reference entity (regardless of the U.S.-person status of the counterparties).

corresponds to the availability of clearing to non-SBS dealers. Interdealer transactions continue to represent a significant fraction of trading activity, even as notional volume has declined over the past ten years,[365] from just under $2 trillion in 2011 to less than $500 billion in 2020.[366]

Figure 2



SOURCE: DTCC CDS – TIW. Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer. Same-day cleared trades are assumed to be either interdealer or between an SBS dealer and an end user (transactions between two end users are rare in both cleared and uncleared trading).

The high level of interdealer trading activity reflects the central position of a small number of SBS dealers, each of which intermediates trades with many hundreds of

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365 The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder, which is important to note for the purpose of understanding the economic baseline for this rulemaking.

366 This estimate is lower than the gross notional amount of $3.5 trillion noted in section XIX(B)(1), *supra*, as it includes only the subset of single-name CDS referencing North American corporate documentation.

counterparties. While the Commission is unable to quantify the current level of trading costs for single-name CDS, these SBS dealers appear to enjoy market power as a result of their small number and the large proportion of order flow that they privately observe.

Against this backdrop of declining North American corporate single-name CDS activity, about half of the trading activity in North American corporate single-name CDS reflected in the set of data that the Commission analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad, as shown in Figure 3 below. Using the self-reported registered office location of the TIW accounts as a proxy for domicile, the Commission estimates that only 13% of the global transaction volume by notional volume between 2008 and 2020 was between two U.S.-domiciled counterparties, compared to 49% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty, and 38% entered into between two foreign-domiciled counterparties.[367]

If the Commission instead considers the number of cross-border transactions from the perspective of the domicile of the corporate group (*e.g.*, by classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the percentages shift significantly. Under this approach, the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 35%, and to 50% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty. By contrast, the proportion of activity between two foreign-domiciled counterparties drops from 38% to 15%. This change in respective shares based on different classifications suggests that the activity of foreign subsidiaries of U.S. firms and foreign branches of U.S. banks accounts for a higher percentage of SBS activity than U.S. subsidiaries of foreign firms and U.S. branches of foreign banks. It also demonstrates that financial groups based in the United States are involved in an overwhelming

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[367] For purposes of this discussion, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account, but the Commission notes that this domicile does not necessarily correspond to the location of an entity's sales or trading desk. *See* ANE Adopting Release, 81 FR at 8607, n. 83.

majority (approximately 85%) of all reported transactions in North American corporate single-name CDS.

Financial groups based in the United States are also involved in a majority of interdealer transactions in North American corporate single-name CDS. Of the 2020 transactions on North American corporate single-name CDS between two ISDA-recognized SBS dealers and their branches or affiliates, 81% of transaction notional volume involved at least one account of an entity with a U.S. parent.[368] The Commission notes, in addition, that a majority of North American corporate single-name CDS transactions occur in the interdealer market or between SBS dealers and foreign non-SBS dealers, with the remaining portion of the market consisting of transactions between SBS dealers and U.S.-person non-SBS dealers. Specifically, 81% of North American corporate single-name CDS transactions involved either two ISDA-recognized SBS dealers or an ISDA-recognized SBS dealer and a foreign non-SBS dealer. Approximately 19% of such transactions involved an ISDA-recognized SBS dealer and a U.S.-person non-SBS dealer.

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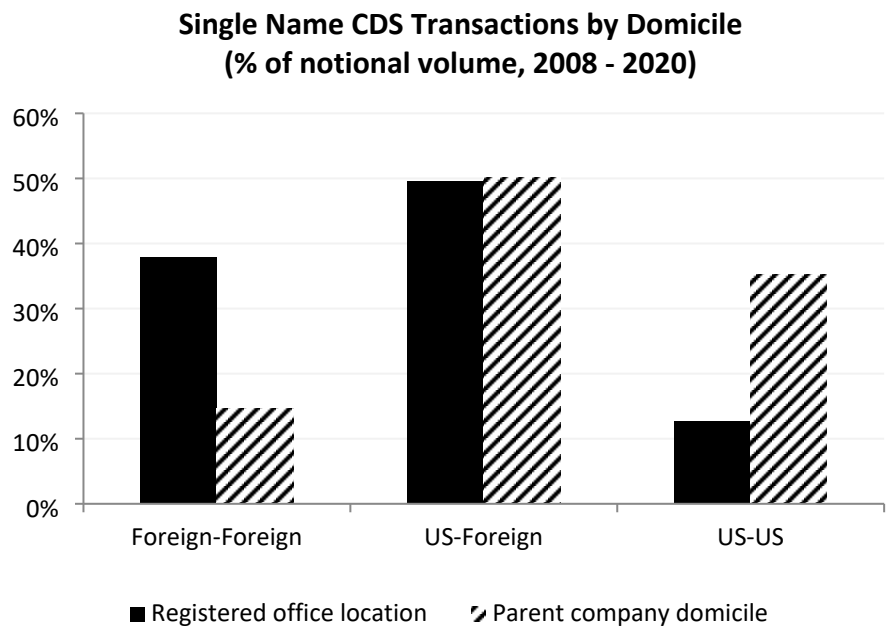
[368] Since the Commission is unable to pair up the same-day cleared trades, this 81% estimate is based on bilateral trades that were not same-day cleared.

Figure 3



SOURCE: DTCC CDS – TIW. The fraction of notional volume in North American corporate single-name CDS 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 2020.

3. Distribution of transaction size

In proposing the definition of a block trade, the Commission has considered the distribution of transaction size in the single-name CDS market, which the Commission believes is representative of the market for SBS based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments).[369] Table 3 reports the total number of newly initiated price-forming CDS transactions referencing North American corporate single-name reference entities. The table also reports the number and percentage of such transactions with a size (notional amount) of at least $5 million. These

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[369] *See* proposed Rule 802. In considering a block trade definition, the Commission also took into consideration that FINRA applies a $5 million cap when disseminating transaction reports of economically similar cash debt securities. *See supra* section VII(E).

statistics are reported for each year between 2011 and 2020 and for the entire ten-year period.

Overall, the number of newly initiated price-forming transactions exhibited a declining trend between 2011 and 2020. The number of such transactions decreased from around 180,000 in 2011 to around 90,000 in 2019, with an uptick to around 127,000 transactions in 2020. The number of newly initiated price-forming transactions with a notional size of at least $5 million also exhibits a declining trend between 2011 and 2020, but without an uptick in 2020. As a percentage of all newly initiated price-forming transactions, those with a notional size of at least $5 million fell from 88% to 23% between 2011 and 2020.

Table 3. The distribution of North American Corporate Single-Name CDS Trade Sizes.

	No. of transactions	No. of transactions with size of at least $5 million	Percentage of transactions with size of at least $5 million
2011	180,700	159,061	88%
2012	165,479	121,151	73%
2013	130,570	87,515	67%
2014	127,410	80,122	63%
2015	107,698	53,991	50%
2016	97,459	37,273	38%
2017	80,513	33,695	42%
2018	88,787	34,840	39%
2019	89,823	34,811	39%
2020	127,379	29,354	23%
2011-2020	1,195,816	671,810	56%

4. Other markets and regulatory frameworks

The numerous financial markets are integrated, often attracting the same market participants that trade across corporate bond, swap, and SBS markets, among others.[370] This is notwithstanding the fact that the SBS market is a small fraction of the swap market and the single-name CDS market, which falls under SEC jurisdiction, is smaller than the index CDS market, which falls under CFTC jurisdiction.[371] For example, persons who register as SBS

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[370] *See* Rule 194 Proposing Release, 80 FR at 51711.

[371] According to data published by BIS, as of December 2020, the global swap market (comprising, for purposes of this discussion, IRS, foreign exchange swaps, multi-name

dealers and major SBS participants are likely also to be engaged in swap activity. In part, this overlap reflects the relationship between single-name CDS contracts, which are SBS, and index CDS contracts, which may be swaps or SBS. A single-name CDS contract covers default events for a single reference entity or reference security. Index CDS contracts and related products make payouts contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. A default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, the prices of these products depend upon one another,[372] creating hedging opportunities across these markets.

These hedging opportunities mean that participants that are active in one market are likely to be active in the other. Commission staff analysis of approximately 4149 TIW accounts that participated in the market for single-name CDS in 2020 revealed that approximately 3096 of those accounts, or 75%, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2020 suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability

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index CDS, and commodity swaps) had a global notional amount outstanding of approximately $571 trillion, while the global SBS market (comprising, for purposes of this discussion, single-name equity swaps and forwards and single-name CDS) had a global notional amount outstanding of approximately $7.1 trillion. The global notional amount outstanding in single-name CDS was approximately $3.5 trillion and in multi-name index CDS was approximately $4.5 trillion. The Commission preliminarily believes that the relative magnitudes presented by these statistics for the global OTC derivatives market are also representative of the U.S. OTC derivatives markets. *See Table D5.2*, BIS, *supra* note 345; *Table D5.1*, BIS, *supra* note 347. *See also supra* section XIX(B)(1).

372 "Correlation" typically refers to linear relationships between variables; "dependence" captures a broader set of relationships that may be more appropriate for certain swaps and SBS. *See*, *e.g.*, George Casella & Roger L. Berger, Statistical Inference 171 (2nd ed. 2002).

of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 61%; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 11%. As a result of cross-market participation, informational efficiency, pricing and liquidity may spill over across markets.[373]

Of the 44 registered SBS dealers, 41 are dually registered with the CFTC as swap dealers and are therefore subject to CFTC requirements for entities registered with the CFTC as swap dealers. Further, of the 44 registered SBS dealers, 27 have a prudential regulator.

5. Number of entities that likely will register as SBSEFs

Entities that will seek to register with the Commission as SBSEFs are likely to be SEFs that are active in the index CDS market. Currently, 20 SEFs have permanent or temporary registration with the CFTC.[374] Of these SEFs, eight list index CDS for trading.[375] If these SEFs

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[373] *See* Business Conduct Adopting Release, 81 FR at 30108; Christopher L. Culp, Andria van der Merwe, & Bettina J. Starkle, *Single-name Credit Default Swaps: A Review of the Empirical Academic Literature* 71-85 (ISDA Study, September 2016), available at *https://www.isda.org/a/KSiDE/single-name-cdsliterature-review-culp-van-der-merwe-staerkleisda.pdf*; Patrick Augustin, Marti G. Subrahmanyam, Dragon Y. Tang, & Sarah Q. Wang, Credit Default Swaps: Past, Present, and Future, 8 Ann. Rev. Fin. Econ. 175 (2016).

[374] *See supra* note 17.

[375] For purposes of this discussion, options on index CDS and index CDS tranches are included as part of index CDS. For SEFs that list index CDS for trading, s*ee* BGC SEF Contract Specifications (January 21, 2022), available at *http://www.bgcsef.com/wp-content/uploads/2022/01/BGC-SEF-Contract-Specifications_01-21-22.pdf*; *Bloomberg SEF LLC Rulebook* (February 24, 2022), *available at https://assets.bbhub.io/professional/sites/10/BSEF-Rulebook.pdf*; *GFI Swaps Exchange: Products & Contract Specifications*, GFI GROUP, available at *http://www.gfigroup.com/markets/gfi-sef/products/*; ICE Swap Trade, LLC, *Swap Execution Facility Rulebook Version: 2.38* (effective December 15, 2021), available at *https://www.theice.com/publicdocs/swap_trade/Rulebook.pdf*; Letter from Ron Steinfeld, CCO, MarketAxess SEF Corp., to CFTC regarding Listing Products for Trading by Certification Pursuant to CFTC Rule 40.2 (January 13, 2015), available at *https://content.marketaxess.com/sites/default/files/marketaxess-sef-product-listing-filing-and-appendices-january-13-2015.pdf*; TW SEF LLC, *Swap Execution Facility Rules* (effective October 1, 2021), available at *https://www.tradeweb.com/4a7851/globalassets/our-businesses/market-regulation/sef-*

were to list single-name CDS or other SBS for trading, they would be required to register as SBSEFs with the Commission. In 2021, index CDS volume on U.S. SEFs was distributed as follows: one SEF had the largest share of index CDS volume (in notional amount) at $8 trillion (69%); one SEF had the second largest share at $2.1 trillion (18%); and the remaining 13% of volume was shared among the other five SEFs.[376] The Commission preliminarily believes that the number of SBSEF registrants most likely falls between two and eight, but acknowledges uncertainty around the upper end of this estimate. The Commission preliminarily believes that the likely number of SBSEF registrants would be five. The Commission invites commenters to provide feedback on the number of entities that will register as SBSEFs.

6. SBS trading on platforms

By analyzing SBS transactions reported to registered SDRs,[377] the Commission has obtained a preliminarily estimate of the extent of SBS trading on platforms. Of the new transactions in credit SBS executed between November 8, 2021 and February 28, 2022, 6,131 were executed on platforms (2% of all new transactions in credit SBS transactions). During the same period, 44 new transactions in equity SBS were executed on platforms (less than 0.01% of all new transactions in equity SBS transactions), while no new transactions in interest rate SBS were executed on platforms. These observations suggest that the vast majority of SBS trading continues to be conducted bilaterally in the OTC market. The Commission invites commenters to provide feedback on the extent of SBS trading on platforms.

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rulebook-oct-1-2021/tw-sef-rulebook_9.17.21.pdf; *Category: Rulebook*, TRADITION SEF, *available at https://www.traditionsef.com/regulatory/filter/rulebook/all/all*; tpSEF Inc. rulebook, tpSEF Inc., *tpSEF Inc. Rulebook Appendix B: tpSEF Inc. Swap Specifications* (effective July 2, 2021), available at *https://www.tullettprebon.com/swap_execution_facility/documents/tpSEF%20-%20Rulebook%20-%20Appendix%20B%20-%20Swap%20Specifications.pdf?20211031*.

376 Index CDS volume traded on SEFs is from Futures Industry Association's SEF Tracker. *See SEF Tracker Historical Volume*, FIA, available at *https://www.fia.org/monthly-volume*.

377 Beginning on November 8, 2021, market participants were required to report SBS transactions to registered SDRs pursuant to Regulation SBSR.

The Commission preliminarily identifies 11 platforms on which new SBS transactions were executed between November 8, 2021 and February 28, 2022. Of these 11 platforms, ten are foreign SBS trading venues and one is a U.S. SBS trading venue that is affiliated with a CFTC-registered SEF. Of the new transactions in credit SBS executed between November 8, 2021 and February 28, 2022, 2,126 were executed on non-U.S. platforms and involved at least one counterparty that is a U.S. person or a non-U.S. person whose performance under the SBS is guaranteed by a U.S. person (0.7% of all new transactions in credit SBS transactions). During the same period, 30 new transactions in equity SBS were executed on a non-U.S. platform and involved at least one counterparty that is a U.S. person or a non-U.S. person whose performance under the SBS is guaranteed by a U.S. person (less than 0.01% of all new transactions in equity SBS transactions).

7. Global regulatory efforts

In 2009, the G20 leaders—whose membership includes the United States, 18 other countries, and the European Union—addressed global improvements in the OTC derivatives market. They expressed their view on a variety of issues relating to OTC derivatives contracts.[378] In subsequent summits, the G20 leaders have returned to OTC derivatives regulatory reform and encouraged international consultation in developing standards for these markets.[379]

Foreign legislative and regulatory efforts have generally focused on five areas: (1) moving standardized OTC derivatives onto organized trading platforms; (2) requiring central clearing of OTC derivatives;[380] (3) requiring post-trade reporting of transaction data to trade repositories; (4) establishing or enhancing capital requirements for non-centrally cleared OTC

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378 *See* G20, *Leaders' Statement: The Pittsburgh Summit* (September 24-25, 2009) at paragraph 13.

379 *See, e.g.*, G20, *Toronto Summit Declaratio*n (June 27, 2010) at Annex II paragraph 25; *Cannes Summit Final Declaration–Building Our Common Future: Renewed Collective Action for the Benefit of All* (November 4, 2011) at paragraph 24.

380 *See supra* note 94.

derivatives transactions; and (5) establishing or enhancing margin and other risk mitigation requirements for non-centrally-cleared OTC derivatives transactions. The rules being proposed in this release concern the registration and regulation of SBSEFs, a type of organized trading platform.

As of the end of 2021, platform trading requirements were in force in 12 foreign jurisdictions while seven jurisdictions were in the process of proposing legislation or rules to implement platform trading requirements.[381] Seven foreign jurisdictions have made determinations with respect to the specific OTC derivatives that are required to be traded on platforms.[382]

8. Trading models

Unlike the markets for cash equity securities and listed options, the market for SBS currently is characterized by bilateral negotiation in the OTC swap market; is largely decentralized; has many non-standardized instruments; and has many SBS that are not centrally cleared. The lack of uniform rules concerning the trading of SBS and the one-to-one nature of trade negotiation in SBS has resulted in different models for the trading of these securities,

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381 Apart from the 12 foreign jurisdictions, the United States is considered to have platform trading requirements in place based on the CFTC's implementation of platform trading requirements. *See* FSB, *OTC Derivatives Market Reforms: Implementation Progress in 2021* Tables 1 & K (December 3, 2021), available at *https://www.fsb.org/2021/12/otc-derivatives-market-reforms-implementation-progress-in-2021/* (describing progress made towards implementing platform trading requirements in 2021); FSB, *OTC Derivatives Market Reforms: 2019 Progress Report on Implementation* Table A (October 15, 2019), available at *https://www.fsb.org/2019/10/otc-derivatives-market-reforms-2019-progress-report-on-implementation/* (discussing the CFTC's implementation of platform trading requirements).

382 These jurisdictions are China (bond forwards; certain currency forwards, options, and swaps); the European Union (certain index CDS; certain IRS denominated in Euro, U.S. dollar, and British pound); India (certain overnight index swaps); Indonesia (equity and commodity derivative products); Japan (selected Yen-denominated IRS); Mexico (certain Peso-denominated IRS); and Singapore (certain IRS denominated in Euro, US dollar, and British pound). *See* FSB, *2019 Progress Report*, *supra* note 381, Table R. In its 2021 report, *see supra* note 381, the FSB noted no change in status in the implementation of platform trading requirements, including platform trading determinations, since its 2019 report.

ranging from bilateral negotiations carried out over the telephone, to RFQ systems (*e.g.,* single-dealer and multi-dealer RFQ platforms) and central limit order books outside the United States, as more fully described below. The use of electronic media to execute transactions in SBS varies greatly across trading models, with some models being highly electronic whereas others rely almost exclusively on non-electronic means such as the telephone. The reasons for use of, or lack of use of, electronic media vary from such factors as user preference to limitations in the existing infrastructure of certain trading platforms. The description below of the ways in which SBS may be traded is based in part on discussions with market participants. The Commission solicits comments on the accuracy of this description.

The Commission uses the term "bilateral negotiation" to refer to the model whereby one party uses the telephone, email, or other communications to contact directly a potential counterparty to negotiate an SBS transaction. Once the terms are agreed, the SBS transaction is executed and the terms are memorialized.[383] In a bilateral negotiation, there might be no pre-trade or post-trade transparency available to the market place because only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement. Further, no terms of the proposed transaction are firm until the transaction is executed. However, reputational costs generally serve as a deterrent to either party's failing to honor any quoted terms. Dealer-to-customer bilateral negotiation currently is used for all SBS asset classes, and particularly for trading in less liquid SBS, in situations where the parties prefer a privately negotiated transaction, such as for a large notional transaction, or in other circumstances in which it is not cost-effective for a party to the trade to use one of the execution methods described below.

Another model for the trading of SBS is the RFQ system. An RFQ system typically allows market participants to obtain quotes for a particular SBS by simultaneously sending

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[383] *See*, *e.g.*, Trade Acknowledgement and Verification Adopting Release, 81 FR at 39809.

messages to one or more potential respondents (SBS dealers).[384] The initiating participant is typically required to provide information related to the request in a message, which may include the name of the initiating participant, SBS identifier, side, and size. SBS dealers that observe the initiating participant's request have the option to respond to the request with a price quote.[385] These respondents are often, though not always, pre-selected. The initiating participant can then select among the respondents by either accepting one of multiple responses or rejecting all responses, usually within a "good for" time period. After the initiating participant and a respondent agree on the terms of the trade, the trade will then proceed to post-trade processing.

RFQ systems provide a certain degree of pre-trade transparency in that the initiating participant can observe the quotes it receives (if any) in response to its RFQ. The number of quotes received depends, in part, on the number of respondents that are invited to participate in the RFQ. As the Commission discussed elsewhere, several factors may influence the number of respondents that are invited to participate in an RFQ.[386] First, the RFQ system itself may limit the total number of respondents that can be selected for a single RFQ, typically to five counterparties. This limitation may encourage SBS dealers to respond to RFQs, since it reduces the number of other SBS dealers they would compete with in any give request session. Second, the initiating participant may have an incentive to limit the degree of information leakage. If the trade the initiating participant is seeking to complete with the help of the RFQ is not

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384 *See* Lynn Riggs, Esen Onur, David Reiffen, and Haoxiang Zhu, *Swap Trading After Dodd-Frank: Evidence from Index CDS*, 137 J. Financial Economics 857 (2020) (finding that, in the index CDS market, an initiating participant is more likely to send RFQs to its relationship dealers, *i.e.,* its clearing members or dealers with whom it has traded more actively in the recent past).

385 *See id.* (finding that, in the index CDS market, a dealer's response rate to an RFQ declines with the number of dealers included in the RFQ).

386 *See Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities* SEA Release No. 94062 (January 26, 2022), 87 FR 15496 (March 18, 2022) ("ATS-G Proposal"), section VIII(B)(1)(a) therein.

completely filled in that one session, and other participants know this, quotes the initiating participant receives elsewhere may be affected, including in subsequent RFQ sessions. Third, respondents and initiators both have an incentive to limit price impact because of the expense it will add to the offsetting trade that must follow. Specifically, an SBS dealer who takes a position to fill a customer order through an RFQ will often subsequently offset that position in the interdealer market. If a large number of SBS dealers are invited to participate in an RFQ, this would lead to widespread knowledge that the SBS dealer with the winning bid will now try to offset that position, which could impact the prices available to that dealer in the interdealer market.

A third model for the trading of SBS is a limit order book system or similar system, which the Commission understands is not yet in operation for the trading of SBS in the United States but exists for the trading of SBS in Europe. Today, securities and futures exchanges in the United States display a limit order book in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs.[387] Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system also provides greater pre-trade transparency than the two models described above, because participants can view bids and offers before placing their bids and offers. However, broadly communicating trading interest, particularly about a large trade, might increase hedging costs, and thus costs to investors, as reflected in the prices from the SBS dealers. The system can also provide post-trade transparency, to the extent that participants can see the terms of executed transactions.

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[387] Under CFTC rules applicable to the swap market, § 37.9(f) prohibits the practice of post-trade name give-up for swaps that are executed, pre-arranged, or pre-negotiated anonymously on or pursuant to the rules of a SEF and intended to be cleared, subject to an exception related to certain package transactions. *See supra* section VII(E) (discussing proposed Rule 815).

The three models described above represent broadly the types of trading of SBS in the OTC market today. These examples may not represent every method in existence today, but the discussion above is intended to give an overview of the models without providing the nuances of each particular type.

C. Benefits, costs, and reasonable alternatives

This section discusses the benefits and costs of the proposal. The section also discusses a number of alternatives that the Commission considered when formulating the proposed rules and amendments.

The Commission's consideration of the benefits and costs of the proposal takes into account the connection between the trade execution requirement and the mandatory clearing requirement mandated by Congress. The Dodd-Frank Act amends the SEA to require, among other things, the following with respect to SBS transactions: (1) transactions in SBS must be cleared through a clearing agency if they are required to be cleared;[388] and (2) if the SBS is subject to the clearing requirement, the transaction must be executed on an exchange or on an SBSEF registered under section 3D of the SEA or an SBSEF exempt from registration under section 3D(e) of the SEA, unless no SBSEF or exchange makes such SBS available for trading or the SBS is subject to the clearing exception in section 3C(g) of the SEA.[389] The benefits and costs associated with the trade execution requirement would not materialize unless and until the Commission makes mandatory clearing determinations, *i.e.*, determining what SBS transactions must be cleared by a clearing agency.

The Commission preliminarily believes that the general approach to proposing requirements relating to SBS execution could mitigate costs associated with the proposal. As discussed in section III, the Commission's approach is to harmonize as closely as practicable

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388 *See* Pub. L. 111-203, section 763(a) (adding section 3C(a)(1) of the SEA).

389 *See* Pub. L. 111-203, section 763(a) (adding section 3C(h) of the SEA). *See also* Pub. L. 111-203, section 761(a) (adding section 3(a)(77) of the SEA to define the term "security-based swap execution facility").

with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area. Based on the Commission's preliminarily belief that SBSEF registrants likely would be registered SEFs that have established systems and policies and procedures to comply with CFTC rules, the Commission's general approach likely would result in compliance costs for registered SBSEFs that are lower than compliance costs that would have resulted had the Commission chosen not to follow the CFTC's approach.[390]

In assessing the economic impact of the proposed rules, the Commission considers the broader costs and benefits associated with the application of the proposed rules, including the costs and benefits of applying the substantive Title VII requirements to the trading of SBS.[391] The Commission's analysis also considers "assessment" costs—*i.e.*, those that arise from current and future market participants expending resources to assess how they will be affected by Regulation SE, and could incur expenses in making this assessment even if they ultimately are not subject to rules for which they made an assessment.

Many of the benefits and costs discussed below are difficult to quantify. These benefits and costs would depend on how potential SBSEFs and their prospective members respond to the proposed rules, if adopted by the Commission. If potential SBSEFs perceive the costs associated with operating registered SBSEFs to be high, such that few or no entities come forward to register as SBSEFs, there could be no triggering of the trade execution requirement, which depends on MAT determinations made by registered SBSEFs (or exchanges). Under this scenario, the future state of the SBS market likely would not differ from the current baseline and

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390 In section XX *infra*, for purposes of the PRA, the Commission preliminarily estimates burdens applicable to a stand-alone SBSEF. However, the Commission preliminarily believes that most if not all SBSEFs will be dually registered with the CFTC as SEFs, and thus will already be complying with relevant CFTC rules that have analogs to rules contained within proposed Regulation SE. Therefore, the Commission's burden estimates may be larger for stand-alone SBSEF than may exist in practice, considering the effect of overlapping CFTC rules.

391 In certain prior Title VII releases, the Commission had referred to such costs and benefits as programmatic costs and benefits. *See, e.g.,* Regulation SBSR Adopting Release I.

the potential costs and benefits discussed below would not materialize. An alternative scenario is that prospective SBSEFs perceive the costs associated with operating registered SBSEFs to be high but nevertheless register as SBSEFs because they expect to be able to pass on such costs to their members to help maintain the commercial viability of operating a registered SBSEF. MAT determinations by registered SBSEFs would move trading of the products covered by the determinations onto SBSEFs, which could generate benefits and costs associated with increased pre-trade transparency, in addition to benefits and costs associated with the operation of regulated markets. A third possibility is that entities come forward to register as SBSEFs because they perceive the associated costs of operating SBSEFs to be low in light of the close harmonization of the proposed rules with analogous CFTC SEF rules. If these registered SBSEFs do not make MAT determinations and thus do not trigger the trade execution requirement, the benefits and costs associated with increased pre-trade transparency likely would not arise. If SBSEF trading is limited because of an absence of MAT determinations, the benefits and costs associated with the operation of regulated markets potentially would be limited as well. A fourth possibility is that entities do come forward to register as SBSEFs because they perceive the associated costs of operating SBSEFs to be low and these registered SBSEFs make MAT determinations and trigger the trade execution requirement. Under this scenario, the benefits and costs associated with increased pre-trade transparency and regulated markets likely would arise. The Commission does not have the data to determine which of the above possibilities will prevail should the proposed rules be adopted.

The Commission has attempted to quantify economic effects where possible, but much of the discussion of economic effects is necessarily qualitative. The Commission requests comment and, with regard to any comments, such comments are of greatest assistance if they are accompanied by supporting data and analysis of the issues addressed.

1. Overarching benefits of the proposal

Broadly, the Commission anticipates that proposed Regulation SE may bring several

overarching benefits to the SBS market.

Improved Transparency. The proposal would enable the Commission to obtain information about SBSEFs, thereby facilitating the Commission's oversight of these entities.[392]

In addition, the proposed requirements relating to pre-trade transparency would increase pre-trade transparency in the market for SBS.[393] Increased pre-trade price transparency should allow an increased number of market participants to better see the trading interest of other market participants prior to trading, which should lead to increased price competition among market participants.[394] The Commission preliminarily believes that the proposed requirements with respect to pre-trade price transparency should lead to more efficient pricing in the SBS market.[395]

Evidence from the swap market suggests that an increase in pre-trade transparency is associated with improved liquidity and reduced transaction costs.[396] The Commission is not

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392 For example, proposed Rule 826 would, among other things, require an SBSEF to maintain records of its business activities (including a complete audit trail) for a period of five years and report to the Commission such information as the Commission determines to be necessary or appropriate for performing the duties of the Commission under the SEA. *See* also the discussion below on how the proposal would provide the means for the Commission to gain better insight into and oversight of SBSEFs and the SBS market.

393 Proposed Rules 803(a)(2) and (3) would require an SBSEF to offer, at a minimum, an order book for SBS trading, subject to certain exceptions related to package transactions. Proposed Rule 815 would require SBS transactions subject to the trade execution requirement to be executed using either an order book or via an RFQ-to-3 system. Proposed Rule 816 would set forth the process by which an SBSEF would subject an SBS to the trade execution requirement. Proposed Rule 832 would describe those cross-border SBS transactions that would be subject to the trade execution requirement.

394 *See*, *e.g.*, Ananth Madhavan, *Market Microstructure: A Practitioner's Guide*, Fin. Analysts J., Vol. 58, at 38 (2002) (nondisclosure of pre-trade price information benefits dealers by reducing price competition).

395 *See*, *e.g.*, Ekkehart Boehmer, *et al.*, *Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE*, J. Fin., Vol. LX (2005) (greater pre-trade price transparency leads to more efficient pricing).

396 *See* Evangelos Benos, Richard Payne, and Michalis Vasios, *Centralized Trading, Transparency, and Interest Rate Swap Market Liquidity: Evidence from the Implementation of the Dodd-Frank Act*, 55 J. Fin. and Quantitative Analysis 159 (2020) (finding, among other things, that imposition of the CFTC's trade execution requirement

aware of any difference between the swap market and the SBS market that would cause the empirical findings regarding the impact of pre-trade price transparency on liquidity and transaction costs not to carry over into the SBS market, when implemented. The Commission is mindful that, under certain circumstances, pre-trade price transparency could also discourage the provision of liquidity by some market participants.[397] However, the Commission preliminarily believes that by proposing two execution methods for Required Transactions (limit order book and RFQ-to-3), market participants have flexibility in the degree of pre-trade transparency they wish to employ, which should attenuate potential concerns associated with the exposure of pre-trade trading interest.

Improved oversight of trading. Regulation SE would require, among other things, that SBSEFs maintain an audit trail and automated trade surveillance system; conduct real-time market monitoring; establish and enforce rules for information collection; and comply with reporting and recordkeeping requirements.[398] These requirements are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and deterring abusive trading practices.

This framework could enhance investor protection and increase confidence in a well-regulated market among SBS market participants, which could in turn make them more willing to increase their participation or entice new participants. An increase in participation in the SBS market would, all else being equal, benefit the SBS market as a whole. Further, to the extent that

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improved the liquidity of IRS that were subject to the requirement, and that the liquidity improvement was associated with more intense competition between swap dealers); Y.C. Loon and Zhaodong (Ken) Zhong, *Does Dodd-Frank Affect OTC Transaction Costs and Liquidity? Evidence from Real-Time CDS Trade Reports*, 119 J. Fin. Econ. 645 (2016) (finding that index CDS transactions executed on SEFs have lower transaction costs and improved liquidity than index CDS transactions executed bilaterally).

397 *See*, *e.g.*, Ananth Madhavan, *et al*., *Should Securities Markets Be Transparent?*, J. of Fin. Markets, Vol. 8 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

398 *See* proposed Rules 819, 821, 822, and 826.

market participants utilize SBS to better manage their risk with respect to a position in underlying securities or assets, their participation in the SBS market could impact their willingness to participate in the underlying asset markets. Thus, the Commission preliminarily believes that the proposal could benefit the securities markets overall by encouraging a more efficient, and potentially higher, level of capital investment.

Improved access and competition. Currently, the SBS market is dominated by a small group of SBS dealers.[399] A mandatory clearing determination by the Commission, followed by a MAT determination by one or more SBSEFs or exchanges, should help foster greater competition in the trading of SBS by promoting greater order interaction and increasing access to and participation on SBSEFs. The proposed rules would provide a framework for allowing a number of trading venues to register as SBSEFs and thus more effectively compete for business in SBS. Furthermore, proposed Rule 827 is designed to promote competition generally by prohibiting an SBSEF from adopting any rules or taking any actions that unreasonably restrain trade, or imposing any material anticompetitive burden on trading or clearing. In addition, proposed Rule 819(c) would, among other things, require an SBSEF to provide any ECP with impartial access to its market(s) and market services.

The proposed new rules and amendments to the Commission's Rules of Practice would allow persons who are aggrieved by a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access by an SBSEF to seek an application for review by the Commission.[400] These proposed rules and amendments are designed to improve access to SBSEFs by creating a procedure for making appeals to the Commission, thereby limiting the ability of an SBSEF to make a disciplinary action, denial or conditioning of membership, or denial or limitation of access

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399 *See supra* section XIX(B)(2).

400 *See* proposed Rules 442 and 443; proposed amendments to Rules 101, 202, 210, 401, 450, and 460.

without any recourse by the affected party. Taken together, these proposed rules and amendments should foster greater access to SBSEFs by SBS market participants, which in turn could promote greater participation by liquidity providers on SBSEFs. Increased participation could increase competition in liquidity provision and lower trading costs, which may lead to increased participation in the SBS market.

Improved Commission oversight. One of the goals of the Dodd-Frank Act is to increase regulatory oversight of SBS trading relative to the existing OTC SBS market.[401] The proposal would provide the means for the Commission to gain better insight into and oversight of SBSEFs and the SBS market by, among other things, allowing the Commission to review new rules, rule amendments, and product listings by SBSEFs[402] and to obtain other relevant information from SBSEFs.[403]

Additionally, proposed Rule 826(b) would require every SBSEF to keep full, complete, and systematic records of all activities relating to its business with respect to SBS. In addition, proposed Rule 819(f) would require an SBSEF to capture and retain a full audit trail of activity on its facility. The records required to be kept by an SBSEF would help the Commission to determine whether an SBSEF is operating in compliance with the SEA and the Commission's rules thereunder. The audit trail data required to be captured and retained would facilitate the ability of the SBSEF and the Commission to carry out their respective obligations under the SEA, by facilitating the detection of abusive or manipulative trading activity, allowing reconstructions of activity on the SBSEF, and generally understanding the causes of both specific trading events and general market activity.

Furthermore, proposed Rule 835 would require an SBSEF to provide the Commission notice of a final disciplinary action, a final action with respect to a denial or conditioning of

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401 *See* Pub. L. 111-203, Preamble.

402 *See* proposed Rules 804, 805, 806, and 807.

403 *See* proposed Rule 811.

membership, or a final action with respect to a denial or limitation of access, which would allow the Commission to review the SBSEF's disciplinary process and exercise of its regulatory powers, providing the Commission an additional tool to carry out its oversight responsibilities. The proposed registration requirements and related proposed Form SBSEF, and the CCO's annual compliance report, which are further discussed below, would also help the Commission with its oversight responsibilities.

Improved automation. To comply with the requirements of proposed Regulation SE relating to recordkeeping and surveillance, an SBSEF potentially would need to invest in and develop automated technology systems to store, monitor, and communicate a variety of trading data, including orders, RFQs, RFQ responses, and quotations.[404] The proposed rules should promote increased automation in the SBS market, although CFTC-registered SEFs that plan to register as SBSEFs are already deploying automated systems that could be supplemented to support an SBS business. In addition, the automation and systems development associated with the regulation of SBSEFs could provide SBS market participants with new platforms and tools to execute and process transactions in SBS at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency.

2. Benefits associated with specific proposed rules

In addition to the broad benefits that the Commission anticipates as a result of proposed Regulation SE, individual rules could bring particular benefits to the SBS market. These include the following:

Registration requirements and Form SBSEF. SBSEF registration is required under the Dodd-Frank Act.[405] Proposed Rule 818(a) incorporates the requirement under the Dodd-Frank Act that an SBSEF, in order to be registered and maintain registration, must comply with the

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404 *See* proposed Rules 819(d)(4) and 826.

405 *See* section 3D(a)(1) of the SEA, 15 U.S.C. 78c-4(a)(1).

Core Principles in section 3D(d) of the SEA and the Commission's rules thereunder. The registration process described in proposed Rule 803 would implement this statutory requirement and assist the Commission in overseeing and regulating the SBS market. The information to be provided on proposed Form SBSEF is designed to enable the Commission to assess whether an applicant has the capacity and the means to perform the duties of an SBSEF and to comply with the Core Principles and other requirements imposed on SBSEFs. Proposed Rule 803 is closely modelled on analogous CFTC registration requirements for SEFs. The choice to align the Commission's registration requirements for SBSEFs with the CFTC's requirements for SEFs is designed to achieve the abovementioned benefits while imposing only marginal costs on SBSEF registrants, who likely are SEFs.

Proposed exemptions (proposed Rule 833, proposed Rule 816(e), proposed amendments to Rule 3a1-1, and proposed Rule 15a-12). Proposed Rule 833 is designed to preserve access to foreign markets by "covered persons" (as defined in proposed Rule 832). As discussed in section XIX(B)(6), an analysis of SBS transaction data indicates that certain trades executed on foreign SBS trading venues involve at least one counterparty that is a covered person. Absent the proposed rule, these trading venues might elect to avoid having members that are covered persons if those venues do not wish to register with the Commission in some capacity (such as an exchange or SBSEF). In addition, covered persons would not be permitted to execute SBS that are subject to the trade execution requirement on these venues if the venues do not register with the Commission in some capacity (such as an exchange or SBSEF) or obtain an appropriate exemption. This would limit access to foreign SBS trading venues by covered persons, potentially making it harder for them to locate counterparties and obtain liquidity for SBS that trade on those venues. This in turn could increase their trading costs, because they might spend more time and effort to locate counterparties or because they have less bargaining power relative to the remaining pool of potential counterparties with which they could trade. To the extent that a foreign SBS trading venue can obtain a Rule 833(a) exemption, it could continue to provide

members that are covered persons with access to and liquidity on its market. Furthermore, a Rule 833(b) exemption would allow covered persons to continue accessing foreign SBS trading venues to execute SBS that are subject to the SEA's trade execution requirement.

Currently, all trading venues that trade SBS—whether domestic or foreign—are exempt from having to register as a national securities exchange or SBSEF on account of the SBS trading business. This exemption expires when the Commission's rules for registering and regulating SBSEFs come into force.[406] Thus, removal of the existing exemption would merely restore the *status quo ante*, where the SEA itself, as amended by the Dodd-Frank Act, requires entities meeting the definition of "security-based swap execution facility" or "exchange" and falling within the territorial jurisdiction of the SEA to register with the Commission. By offering foreign SBS trading venues the possibility of an exemption from the definitions of "security-based swap execution facility" and "exchange" as well as from section 3D(a)(1) of the SEA, proposed Rule 833(a) would allow foreign SBS trading venues to operate in conditions similar to the current baseline (if the Commission ultimately grants an exemption under Rule 833(a)).

Currently, market participants that trade SBS that would be covered by proposed Rule 816(e)[407] do not trade these products on registered exchanges or registered SBSEFs. Proposed Rule 816(e), by providing exemptions from the trade execution requirement for these SBS, would preserve the *status quo* for these SBS.

Proposed paragraph (a)(4) of Rule 3a1-1 would provide that an entity that has registered with the Commission as an SBSEF and provides a market place for no securities other than SBS would not fall within the definition of "exchange" and thus would not be subject to the

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406 *See supra* section V, note 43.

407 Proposed paragraphs (e)(1), (2), and (3) of Rule 816 would exempt from the trade execution requirement, respectively: an SBS transaction that is executed as a component of a package transaction that also includes a component transaction that is the issuance of a bond in a primary market; an SBS that qualifies for an exception under section 3C(g) of the SEA or any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met; and an SBS transaction that is executed between counterparties that qualify as "eligible affiliate counterparties."

requirement in section 5 of the SEA to register as a national securities exchange (or obtain a low-volume exemption). The Commission preliminarily believes that the benefit of the proposed amendment would be to clarify to prospective SBSEF applicants that, if they register with the Commission as SBSEFs, they would not face duplicative registration and regulatory requirements as exchanges. In addition, proposed paragraph (a)(5) of Rule 3a1-1 would codify a series of exemptions that the Commission has granted over several years to SBS clearing agencies that operate "forced trading" sessions. Because the proposed amendment is intended to codify existing exemptions, the Commission preliminarily believes that any associated economic effects would be minimal.

Proposed new Rule 15a-12 is designed to minimize overlapping compliance burdens for SBSEFs, which are also brokers under the SEA, that restrict their activity to engaging in the business of operating an SBSEF (and no other broker activities). Absent the proposed rule, such SBSEFs (defined as "SBSEF-Bs" for purposes of Rule 15a-12) would need to register as SBSEFs and be subject to the SBSEF regulatory regime, in addition to registering as brokers and being subject to the broker regulatory regime. Proposed Rule 15a-12 would allow an SBSEF-B to satisfy the requirement to register as a broker by registering as an SBSEF under proposed Rule 803, and would exempt an SBSEF-B from SIPA and other broker requirements, except for sections 15(b)(4), 15(b)(6), and 17(b) of the SEA. As a result of the proposed rule, SBSEF-Bs could avoid incurring what the Commission preliminarily believes to be duplicative and unnecessary compliance burdens. Each SBSEF-B could save an estimated $324,849 in initial broker registration costs[408] and $59,063 in annual ongoing costs of meeting broker registration

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[408] The Commission previously estimated that an entity would incur costs of $301,400 to register as a broker-dealer and become a member of a national securities association. *See* Cross-Border Amendments Adopting Release, 85 FR at 6312. Adjusted for inflation through December 2021, these costs are $324,849.

requirements.[409] In deriving these estimates, the Commission assumes that the activities an SBSEF-B performs to register and maintain registration as a broker do not overlap with those that it performs to register and maintain registration as an SBSEF-B. If there is an overlap in such activities, the estimated cost savings could be smaller. Each SBSEF-B could save an estimated $823 in ongoing costs associated with satisfying broker minimum capital requirements.[410] The estimated aggregate initial and annual ongoing savings are $1,624,245 and $299,430, respectively.[411]

Rule and product filings. Proposed Rules 806 and 807 would set forth alternative filing processes for a new rule or rule amendment of a registered SBSEF, and proposed Rules 804 and 805 would set forth alternative filing processes for an SBSEF to file an SBS product that it wishes to list. Proposed Rule 810 would address new product filings by an entity that has applied for SBSEF registration but has not yet been registered, or by a dormant SBSEF seeking reinstatement of its registration. The self-certification processes of Rules 804 and 807 would

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409 The Commission previously estimated that an entity would incur ongoing annual costs of $54,800 to maintain broker-dealer registration and membership of a national securities association. *See* Cross-Border Amendments Adopting Release, 85 FR at 6312. Adjusted for inflation through December 2021, these costs are $59,063. The estimation of ongoing annual costs is based on the assumption that the entity would use existing staff to perform the functions of the registered broker-dealer and would not incur incremental costs to hire new staff. To the extent that the entity chooses to hire new staff, the ongoing annual costs would likely be higher.

410 The Commission preliminarily believes that, absent the proposed rule, an SBSEF-B would comply with the minimum net capital requirement of $5,000 for a registered broker-dealer because it would not receive, owe, or hold customer funds or securities; carry customer accounts; and engage in certain other activities. *See* Rule 15c3-1(a)(2)(vi) under the SEA, 17 CFR 240.15c3-1(a)(2)(vi). The Commission preliminarily estimates the cost of capital using the annual stock returns on a value-weighted portfolio of financial stocks from 1986 to 2021 (*see* website of Professor Ken French, available at *http://mba.tuck.dartmouth.edu/pages/faculty/ken.french/ftp/48_Industry_Portfolios_CSV.zip* (accessed on March 14, 2022). These returns were averaged to arrive at an estimate of 16.45%. The cost of capital = 16.45% x $5,000 = $823.

411 The Commission preliminarily estimates the number of SBSEF-Bs as the number of entities that likely will register as SBSEFs. *See supra* section XIX(B)(5). Aggregate initial savings = $324,849 x 5 (number of SBSEF-Bs) = $1,624,245. Aggregate annual ongoing savings = ($59,063 + $823) x 5 (number of SBSEFs) = $299,430.

require SBSEFs to include a certification that the product, rule, or rule amendment, as the case may be, complies with the SEA and Commission rules thereunder.[412] The information to be provided by the SBSEF under proposed Rules 804, 805, and 810 would further the ability of the Commission to obtain information regarding SBS that an SBSEF intends to list on its market. The proposed rules would assist the Commission in overseeing and regulating the trading of SBS and to help ensure that SBSEFs operate in compliance with the SEA.

In addition, proposed Rule 806(a)(5), which would require an SBSEF to explain the anticipated benefits and potential anticompetitive effects on market participants of a proposed new rule or rule amendment potentially could help foster a competitive SBS market because it could prompt SBSEFs to consider the positive as well as negative aspects of their proposed rules or rule amendments. Proposed Rule 808 is designed to facilitate the public's ability to obtain information from SBSEF applications as well as rule and product filings. Proposed Rule 808(a) would specify the parts of an SBSEF application that shall be made publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b-2. Proposed Rule 808(b) would provide that an SBSEF's rule and product filings shall be made publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b-2. Proposed Rule 808(c) would provide that the terms and conditions of a product submitted to the Commission pursuant to any of proposed Rules 804 through 807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to SEA Rule 24b-2.

Proposed Rule 809 would provide a mechanism for the staying or tolling of a filing by an SBSEF relating to a product while the appropriate jurisdictional classification of that product is determined. The proposed rule is designed to provide regulatory certainty for SBSEFs and market participants who may be interested in trading products whose classification as an SBS subject to SEC jurisdiction or a swap subject to CFTC jurisdiction is unclear. In particular,

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412 *See* proposed Rules 804(a)(3)(iv) and 807(a)(6)(iv) .

proposed Rule 809 would help ensure that determinations regarding whether the SEC or CFTC appropriately has jurisdiction over a product are made before the product is traded.

The Commission's election to model proposed Rules 804 through 810 closely on analogous rules in part 40 of the CFTC's rules that apply to SEFs (and other registered entities) is designed to promote efficiency. Utilizing the same processes for rule and product filings, with which dually registered SEF/SBSEFs are familiar, would impose only minimal burdens on such entities while obtaining the similar regulatory benefits as the CFTC rules. In some cases, where a new rule or rule amendment affects both the swap and SBS business of a dually registered entity, the same or a very similar filing could be made to each of the CFTC and SEC, in lieu of having to make different filings to support the same rule change.

Chief Compliance Officer. Proposed Rule 831 would, among other things, require the CCO of an SBSEF to submit an annual compliance report and annual financial report to the Commission. These reports would assist the Commission in carrying out its oversight of the SBSEFs and the SBS market by providing the Commission with information about the compliance activities and financial state of SBSEFs. Furthermore, by requiring an SBSEF to designate an individual as the CCO and making the CCO responsible for ensuring compliance with the SEA and the Commission's rules thereunder, proposed Rule 831 would promote regulatory compliance on SBSEFs and the SBS market generally. This in turn would further the goal of moving SBS trading away from opaque and unregulated OTC markets and onto transparent and regulated markets by promoting effective regulation of the latter.

Conflicts of Interest. Proposed Rule 831 would, among other things, require the CCO to resolve material conflicts of interest that may arise in consultation with the governing board or the senior officers of the SBSEF.[413] Proposed Rule 828(a) would require an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and establish a

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[413] *See* proposed Rules 831(a)(2)(iii) and (h)(2).

process for resolving the conflicts of interest. Proposed Rule 828(b) would require an SBSEF to comply with the requirements of proposed Rule 834 which is designed to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges. Proposed Rule 834 would, among other things, impose a 20% cap on the voting interest held by an individual member of an SBSEF or SBS exchange, mitigate conflicts of interest in the disciplinary process of an SBSEF or SBS exchange, set forth certain minimum requirements for the composition of the governing board of an SBSEF or SBS exchange, set forth reporting requirements related to governing board elections, and address the avoidance of conflicts of interest in the execution of regulatory functions by an SBSEF or SBS exchange.[414]

The Commission preliminarily believes that the proposed rules would mitigate conflicts of interest between an SBSEF or SBS exchange and its members as discussed in section X. Relative to the bilateral OTC SBS market, SBSEFs and SBS exchanges promote competition between liquidity providers, potentially forcing them to lower their prices for supplying liquidity (*e.g.*, narrowing bid-ask spread) and reducing their profits from liquidity provision. However, if SBS dealers or major SBS participants were able to restrict access to such venues by, for example, exercising their voting interest in an SBSEF or SBS exchange, they could stifle competition in SBSEFs and SBS exchanges and preserve their profits from liquidity provision. The proposal, by mitigating such conflicts of interest[415] could help ensure access to SBSEFs and SBS exchanges and in turn increase competition in liquidity provision and lower transaction costs. The Commission preliminarily believes that proposed Rules 834(e), (f), and (g) also may promote good governance at SBSEFs and SBS exchanges. To the extent that improved governance result in more effective oversight by SBSEFs and SBS exchanges of their markets, market participants may benefit. These benefits could be limited to the extent that prospective

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414 *See* proposed Rules 834(b) to (g).

415 *See, e.g.*, proposed Rule 834(b) (proposing a 20% cap on the voting interest held by an individual member of an SBSEF or SBS exchange).

SBSEFs and SBS exchanges already have rules in place that comply with the proposed rules.

Structured Data Requirement. Proposed Rule 825(c)(3) would require an SBSEF to publish a Daily Market Data Report on its website without charge or usage restrictions and in a downloadable and machine-readable format using the most recent version of the associated XML schema and PDF renderer as published on the Commission's website.[416] The Commission preliminarily believes that requiring the Daily Market Data Report to be provided in a structured, machine-readable format (using a Commission-created XML schema) would facilitate the use of the price, trading volume, and other trading data on the report by end users such as SBS market participants and market observers. By including a structured data requirement, the information in the report would be made available in a consistent and openly accessible manner that would allow for automatic processing by software applications, thus enabling search capabilities and statistical and comparative analyses across SBSEFs and date ranges.[417] Absent a structured data requirement, any SBS market participants and market observers seeking to use the data would have to spend time manually collecting and entering the data into a format that allows for analysis, thus increasing the time needed to analyze the data and potentially leading to data errors. Alternatively, data users could choose to subscribe to a service provider specializing in such a data aggregation and comparison process. Under that scenario, data users would be unable to access the posted data on as timely a basis as they would if the disclosures were machine-readable upon posting, and users would also incur monetary costs in paying for the aggregated data.

Proposed Regulation SE would require SBSEFs to file documents required under various provisions in the EDGAR system using Inline XBRL, a structured (machine-readable) data

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416 *See supra* note 392 and accompanying text.

417 In addition, the associated PDF renderer would provide users with a human-readable document for those who prefer to review manually individual reports, while still providing a uniform presentation.

language.[418] Requiring a centralized filing location and a machine-readable data language for the filings would facilitate access, retrieval, analysis, and comparison of the disclosed information across different SBSEFs and time periods by the Commission and the public, thus potentially augmenting the informational benefits of the various disclosure requirements discussed herein. Also, because EDGAR provides basic technical validation capabilities, the use of EDGAR could reduce the incidence of technical errors (*e.g.*, letters instead of numbers in a field requiring only numbers) and thereby improve the quality of the disclosures.

Unlike the XML schema that would be used for Daily Market Data Reports, Inline XBRL would provide the ability to tag detailed facts within narrative text blocks, and is thus likely more well-suited to accommodate the other filings required under proposed Regulation SE, many of which require narrative discussions (*e.g.*, the explanation and analysis of the product and its compliance with applicable provisions of the SEA for a product filing required under Rule 804[419]). In addition, certain proposed SBSEF disclosures consist of financial information (*e.g.*, the financial statements of the SBSEF required under Exhibit I to Form SBSEF), and Inline XBRL is designed specifically for the accurate capture and communication of financial information, among other uses.[420]

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418 This includes the documents required under: proposed Rule 803(b)(1)(i) and (3) (filings of, and amendments to, a Form SBSEF application); proposed Rules 803(e) and 803(f) (requests to withdraw or vacate an application for registration); proposed Rule 804(a)(1) (filings for listing products for trading by certification); proposed Rule 805(a)(1) (filings for voluntary submission of new products for Commission review and approval); proposed Rule 806(a)(1) (filings for voluntary submission of rules for Commission review and approval); proposed Rule 807(a)(1) (filings for self-certification of rules); proposed Rule 807(d) (filings of weekly notifications to the Commission of rules and rule amendments that were not required to be certified); proposed Rule 829(g)(6) (submission to the Commission of reports related to financial resources and related documentation); proposed Rule 831(j)(2) (submission to the Commission of the annual compliance report of SBSEF's CCO). *See supra* section XV.

419 *See* proposed Rule 804(c)(3)(v).

420 For example, because Inline XBRL enables the block tagging of textual narrative disclosures and the individual tagging of numeric disclosures nested within those textual narrative disclosures, it facilitates the comprehensive capture and communication of information contained in notes to financial statements.

3. Costs

Although the Commission preliminarily believes that proposed Regulation SE would benefit the SBS market, the Commission recognizes that the proposed Regulation SE also would entail certain costs. Some costs are difficult to precisely quantify and are discussed below. The Commission is mindful that any rules it may adopt with respect to SBSEFs under the Dodd-Frank Act may impact the incentives of market participants with respect to where and how they trade SBS. If the rules proposed by the Commission are, or are perceived to be, too costly for trading venues to comply with, fewer entities than expected may seek to register as SBSEFs, which would not further the goal of moving a greater percentage of SBS trading from opaque and unregulated OTC markets to transparent and regulated trading venues. In addition, if the proposed rules for trading on an SBSEF are perceived as too burdensome by market participants, SBS trading may continue in the OTC market absent a mandatory clearing determination and a triggering of the mandatory trade execution requirement, thus frustrating the goals of the Dodd-Frank Act.[421] At the same time, if the proposed rules relating to SBSEFs are too lenient, they may have little or no impact on the market structure and surveillance of the SBS market relative to the *status quo*, which could result in the loss of many of the benefits discussed above and fail to achieve the goals of the Dodd-Frank Act.

In addition, SBS traded on SBSEFs may be perceived to be subject to increased costs, monetary and otherwise. For example, the proposed requirements related to pre-trade transparency could cause market participants to reveal valuable economic information regarding their trading interest more broadly than they may believe would be economically prudent and could discourage participation in the SBS market. An additional impact of pre-trade transparency are perceived costs associated with frontrunning, if customers or SBS dealers are

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421 *See* section XIX(C) (noting that the benefits and costs associated with the trade execution requirement would not materialize unless and until the Commission makes mandatory clearing determinations).

required to show their trading interest before a trade is executed. These potential costs of pre-trade transparency may change market participants' trading strategies, which could result in them working more orders or finding ways to attempt to hide their interest.[422] If market participants view the Commission's proposal as too burdensome with respect to pre-trade transparency, SBS dealers may be less willing to supply liquidity for SBS that trade on SBSEFs or exchanges, thus adversely affecting liquidity and competition. However, such effects could be mitigated by MAT determinations that would require SBS trading to occur on SBSEFs or exchanges. On the other hand, if the proposed requirements with respect to pre-trade transparency are too loose, the result could be that there would be no substantive change from the *status quo*, including no benefits of alleviating informational asymmetries, increasing price competition, and supplying better executions beyond the changes in response to the other requirements of the Dodd-Frank Act. This actual impact would depend on the degree of pre-trade transparency required and the characteristics of the trading market. The proposed rules are intended to provide for greater pre-trade transparency than currently exists without requiring pre-trade transparency in a manner that would cause participants to avoid providing liquidity on SBSEFs.

The Commission preliminarily believes that there would be transaction costs, such as fees and connectivity costs, that trading counterparties would incur in executing or trading SBS subject to the trade execution requirement on SBSEFs. Likewise, although unregulated trading venues exist in today's OTC derivatives market, the Commission does not have information regarding what, if any, fees and connectivity costs are associated with transacting on these unregulated trading venues. The Commission invites commenters to provide feedback on the likely fees and costs associated with transacting on SBSEFs as well as fees and costs associated with transacting on unregulated trading venues that exist in today's OTC derivatives market.

As discussed in section XIX(B), the Commission preliminarily believes that prospective

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422 *See*, *e.g.*, Ananth Madhavan, *Market Microstructure: A Survey*, J. of Fin. Markets, Vol. 3 (2000).

SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market. Because the proposed rules are harmonized as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area, the Commission preliminarily believes that much of the systems, policies, and procedures that are used to support SEF trading also could be used to support SBSEF trading. The prospective SBSEF registrants likely would incur marginal costs associated with listing SBS products on their venues[423] and making limited changes to their systems, policies, and procedures to comply with proposed SEC rules that differ slightly from analogous CFTC rules. The Commission preliminarily estimates the one-time costs associated with such changes to systems, policies, and procedures would range between $25,000 and $1.5 million per SBSEF, depending on the changes needed. The annual ongoing costs of maintaining the technology (*e.g.*, ensuring any necessary technological updates and improvements are made) and applying the technology to ongoing compliance requirements are estimated to be in the range of $1 million to $2 million.[424] The Commission invites commenters to provide feedback on the costs that SEFs may incur should they register as SBSEFs.

We detail below cost estimates for specifics parts of the proposed rules. Many of these

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423 *See infra* section XIX(C)(3)(c) (discussing the costs that these entities might incur to list SBS products).

424 In the 2011 SBSEF Proposal, the Commission estimated that an entity owning or operating a platform for the trading of OTC derivatives would incur costs of between $50,000 and $3 million to enhance its platform to be compatible with proposed requirements in that release. Further, such an entity would incur annual ongoing costs of between $2 million and $4 million to maintain such enhancements. *See* 2011 SBSEF Proposal, 76 FR at 11041. The Commission is revising these estimates downward by 50%, taking into account any potential inflationary effects, because harmonizing proposed Regulation SE closely with CFTC rules likely would reduce the one-time and annual ongoing costs incurred by SEFs to change their systems, policies, and procedures to comply with proposed Regulation SE, if they choose to register as SBSEFs. Therefore, the Commission preliminarily estimates that the one-time costs associated with changes to systems, policies, and procedures would range between $50,000/2 = $25,000 and $3 million/2 = $1.5 million per SBSEF, depending on the changes needed. The annual ongoing costs are preliminarily estimated to be between $2 million/2 = $1 million and $4 million/2 = $2 million.

costs estimates are based on the PRA estimates of costs and burdens from section XX.[425]

a. Registration requirements for SBSEFs and Form SBSEF

The Commission preliminarily believes that the proposed registration provisions would impose costs on entities that seek registration as SBSEFs. The Commission preliminarily estimates that initial filings on Form SBSEF by prospective SBSEFs seeking to register with the Commission pursuant to proposed Rule 803 would result in aggregate initial costs of $94,400 for prospective SBSEFs.[426]

b. Ongoing compliance with other requirements that are similar to the remainder of part 37

As discussed in section XX(D)(2)(b), the Commission preliminarily estimates the aggregate annual paperwork burden for SBSEFs to comply with all of the proposed SBSEF rules that have analogs in part 37 to be 1935 hours.[427] These burdens are estimated to impose aggregate ongoing annual costs of $123,840 on SBSEFs.[428]

c. Rule and product filing processes for SBSEFs

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425 In section XX *infra*, for purposes of the PRA, the Commission preliminarily estimates burdens applicable to a stand-alone SBSEF. However, most if not all SBSEFs will be dually registered with the CFTC as SEFs and thus will already be complying with relevant CFTC rules that have analogs to rules proposed in Regulation SE. Therefore, the Commission's burden estimates are greater for stand-alone SBSEFs than may exist in practice, considering the effect of overlapping CFTC rules.

426 $94,400 = 1,475 burden hours x $64/hour blended hourly rate. The $64/hour blended hourly rate is the $59/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through December 2021. The CFTC used the blended hourly wage to estimate PRA costs associated with part 37. *See infra* section XX(D)(2)(a); OMB, Supporting Statement for New and Revised Information Collections: Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038-0074, Attachment A (July 7, 2021), available at *https://omb.report/icr/202107-3038-004/doc/113431800.pdf*. CPI inflation adjustment is based on data published by the Bureau of Labor Statistics. *See CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, available at *https://www.bls.gov/data/inflation_calculator.htm*.

427 *See infra* section XX(D)(2)(b). This estimate excludes the paperwork burdens associated with registration requirements for SBSEFs and Form SBSEF and provisions of certain proposed rules to be discussed subsequently.

428 $123,840 = 1,935 burden hours x $64/hour blended hourly rate. *See supra* note 426 (derivation of the $64/hour blended hourly rate).

The Commission preliminarily estimates that the aggregate ongoing annual costs incurred by all SBSEFs to prepare and submit rule and product filings under proposed Rules 804, 805, 806, and 807 (including the cover sheet) would be $31,200.[429]

d. Proposed Rules 809, 811, 819, 826, 829, 833, 834, and 835

The Commission preliminarily estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with proposed Rule 809 would be $108.[430]

The Commission preliminarily estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with requests for documents or information pursuant to proposed Rule 811(d) would be $88.[431]

The Commission preliminarily estimates the aggregate ongoing annual costs incurred by

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429 $31,200 = 300 hours x $104/hour blended hourly rate. The $104/hour blended hourly rate is the $96.26/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through December 2021. The CFTC used the blended hourly rate to estimate PRA costs associated with part 40. *See* section XX(D)(3)(a); OMB, Supporting Statement for Information Collection Renewal: OMB Control Number 3038-0093, Attachment A (July 10, 2020), available at *https://omb.report/icr/202005-3038-001/doc/101274002.pdf*. CPI inflation adjustment is based on data published by the Bureau of Labor Statistics. *See* U.S. BUREAU OF LABOR STATISTICS, *supra* note 426. The platform ID requirement on the submission cover sheet would not impose burdens for obtaining a platform ID, because an SBSEF (whether registered or exempt) is already required under Rule 903(a) of Regulation SBSR to obtain an LEI to identify itself as its platform ID. *See supra* note 84.

430 $108 = 1.25 hours x $86/hour hourly rate for a compliance officer. The $86/hour hourly rate for a compliance officer is the $70/hour hourly rate for a compliance officer computed by the CFTC and adjusted for CPI inflation through December 2021. The CFTC used the hourly rate to estimate PRA costs associated with § 40.12 after which proposed Rule 809 is modelled. *See infra* section XX(D)(3)(b)(ii); Revised Supporting Statement for New Information Collections: part 40, Provisions Common to Registered Entities, OMB Control Number 3038-AD07, Attachment A (October 14, 2011), *available at: https://omb.report/icr/201203-3038-005/doc/31042501*. CPI inflation adjustment is based on data published by the Bureau of Labor Statistics. *See* U.S. BUREAU OF LABOR STATISTICS, *supra* note 426.

431 $88 = 1 hour x $88/hour hourly rate for an attorney. The $88/hour hourly rate is the $80/hour hourly rate computed by the CFTC and adjusted for CPI inflation through December 2021. The CFTC used the hourly rate to estimate PRA costs associated with Part 1.6. *See infra* section XX(D)(4)(a); OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038-0033 (August 23, 2018), available at *https://omb.report/icr/201808-3038-004/doc/85625801.pdf*. CPI inflation adjustment is based on data published by the Bureau of Labor Statistics. *See* U.S. BUREAU OF LABOR STATISTICS, *supra* note 426.

SBSEFs to comply with proposed Rule 819(i) would be $25,546.[432]

The Commission preliminarily estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with proposed Rule 819(j) would be $1,135.[433]

The Commission preliminarily estimates the aggregate ongoing annual costs incurred by SBSEFs to update information required by proposed Rule 826(f) would be $152.[434] The Commission preliminarily estimates that interested parties would incur aggregate one-time costs of $108,960 in the first year and $72,640 in each subsequent year to submit exemption requests under one or both paragraphs of proposed Rule 833.[435]

The Commission preliminarily estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $47,880 associated with drafting and implementing rules to comply with proposed Rules 834(b) and (c).[436]

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432 $25,546 = 399.15 hours x $64/hour blended hourly rate. The Commission preliminarily believes that the burdens associated with this proposed rule are not different from burdens associated with proposed rules that have part 37 analogs. Thus, the Commission preliminarily believes that it would be appropriate to apply the $64/hour blended hourly rate to estimate the paperwork related costs associated with this proposed rule. *See infra* section XX(D)(4)(c). *See also supra* note 426 (derivation of the $64/hour blended hourly rate).

433 $1,135 = 2.5 hours x $454/hour national hourly rate for an attorney. *See infra* section XX(D)(4)(d). The per-hour figure for an attorney is from SIFMA's Management and Professional Earnings in the Securities Industry – 2013, as modified by Commission staff to adjust for inflation (through December 2021) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

434 $152 = 2 hours x $76/hour national hourly rate for a compliance clerk. *See infra* section XX(D)(4)(f). The per-hour figure for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through December 2021) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

435 First year costs: $108,960 = 240 hours x $454/hour national hourly rate for an attorney. Costs in each subsequent year: $72,640 = 160 hours x $454/hour national hourly rate for an attorney. *See infra* section XX(D)(5)(a). *See also supra* note 433 (derivation of the national hourly rate for an attorney).

436 $47,880 = 120 hours x $399/hour national hourly rate for a compliance attorney. The estimate of 120 burden hours is based on the Commission's preliminary estimate that five SBSEFs and three SBS exchanges will incur paperwork burdens associated with

The Commission preliminarily estimates that SBSEFs and SBS exchanges would incur aggregate ongoing annual costs of $640 to comply with proposed Rules 834(d), 834(e), and 834(f).[437]

The Commission preliminarily estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $1,024 to comply with proposed Rule 834(g).[438]

The Commission preliminarily estimates that SBSEFs would incur aggregate ongoing annual costs of $20,430 to comply with proposed Rule 835.[439]

The Commission preliminarily believes that SBSEFs likely would incur costs to comply with the financial resources requirement of proposed Rule 829(b). Assuming that SBSEFs satisfy this requirement by holding financial resources in the form of their own capital pursuant to proposed Rule 829(c)(1), the Commission preliminarily estimates that SBSEFs would incur an

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proposed Rules 834(b) and (c). *See infra* section XX(D)(4)(g). The per-hour figure for a compliance attorney is from SIFMA's Management and Professional Earnings in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through December 2021) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

437 $640 = 10 hours x $64/hour blended hourly rate. Further, the costs incurred by SBSEFs = 5 (number of SBSEFs) x 1.25 hours per SBSEF x $64/hour blended hourly rate = $400. The Commission preliminarily believes that the burdens associated with this proposed rule are not different from burdens associated with proposed rules that have part 37 analogs. Thus, the Commission preliminarily believes that it would be appropriate to apply the $64/hour blended hourly rate to estimate the paperwork related costs associated with this proposed rule. *See infra* section XX(D)(4)(g). *See also supra* note 426 (derivation of the $64/hour blended hourly rate).

438 $1,024 = 16 hours x $64/hour blended hourly rate. The Commission preliminarily believes that the burdens associated with this proposed rule are not different from burdens associated with proposed rules that have part 37 analogs. Thus, the Commission preliminarily believes that it would be appropriate to apply the $64/hour blended hourly rate to estimate the paperwork related costs associated with this proposed rule. *See infra* section XX(D)(4)(g). *See also supra* note 426 (derivation of the $64/hour blended hourly rate).

439 $20,430 = 45 hours x $454/hour national hourly rate for an attorney. *See infra* section XX(D)(5)(b). *See also supra* note 433 (derivation of the national hourly rate for an attorney).

aggregate annual cost of capital of $33,377.[440] SBSEFs could lower this cost if their capital consists of financial assets that generate a return that would serve to offset the cost of capital. However, this cost mitigation is potentially limited by proposed Rule 829(d), which would require an SBSEF to include among the financial resources it holds, a certain amount of unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities),[441] that tend to generate little or no return.

e. Assessment costs

The Commission preliminarily believes that 87 entities likely would incur assessment costs as a result of proposed Rule 832, based on an analysis of counterparties to U.S. single-

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440 The Commission preliminarily estimates the financial resources that SBSEFs would need to hold pursuant to proposed Rule 829(b) as their projected operating costs. *See* proposed Rule 829(b). Further, the Commission preliminarily estimates SBSEFs' projected operating costs as the sum of the aggregate ongoing annual costs incurred by SBSEFs to comply with proposed Regulation SE. Thus, SBSEFs' estimated projected operating costs = $123,840 (ongoing compliance with other proposed requirements that are similar to the remainder of part 37) + $31,200 (rule and product filing processes by SBSEFs) + $108 (proposed Rule 809) + $88 (proposed Rule 811(d)) + $25,546 (proposed Rule 819(i)) + $1,135 (proposed Rule 819(j)) + $152 (proposed Rule 826(f)) + $400 (proposed Rules 834(d), (e), and (f)) + $20,430 (proposed Rule 835) = $202,898. Thus, the Commission preliminarily estimates that SBSEFs would hold $203,221 in the form of their own capital to comply with proposed Rule 829(b). The Commission preliminarily estimates SBSEFs' cost of capital using the annual stock returns on a value-weighted portfolio of financial stocks from 1986 to 2021. *See* website of Professor Ken French, available at *http://mba.tuck.dartmouth.edu/pages/faculty/ken.french/ftp/48_Industry_Portfolios_CSV.zip* (accessed on March 14, 2022). These returns were averaged to arrive at an estimate of 16.45%. SBSEFs' aggregate annual cost of capital = $202,898 x 16.45% = $33,377. The Commission acknowledges that there is uncertainty associated with this estimate. The estimate does not account for the fact that SBSEFs may use reasonable discretion in determining the methodologies used to calculate projected operating costs and wind down costs, pursuant to proposed Rule 829(e). Depending on how SBSEFs exercise this reasonable discretion, the resulting methodologies could yield projected operating costs and in turn, required financial resources, that may be higher or lower than the Commission's estimate.

441 The CFTC's experience overseeing SEFs would appear to support the preliminarily belief that SBSEFs would hold unencumbered, liquid financial assets rather than obtain a line of credit to comply with proposed Rule 829(d). In a previous rulemaking, the CFTC noted that most SEFs satisfy the liquidity requirement of § 37.1303 (the analog of proposed Rule 829(d)) through maintaining liquid assets rather than obtaining a line of credit. *See* CFTC, *Swap Execution Facilities*, 86 FR 9224, 9242, n. 247 (February 11, 2021) ("2021 SEF Amendments Adopting Release").

name CDS. Such costs would be related primarily to the identification of the counterparty status and origination location of the transaction to determine whether the trade execution requirement would apply. The Commission preliminarily believes that market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation and, therefore, the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparties' representations as to whether a transaction is arranged, negotiated or executed by a person within the United States. Therefore, the Commission preliminarily believes that the assessment costs associated with proposed Rule 832 should be limited to the costs of establishing a compliance policy and procedure of requesting and collecting representations from trading counterparties and maintaining the collected representations as part of the market participants' recordkeeping procedures. The Commission preliminarily believes that such assessment costs would be approximately $18,160 per entity.[442] The Commission preliminarily believes that requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding SBS transactions and trading practices and should not result in separate assessment costs.

The Commission also considers the likelihood that market participants could implement systems to keep track of counterparty status for purposes of future trading of SBS that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing SBS dealer or major SBS participant status. Implementation of such a system would involve

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[442] $18,160 = 40 hours x $454/hour national hourly rate for an attorney. This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representations may be built into a form of standardized trading documentation. *See supra* note 433 (derivation of the national hourly rate for an attorney).

one-time programming costs of $14,802 per entity.[443] Therefore, the Commission estimates the total one-time costs per entity associated with proposed Rule 832 could be $32,962 and the aggregate one-time costs could be $2,867,694.[444] To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and transaction location for other Title VII requirements, their assessment costs with respect to proposed Rule 832 may be less.

f. Structured data costs

The Commission preliminarily believes that SBSEFs would likely incur limited costs to comply with the proposed requirement in Rule 825(c)(3) to publish Daily Market Data Reports using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website. Because SBSEFs are required to use a structured format to fulfill their reporting requirements under Regulation SBSR, the compliance cost associated with the Rule 825(c)(3) requirement would be limited to the cost prospective SBSEF registrants would incur to update their systems to incorporate the Commission's XML schema for Daily Market

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443 This is based on an estimate of the time required for a programmer analyst to modify the software to track the covered person status of a counterparty, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to the definition of "covered person" (as defined in proposed Rule 832). $14,802 = (2 hours x $399/hour national hourly rate for a compliance attorney) + (4 hours x $338/hour national hourly rate for a compliance manager) + (40 hours x $263/hour national hourly rate for a programmer analyst) + (4 hours x $250/hour national hourly rate for a senior internal auditor) + (2 hours x $566/hour rate for a Chief Financial Officer). The per-hour figures for compliance attorney, compliance manager, programmer analyst, and senior internal auditor are from SIFMA's Management & Professional Earnings in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through December 2021) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. The hourly rate for a Chief Financial Officer is the $473 hourly rate for the same position used in the Cross-Border Proposing Release (*see* 78 FR at 31140, n. 1425) and adjusted for inflation through December 2021.

444 Total one-time costs per entity = $18,160 (compliance policy and procedure) + $14,802 (systems) = $32,962. Aggregate one-time costs = 87 entities x $32,962 = $2,867,694.

Data Reports.[445] Such costs are included among the costs for prospective SBSEF registrants in making limited changes to their systems, policies, and procedures to comply with proposed SEC rules that differ slightly from analogous CFTC rules, as discussed in further detail above.[446]

With respect to the proposed Inline XBRL requirement for other documents required under proposed Regulation SE, the Commission preliminarily believes that SBSEFs would incur initial Inline XBRL implementation costs (such as the cost of training in-house staff to prepare filings in Inline XBRL, and the cost to license Inline XBRL filing preparation software from vendors) and ongoing Inline XBRL compliance burdens that would result from the proposed tagging requirement, because prospective SBSEF registrants are not currently subject to Inline XBRL requirements. Similarly, because prospective SBSEF registrants are not currently subject to EDGAR requirements, the Commission preliminarily believes they will incur a one-time compliance burden of submitting a Form ID as required by Rule 10(b) of Regulation S-T.[447] The aforementioned costs are included among the costs for prospective SBSEF registrants in making limited changes to their systems, policies, and procedures to comply with proposed SEC rules that differ slightly from analogous CFTC rules, as discussed in further detail above.[448]

4. Reasonable alternatives

The Commission considered a number of alternatives when formulating the proposed rules and amendments.

In developing proposed Regulation SE, the Commission considered the alternative of not harmonizing its rules with analogous CFTC rules. As discussed in sections II and XIX(B), the entities that are most likely to register with the Commission as SBSEFs are those already registered with the CFTC as SEFs. These entities have made substantial investments in systems,

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445 *See* 17 CFR 242.907(a)(2) (requiring information to be submitted to SDRs in an "open-source structured data format that is widely used by participants").

446 *See infra* note 424 and accompanying text.

447 *See* 17 CFR 232.10(b).

448 *See infra* note 424 and accompanying text.

policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. Under the proposed approach of harmonizing with CFTC rules to the extent possible, dually registered entities could utilize their existing systems, policies, and procedures to comply with the Commission's SBSEF rules, and SEF market participants would face no or only incremental changes to trade SBS as well as swaps on those facilities, and to comply with the Commission's rules regarding SBS trading. Under the alternative approach whereby the Commission establishes different or additive requirements, dually registered entities and their market participants might need to incur costs and burdens to modify their systems, policies, and procedures to comply with the SEC-specific rules. Further, proposed requirements that are significantly different from the rules that apply to the swap market could cause SEFs to question whether it is economically viable to enter the SBS market and to register with the Commission as SBSEFs. The Commission preliminary believes that the proposed approach would deliver to the SBS market the regulatory benefits generated by the CFTC regulatory framework and help promote the trading of SBS on regulated platforms, while imposing only limited costs on SBSEFs. The Commission preliminarily believes that this trade-off is preferable to the trade-off associated with the alternative approach.

In formulating the proposed definition of "block trade," the Commission considered the alternative of harmonizing the third prong of the proposed definition with the third prong of the CFTC definition of "block trade." The third prong of the CFTC definition characterizes a block trade in a particular swap as having "a notional or principal amount at or above the appropriate minimum block size applicable to such swap." As discussed in section VII(E), because SBS are not within the CFTC's jurisdiction, the CFTC has never considered what an appropriate minimum block size threshold would be for any SBS asset class. There is no CFTC-defined threshold with which to harmonize when formulating the third prong of the proposed definition of "block trade." Accordingly, the Commission preliminarily believes that establishing a threshold tailored specifically for the SBS market is preferable to the alternative.

In formulating proposed Rule 804(a)(2), the Commission considered the alternative of proposing a one-business-day review of a self-certified SBS product before an SBSEF could list the product. This alternative would harmonize with the parallel provision in § 40.2(a).[449] The Commission preliminarily believes that a ten-business-day review period for self-certified SBS products before they can be listed strikes a reasonable balance between allowing SBSEFs to bring new products to market quickly while affording the Commission staff a reasonable period in which to assess them. The proposed ten-business-day review period for self-certified products also accords with the CFTC's ten-business-day review period for self-certified rules,[450] which the Commission is proposing to replicate in Rule 807(a)(3).[451] Thus, the Commission preliminarily believes the proposed approach is preferable to the alternative.

In formulating proposed Rule 825(c), which would require an SBSEF to publish a "Daily Market Data Report" on its website, the Commission considered the alternative of requiring SBSEFs to submit the information in such reports directly to the Commission. The Commission believes that the regulatory data that it is receiving pursuant to Regulation SBSR would generate the same information as that contained in such reports. Thus, the Commission preliminarily believes that the proposed approach is preferable to the alternative because it would relieve SBSEFs of the need to send daily reports to Commission while preserving the Commission's ability to be informed about SBSEF market activity via the regulatory data it receives pursuant to Regulation SBSR.

The Commission also considered the alternative of requiring a structured data language

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449 *See* § 40.2(a)(2) (one condition for a valid self-certification of a product is that the CFTC has received the submission by the open of business on the business day preceding the product's listing).

450 *See* § 40.6(a)(3) (one condition for a valid self-certification of a rule or rule amendment is that the CFTC has received the submission not later than the open of business on the business day that is ten business days prior to the SEF's implementation of the rule or rule amendment).

451 *See infra* section VI(D).

other than Inline XBRL for SBSEF filings. For example, the Commission could create an XML-based data language (*i.e.*, an XML schema) specific to SBSEF filings, similar to the XML schema to be used for Daily Market Data Reports under proposed Rule 825. The Commission preliminarily believes, however, that Inline XBRL would be more suitable for SBSEF filings to the Commission. As noted, unlike an XML schema that would be used under this alternative, Inline XBRL would provide the ability to tag detailed facts within narrative text blocks, and is thus likely more well-suited to accommodate the other filings required under proposed Regulation SE, many of which require narrative discussions (*e.g.*, the explanation and analysis of the product and its compliance with applicable provisions of the SEA for a product filing required under Rule 804). In addition, certain proposed SBSEF disclosures consist of financial information (*e.g.*, the financial statements of the SBSEF required under Exhibit I to Form SBSEF), and Inline XBRL is designed specifically for the accurate capture and communication of financial information, among other uses.[452]

Another alternative that the Commission considered is to require that an exemption order under proposed Rule 833(a) could apply to a foreign trading venue *only if* it traded SBS and no other types of securities. Under this alternative, an exemption order would be unavailable to a foreign trading venue that trades SBS and other types of securities. The Commission preliminarily believes, however, that this alternative is unnecessary. Other jurisdictions might have market structures where it is common to trade SBS and other types of securities on the same trading venue. The Commission preliminarily believes that it would be inequitable to disqualify such jurisdictions *ex ante* from qualifying for a Rule 833(a) exemption.

In connection with the proposed amendments to Rule 3a1-1, the Commission considered the alternative of applying the retraction provisions of Rule 3a1-1(b) to SBSEFs and clearing agencies that are covered by proposed paragraphs (a)(4) and (a)(5), respectively, of Rule 3a1-1.

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452 *See supra* section XIX(C)(2).

Under this alternative, if a registered SBSEF or a registered clearing agency were to grow above a certain size, its exemption under proposed paragraph (a)(4) or (a)(5), respectively, could be retracted, forcing it to register as a national securities exchange.

The Commission preliminarily believes that, in adopting section 3D of the SEA, Congress gave the Commission a mechanism to regulate SBSEFs of any size. Nothing in section 3D suggests that, if an SBSEF were to grow above a certain size, the Commission should be able to withdraw that entity's ability to operate as an SBSEF and instead compel it to register as a national securities exchange. The Commission preliminarily believes that it is not necessary to apply the retraction provisions in Rule 3a1-1(b) to registered clearing agencies that engage in forced trading sessions and are covered by proposed Rule 3a1-1(a)(5). SBS transactions effected using this functionality are designed to facilitate the clearance and settlement process, and forced trading sessions are carried out by registered clearing agencies under rules that have been approved by the Commission. This trading functionality is not effected for the purpose of conducting open-market transactions. Therefore, the Commission preliminarily believes that it would not be appropriate to apply the retraction provisions of Rule 3a1-1(b) to clearing agencies that would be covered by proposed Rule 3a1-1(a)(5), as this would force these clearing agencies also to register as national securities exchanges. For the above reasons, the Commission preliminarily believes that the proposed approach is preferable to this alternative.

In connection with proposed Rule 15a-12, the Commission considered the alternative of not exempting SBSEF-Bs from section 17(a) of the SEA, which requires a registered broker (among other types of registered entity) to make and keep records as prescribed by Commission rule.[453] This approach would subject SBSEF-Bs to the full scope of the Commission's books and records rules under section 17(a). The Commission is proposing instead to utilize proposed Rule 15a-12 to exempt SBSEF-Bs from section 17(a), among other provisions applying to brokers,

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[453] 15 U.S.C. 78q(a).

and instead to subject SBSEF-Bs to proposed new Rule 826, which derives its statutory authority from Core Principle 9 in section 3D of the SEA. This approach would allow the Commission to tailor a books and records rule specifically to the limited business as an SBSEF-B and to better harmonize with the books and records requirements of the CFTC to which the SBSEF-B would likely also be subject.

D. Effects on efficiency, competition, and capital formation

Proposed Regulation SE and the other proposed rules and rule amendments would likely affect competition, capital formation, and efficiency in various ways discussed below.

1. Competition

As discussed earlier, currently, the SBS market is dominated by a small group of SBS dealers.[454] A mandatory clearing determination by the Commission, followed by a MAT determination by one or more SBSEFs, should help foster greater competition in the trading of SBS by promoting greater order interaction and increasing participation on SBSEFs. Further, proposed rules that improve access to SBSEFs by market participants could increase participation and competition in liquidity provision in the SBS market.[455] To the extent that increased competition in liquidity provision reduces the price of liquidity provision (*e.g.*, bid-ask spread), market participants could benefit in terms of lower transaction costs.

2. Capital formation

The Commission preliminary believes that the proposal could promote capital formation by helping to improve regulatory oversight and market integrity. Regulation SE would require, among other things, that SBSEFs maintain an audit trail and automated trade surveillance system; conduct real-time market monitoring; establish and enforce rules for information collection; and comply with reporting and recordkeeping requirements.[456] These requirements

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454 *See supra* section XIX(B)(2).

455 *See supra* section XIX(C)(1) (discussing improved access and competition as an overarching benefit of the proposal).

456 *See* proposed Rules 819, 821, 822, and 826.

are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and deterring abusive trading practices.[457] The proposed audit trail and recordkeeping and reporting requirements, by providing the Commission access to information about SBSEFs, would increase the Commission's ability to assess risks in the SBS market and to oversee the market, which all else being equal should reduce the amount of risky or abusive behavior in the SBS market.[458] Further, proposed Rule 831, the proposed requirements relating to the CCO, would promote regulatory compliance on SBSEFs and the SBS market generally.[459] In addition, the proposal would provide for various safeguards to help promote market integrity, including proposed Rule 819(c) relating to impartial access to the SBSEF[460] and proposed Rule 830 relating to systems safeguards. Any resulting increase in regulatory oversight and market integrity likely would increase market participants' confidence in the soundness and fairness of SBSEFs, which in turn could spill over into increased confidence in the soundness and fairness of the SBS market more broadly. Such increased confidence could lead to the greater use of SBS, particularly those traded on SBSEFs, by corporate entities to hedge their business risks and investors to hedge their portfolio risks with respect to positions in underlying securities. To the extent that corporate entities can improve their hedging efficiency with SBS, they may divert resources from precautionary savings into productive assets, thereby promoting capital formation. To the extent that investors can improve their hedging efficiency with SBS, they may be more willing to invest in the underlying securities, which should facilitate capital raising and formation by issuers. Therefore, the Commission preliminarily believes that the proposed rules would help encourage capital formation.

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457 *See supra* section XIX(C)(1) (discussing improved oversight of trading by SBSEFs as an overarching benefit of the proposal).

458 *See supra* section XIX(C)(1) (discussing improved Commission oversight as an overarching benefit of the proposal).

459 *See supra* section XIX(C)(2) (discussing the benefits associated with proposed Rule 831).

460 *See supra* note 455.

By reducing the risk of trading disruptions on SBSEFs, proposed Rules 829 and 830 could lead to the greater use of SBS traded on SBSEFs. This in turn could promote capital formation as discussed above.

3. Efficiency

The Commission preliminarily believes that the proposed requirements with respect to pre-trade price transparency could lead to more efficient pricing in the SBS market. The proposed rules are designed to increase pre-trade price transparency for SBS,which should aid market participants in evaluating current market prices for SBS, thereby furthering more efficient price discovery. Price transparency, coupled with increased competition in liquidity provision as discussed above,[461] could further decrease the spread in quoted prices, and thus could lead to higher efficiency in the trading of these securities.

The Commission recognizes the possibility that pre-trade price transparency could cause market participants to reveal more information about trading interest than they believe would be economically desirable. If market participants consider that pre-trade price transparency requirements are too burdensome and choose not to participate in the market, market efficiency could be reduced insofar as these market participants forgo any potential economic benefits that may have resulted from transacting in the SBS market. The Commission preliminarily believes that several factors mitigate such concerns. First, pursuant to proposed Rule 815(c)(2), an SBSEF may offer any execution method for Permitted Transactions. Thus, a market participant engaging in a Permitted Transaction may choose to use an execution method that reveals only the desired amount of information about trading interest. Second, pursuant to proposed Rule 815(a)(2), and as discussed earlier, an SBSEF would be required to offer two execution methods for Required Transactions (limit order book and RFQ-to-3). Thus, market participants have flexibility in the degree of pre-trade transparency they wish to employ, which should attenuate

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[461] *See supra* section XIX(D)(1).

potential concerns associated with revealing too much information about trading interest.

The Commission preliminarily believes that the proposed Rules 829 and 830 may reduce the risk of trading disruptions on SBSEFs that may otherwise prevent market participants from impounding information into SBS prices through market activity (*e.g.*, order submission), and thus could improve the price efficiency in the SBS market.

F. Request for comment

The Commission is requesting comment regarding the economic analysis set forth herein. To the extent possible, the Commission requests that market participants and other commenters provide supporting data and analysis with respect to the benefits, costs, and effects on competition, efficiency, and capital formation of adopting the proposed rules and amendments or any reasonable alternatives. In addition, the Commission asks commenters to consider the following questions:

212. What additional qualitative or quantitative information should the Commission include as part of the baseline for its economic analysis of the proposed rules and amendments?

213. What additional information can the Commission use to estimate the costs and benefits of implementing the proposed rules and amendments?

214. Has the Commission considered all relevant aspects of the proposed rules and amendments? Has the Commission accurately described the costs and benefits of the proposed rules and amendments? Why or why not? Please identify any other benefits associated with the proposed rules and amendments in detail. Please identify any costs associated with the proposed rules and amendments that the Commission has not identified. If possible, please provide quantification or data that would enable a quantification of such effects.

215. What are the economic effects of the discussed reasonable alternatives? Are there any additional reasonable alternatives that the Commission should include? If so,

please identify such alternatives and any economic effects associated with such alternatives. If possible, please provide data that would enable a quantification of such effects.

216. The Commission preliminarily estimates that five CFTC-registered SEFs likely would register as SBSEFs. How many entities do you believe will seek to register with the Commission as SBSEFs? Of these, how many would be CFTC-registered SEFs seeking to be dually-registered SEF/SBSEFs and how many would be standalone SBSEFs?

217. Are SBS products being traded on unregistered SBSEFs? If so, please provide data on (1) the types of SBS that are being traded on unregistered SBSEFs; and (2) the volume of such SBS that are being traded on unregistered SBSEFs.

218. Does the Commission's description of SBS trade execution practices accurately capture the trade execution practices currently used in the trading of SBS? If not, please identify and describe the execution practices that are currently used to trade SBS.

219. What costs would CFTC-registered SEFs incur if they elect to register and operate as SBSEFs under proposed Regulation SE? Would these entities incur costs associated with the *de novo* formation of an SBSEF? Alternatively, would they incur costs associated with listing SBS products on their venues and making limited changes to their systems, policies, and procedures to the extent that the proposed rules differ from analogous CFTC rules? Are there other costs that have not been identified?

220. What would be the likely fees and costs associated with transacting on SBSEFs? What are the fees and costs associated with transacting on unregulated trading venues that exist in today's OTC derivatives market?

XX. Paperwork Reduction Act

Certain provisions of the proposed rules contain new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[462] The Commission is submitting the proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title of the new collection of information is "Regulation SE." As proposed, Regulation SE would create a regime for the registration and regulation of SBSEFs and address other issues relating to SBS execution.

In addition, the Commission is proposing to amend Rule 3a-1 under the SEA to exempt a registered SBSEF from the statutory definition of "exchange." Furthermore, the Commission is proposing new Rule 15a-12 under the SEA that, while affirming that an SBSEF also would be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements under the SEA.

Proposed Regulation SE would include rules regarding the registration of a prospective SBSEF on Form SBSEF, the filing of new or amended rules or new products with the Commission, and rules harmonizing the Commission's SBSEF regime with the CFTC's parallel SEF regime.[463] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid OMB control number.

A. Summary of collection of information

The proposed rules and rule amendments would include a collection of information within the meaning of the PRA for SBSEFs that would be required to comply with Regulation SE and file a Form SBSEF with the Commission. In addition, proposed Rule 833 would include a collection of information within the meaning of the PRA for persons that wish to seek an

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462 44 U.S.C. 3501 *et seq*.

463 *See supra* section III. As proposed, Regulation SE contains 36 separately designated rules (800 to 835, inclusive), which (if adopted) would be located in 17 CFR 242; a Form SBSEF (with instructions); and a submission cover sheet (with instructions). If adopted, the form and the submission cover sheet would be located in 17 CFR 249.

exemption order under that rule, and proposed Rule 834 would include a collection of information within the meaning of the PRA for SBS exchanges (in addition to SBSEFs).

Many of the proposed rules that comprise Regulation SE are modelled after analogous CFTC rules with only minor edits to reflect differences between the statutory regimes of the two agencies. Entities that are most likely to register with the Commission as SBSEFs are those already registered with the CFTC as SEFs. Such entities have made substantial investments in systems, policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. Harmonization would allow such dually-registered entities to utilize their existing systems, policies, and procedures to comply with the Commission's SBSEF rules, and SEF members would likely face only marginal additional burdens to trade SBS as well as swaps on those SEF/SBSEFs. In light of these factors, the Commission has based many of its paperwork burden estimates on CFTC burden estimates calculated for analogous CFTC rules. The CFTC estimated PRA burdens by aggregating the burdens produced by a group of related rules, as explained more fully in section XX(D) below. In most cases, the Commission has modelled its methodology, assumptions, and calculations on those of the CFTC, while making adjustments that reflect differences between the scale of the market for swaps relative to the market for SBS, such as the estimated number of SBSEFs, number of SBS market participants, and number of SBS transactions, as necessary.

The following is a summary of the rules contained in proposed Regulation SE.[464] The

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[464] *See supra* section IV(A) (discussing proposed Rule 800); section IV(B) (discussing proposed Rule 801); section IV(C) (discussing proposed Rule 802); section V(A) (discussing the registration provisions contained in proposed Rule 803); section V(B) (discussing Form SBSEF); section VI(A) (discussing proposed Rule 804); section VI(B) (discussing proposed Rule 805); section VI(C) (discussing proposed Rule 806); section VI(D) (discussing proposed Rule 807); section VI(F) (discussing proposed Rule 808); section VI(G) (discussing proposed Rule 809); section VI(H) (discussing proposed Rule 810); section VII(A) (discussing proposed Rule 811); section VII(B) (discussing proposed Rule 812); section VII(C) (discussing proposed Rule 813); section VII(D) (discussing proposed Rule 814); section VII(E) (discussing proposed Rule 815); section VII(F) (discussing proposed Rule 816); section VII(G) (discussing proposed Rule 817);

paperwork burdens associated with proposed Regulation SE are discussed in section XX(D) below.

Proposed Rule Number and Title	Overview of Proposed Rule	Paperwork Burden Created?
800—Scope	would state that the provisions of this section shall apply to every SBSEF that is registered or is applying to become registered as an SBSEF under section 3D of the SEA	No
801—Applicable provisions	would require an SBSEF to comply with all applicable Commission rules, including any related definitions and cross-referenced sections	No
802—Definitions	Definitions	No
803—Requirements and procedures for registration	would set out a process for registering with the Commission as an SBSEF, including the submission of Form SBSEF	Yes
804—Listing products for trading by certification	procedures by which an SBSEF, via self-certification, may list a product for trading	Yes[465]
805—Voluntary submission of new products for Commission review and approval	procedures for voluntary submission of new products for Commission review and approval	Yes
806—Voluntary submission of rules for Commission review and approval	procedures for voluntary submission of new rules or rule amendments for Commission review and approval	Yes

section VIII(A) (discussing proposed Rule 818); section VIII(B) (discussing proposed Rule 819); section VIII(C) (discussing proposed Rule 820); section VIII(D) (discussing proposed Rule 821); section VIII(E) (discussing proposed Rule 822); section VIII(F) (discussing proposed Rule 823); section VIII(G) (discussing proposed Rule 824); section VIII(H) (discussing proposed Rule 825); section VIII(I) (discussing proposed Rule 826); section VIII(J) (discussing proposed Rule 827); section VIII(K) (discussing proposed Rule 828); section VIII(L) (discussing proposed Rule 829); section VIII(M) (discussing proposed Rule 830); section VIII(N) (discussing proposed Rule 831); section IX(A) (discussing proposed Rule 832); section IX(B) (discussing proposed Rule 833); section X (discussing proposed Rule 834); section XI (discussing the notice required by proposed Rule 835); section XII (discussing proposed amendments to Rule 3a1-1); section XIII (discussing proposed Rule 15a-12); section XVI (discussing new rules and proposed amendments to the Commission's Rules of Practice).

465 Each of the filings that would be required by proposed Rules 804 through 807, 809, and 816 would have to include a submission cover sheet that is also being proposed herein. Because the cover sheet is an integral part of the filing—it is the mechanism whereby an SBSEF would inform the Commission what type of filing is enclosed—the paperwork burdens for the cover sheet are not estimated separately from the paperwork burden of the substantive filing.

807—Self-certification of rules	whereby an SBSEF can implement a new rule or rule amendment via self-certification	Yes
808—Availability of public information	would set out the information that will be made public with respect to applications to become an SBSEF as well as filings relating to rules and products	No
809—Staying of certification and tolling of review period pending jurisdictional determination	would provide for a stay of a product certification or tolling of a review period for a product where it is unclear whether the product should be classified as an SBS under the jurisdiction of the SEC or a swap under the jurisdiction of the CFTC pending the issuance of a joint interpretation by the SEC and CFTC clarifying which agency has jurisdiction over the product	Yes
810—Product filings by SBSEFs that are not yet registered and by dormant SBSEFs	would provide that an applicant for registration as an SBSEF may submit for Commission review and approval an SBS's terms and conditions or rules prior to listing the product as part of its application for registration	Yes
811—Information relating to SBSEF compliance	would provide that an SBSEF shall submit information to the Commission that the Commission requests, including demonstrations that the SBSEF is in compliance with one or more Core Principles, notification of a transfer 50% or more of the equity interest in the SBSEF, and information about pending legal proceedings	Yes
812—Enforceability	would provide that a transaction entered into on or pursuant to the rules of an SBSEF shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable because of a violation by the SBSEF of section 3D of the SEA or the Commission's rules thereunder; also would require an SBSEF to provide each counterparty to a transaction on the SBSEF with a written record of all the terms of the transaction that were agreed to on the SBSEF	Yes
813—Prohibited use of data collected for regulatory purposes	would provide that an SBSEF shall not use for business or marketing purposes any proprietary data or personal information that it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations, without such person's consent; also would require the SBSEF not to condition access to its markets on such consent and provide that the SBSEF may, where necessary for regulatory purposes, share such data or information with other registered SBSEFs or exchanges	No
814—Entity operating both a national securities exchange and SBSEF	would provide that an entity that intends to operate both a national securities exchange and an SBSEF shall separately register the two facilities pursuant to section 6 of the SEA and Rule 803, respectively; also would provide that a national securities exchange shall, to the extent that the exchange also operates an SBSEF and uses the same electronic trade execution system, identify whether electronic trading of SBS is taking place on or through the national securities exchange or the SBSEF	No

815—Methods of execution for Required and Permitted Transactions	would provide that a Required Transaction must be executed on an SBSEF through an order book or RFQ system, whereas a Permitted Transaction can be executed in any manner; also would require an SBSEF to maintain rules and procedures that facilitate the resolution of error trades and that an SBSEF shall not generally disclose the identity of a counterparty to an SBS that is executed anonymously and intended to be cleared	Yes
816—Trade execution requirement and exemptions therefrom	would set out a process and standards for an SBSEF to MAT an SBS; also would establish certain exemptions from the trade execution requirement	Yes
817—Trade execution compliance schedule	would provide that an SBS transaction shall be required to be executed on an SBS exchange or SBSEF upon the later of a determination by the Commission that the SBS is required to be cleared and 30 days after a MAT determination submission or certification for that SBS is approved or certified, respectively	No
818—Core Principle 1 (Compliance with Core Principles)	would require a registered SBSEF to comply with the SEA's Core Principles for SBSEFs	Yes
819—Core Principle 2 (Compliance with rules)	would require a registered SBSEF to establish, comply with, and enforce its own rules—including rules regarding market access; rules governing trading, trade processing, and participation that will deter abuses; rules governing the operation of the SBSEF; and rules to capture and retain an audit trail—and have the capacity to detect, investigate, and enforce those rules; also would require an SBSEF to establish rules that generally prohibit employees from trading any covered interest or disclosing any material, non-public information obtained as a result of their employment by the SBSEF; also would require an SBSEF to maintain in effect rules that render a person ineligible to serve on the SBSEF's disciplinary committees, arbitration panels, oversight panels, or governing board who has been found to have committed enumerated offenses	Yes
820—Core Principle 3 (SBS not readily susceptible to manipulation)	would require that SBSEF to permit trading only in SBS that are not readily susceptible to manipulation	Yes
821—Core Principle 4 (Monitoring of trading and trade processing)	would require an SBSEF to establish and enforce rules detailing trading and trade processing procedures, and to monitor trading and market activity to prevent manipulation, price distortion, and delivery or settlement disruptions; also would require an SBSEF to demonstrate that it has access to sufficient information to assess whether trading on its market or in the underlying assets or indexes is being used to affect prices on its market	Yes

822—Core Principle 5 (Ability to obtain information)	would require an SBSEF to establish and enforce rules that would allow it to obtain any information necessary to comply with section 3D of the SEA and to provide that information to the Commission on request	Yes
823—Core Principle 6 (Financial integrity of transactions)	would require an SBSEF to establish and enforce rules for ensuring the financial integrity of SBS on its facility, including the clearance and settlement of the SBS; also would require that SBS that are required to be cleared shall be cleared by a registered clearing agency (or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for SBS), that the SBSEF provide for minimum financial standards for its members, and that the SBSEF monitor its members for compliance with those standards	Yes
824—Core Principle 7 (Emergency authority)	would require an SBSEF to adopt rules to provide for the exercise of emergency authority, in order for the SBSEF to maintain fair and orderly trading and prevent or address manipulation or disruptive trading practices	Yes
825—Core Principle 8 (Timely publication of trading information)	would require an SBSEF to make public timely information on price, trading volume, and other trading data on SBS transactions, as required by Regulation SBSR, and to publish on its website a Daily Market Data Report	Yes
826—Core Principle 9 (Recordkeeping and reporting)	would set forth recordkeeping and reporting obligations for SBSEFs and require an SBSEF to maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years	Yes
827—Core Principle 10 (Antitrust considerations)	would provide that, unless necessary or appropriate to achieve the purposes of the SEA, an SBSEF shall not adopt any rules or take any actions that result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing	No
828—Core Principle 11 (Conflicts of interest)	would require an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and establish a process for resolving such conflicts	Yes
829—Core Principle 12 (Financial resources)	would require an SBSEF to have adequate financial, operational, and managerial resources to discharge its responsibilities; also would set forth the standards used to calculate the adequacy of such resources; and require certain reports to the Commission	Yes
830—Core Principle 13 (System safeguards)	would require an SBSEF to establish and maintain a program of automated systems and risk analysis to identify and minimize sources of operational risk, through the development of appropriate controls and procedures; also would require an SBSEF to establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery; conduct periodic tests to verify those resources are sufficient; and notify the Commission promptly of any cyber incidents and material planned	Yes

	changes to the SBSEF's systems safeguards	
831—Core Principle 14 (Designation of CCO)	would require an SBSEF to designate a CCO and set forth regulatory and reporting obligations for the CCO	Yes
832—Cross-border mandatory trade execution	would explain when the SEA's trade execution requirement applies to a cross-border SBS transaction	No
833—Cross-border exemptions	would provide for a process by which the Commission, upon making the requisite findings, could grant exemptions from the SEA definitions of "exchange," "security-based swap execution facility," and "broker" and exempt cross-border SBS from the SEA's trade execution requirement	Yes
834—Mitigation of conflicts of interest of SBSEFs and SBS exchanges	would provide that each SBSEF and SBS exchange must create and maintain rules to mitigate conflicts of interest between SBSEFs and SBS exchanges and their members, including by prohibiting members from owning 20% or more of the voting securities of an SBSEF or SBS exchange, and from exercising disproportionate influence in disciplinary proceedings; also would require each SBSEF and SBS exchange to submit to the Commission after every governing board election a list of each governing board's members, the groups they represent, and how the composition of the board complies with the requirements of Rule 834	Yes
835—Notice to Commission by SBSEF of final disciplinary action or denial or limitation of access	would provide that, if an SBSEF issues a final disciplinary action against a member, denies or conditions membership, or denies or limits access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person	Yes
3a1-1 proposed amendments	would exempt from the SEA definition of "exchange" a registered SBSEF that provides a market place for no securities other than SBS, and an entity that has registered with the Commission as a clearing agency and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations	No
15a-12—Exemption for certain SBSEFs from certain broker requirements	would exempt a registered SBSEF from certain broker requirements while affirming that an SBSEF is a broker under the SEA	No
Proposed rules and amendments to the Commission's Rules of Practice	new rules and amendments to the Rules of Practice to allow persons who are aggrieved by a final disciplinary action, a denial or conditioning of membership, or a denial or limitation of access by an SBSEF to seek an application for review by the Commission	No**

** The Commission finds, in accordance with section 553(b)(3)(A) of the Administrative Procedure Act ("APA"), 5 U.S.C. 553(b)(3)(A), that the proposed revisions to the Commission's Rules of Practice relate solely to agency organization, procedure, or

practice. They are therefore not subject to the provisions of the APA requiring notice, opportunity for public comment, and publication. However, the Commission believes that it would be useful to publish the rules for notice and comment. To the extent that these rules relate to agency information collections during the conduct of administrative proceedings, they are exempt from review under the PRA.

B. Proposed use of information

1. Registration requirements and Form SBSEF

Proposed Regulation SE would impose various requirements relating to SBSEF registration, which are set forth in proposed Rule 803.[466]

The information collected pursuant to these proposed rules would enhance the ability of the Commission to determine whether to approve the registration of an entity as an SBSEF; to monitor and oversee SBSEFs; to determine that SBSEFs initially comply, and continue to operate in compliance, with the SEA, including the Core Principles applicable to SBSEFs; to carry out its statutorily mandated oversight functions; and to maintain accurate and updated information regarding SBSEFs. Because the registration information would be publicly available, it could also be useful to an SBSEF's members, other market participants, other regulators, and the public generally.

2. Requirements for SBSEFs to establish rules

Various provisions of proposed Regulation SE would require SBSEFs to establish certain rules, policies, and procedures to comply with applicable requirements of the SEA and the Commission's rules thereunder.[467] The rules also would help an SBSEF's members to understand and comply with requirements of the SBSEF.

3. Reporting requirements for SBSEFs

Various provisions of proposed Regulation SE would require SBSEFs and certain other

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466 *See*, *e.g.*, proposed Rule 803(b)(1) (requiring an entity that wishes to register with the Commission as an SBSEF to submit a Form SBSEF).

467 *See*, *e.g.*, proposed Rule 819(a)(2) (requiring an SBSEF to establish and enforce trading, trade processing, and participation rules).

persons to submit reports or provide specified information.[468] This information generally would be used by the Commission in its oversight of SBSEFs and the SBS markets; certain of the information to be collected could be used by market participants to confirm their SBS transactions.

4. Recordkeeping required under Regulation SE

Proposed Regulation SE would require an SBSEF to keep specified records.[469] The audit trail information required to be maintained under proposed Regulation SE would aid the SBSEF in detecting and deterring fraudulent and manipulative acts with respect to trading on its market, as well as help it to fulfill the statutory requirement in Core Principle 4 that an SBSEF monitor trading in SBS, including through comprehensive and accurate trade reconstructions. In addition, Commission access to these records would provide a valuable tool to help the Commission carry out its oversight responsibility over SBSEFs and the SBS markets in general.

5. Timely publication of trading information requirement for SBSEFs

Proposed Regulation SE would impose certain publication burdens on SBSEFs in proposed Rule 825.[470]

The requirement contained in proposed Rule 825 that an SBSEF have the capacity to electronically capture, transmit, and disseminate information on price, trading volume, and other trading data on all SBS executed on or through the SBSEF would assist the SBSEF in carrying out its regulatory responsibilities under the SEA and enable the SBSEF to comply with reasonable requests to provide information to others. Furthermore, proposed Rule 825 would require an SBSEF to publish a Daily Market Data Report that is designed to provide market

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468 *See*, *e.g.*, proposed Rule 829 (requiring an SBSEF, quarterly or upon Commission request, to provide the Commission a report that includes the amount of financial resources necessary to meet the requirements of Rule 829).

469 *See* proposed Rule 826 (requiring an SBSEF to maintain records of all activities relating to the business of the facility, including a complete audit trail, and to report information to the Commission upon request).

470 *See* proposed Rule 825 (requiring an SBSEF to make publicly available a "Daily Market Data Report").

observers with a daily snapshot of market activity on the SBSEF.

6. Rule filing and product filing processes for SBSEFs

Proposed Regulation SE would establish various filing requirements applicable to SBSEFs. Proposed Rules 804 and 805 would provide mechanisms for an SBSEF to submit filings for new products that they seek to list either through a self-certification process or by voluntarily requesting approval of the Commission, respectively. Proposed Rules 806 and 807 would require an SBSEF to submit new rule or rule amendments either through a self-certification process or by voluntarily requesting approval of the Commission, respectively.

Proposed Rule 808 would address the public availability of certain information in an application to register as an SBSEF and SBSEF filings made under the self-certification procedures or pursuant to Commission review and approval. Proposed Rule 809 would establish procedures for addressing a situation where an SBSEF wishes to list a product and it is unclear whether the product is an SBS or swap (*i.e.,* whether it properly falls under the jurisdiction of the SEC or the CFTC). Proposed Rule 810 would provide that an applicant for registration as an SBSEF may submit for Commission review and approval an SBS's terms and conditions or rules prior to listing the product as part of its application for registration.

The information that would be collected under proposed Rules 804 and 805 would help the Commission assess whether an SBS listed by an SBSEF complies with relevant provisions of the SEA. In addition, this information would assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations generally and to learn about developments in the SBS product market. Proposed Rules 804 and 805 also would provide a mechanism whereby market participants, other SBSEFs, other regulators, and the public generally could learn what products an SBSEF intends to list, and to obtain information regarding such products.

The information that would be collected under proposed Rules 806 and 807 would help the Commission assess whether a new rule or rule amendment of an SBSEF complies with relevant provisions of the SEA, and assist the Commission in overseeing the SBSEF's

compliance with its regulatory obligations generally. Proposed Rules 806 and 807 also would provide a mechanism whereby an SBSEF's members (and prospective members) could learn what new rules or rule amendments the SBSEF intends to apply in its market.

The information collected under proposed Rules 809 and 810 would help the Commission assess an SBSEF's compliance with relevant provisions of the SEA, and assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations. This information also would be useful to the SBSEF's members, because they would be subject to such new or amended rules or products and thus would have an interest in learning about those rules or products. Other market participants, other SBSEFs, and other regulators, as well as the public generally, may find information about proposed new or amended rules or products useful.

7. Requirements relating to the CCO

Proposed Regulation SE includes Rule 831 that would set out requirements relating to an SBSEF's CCO.

The information that would be collected under proposed Rule 831 would help ensure compliance by SBSEFs with relevant provisions of the SEA and assist the Commission in overseeing SBSEFs generally. The Commission could use the annual compliance report to help it evaluate whether an SBSEF is carrying out its statutorily-mandated regulatory obligations and, among other things, to discern the scope of any denials of access or refusals to grant access by the SBSEF and to obtain information on the status of the SBSEF's regulatory compliance program. The SBSEF's fourth-quarter financial report would provide the Commission with important information on the financial health of the SBSEF.

8. Surveillance systems requirements for SBSEFs

The proposed rules that would require an SBSEF to maintain surveillance systems and to

monitor trading[471] are designed to promote compliance by an SBSEF with its obligations under the SEA to oversee trading on its market, and to prevent manipulation and other unlawful activity or disruption of its market.

C. Respondents

The respondents subject to the collection of information burdens associated with proposed Regulation SE would be: (1) SBSEFs (and entities wishing to register with the Commission as SBSEFs); (2) in the case of Rule 833, persons that seek an exemption order under that rule; and (3) in the case of Rule 834, SBS exchanges.

Currently there are no registered SBSEFs. Based on the number of SEFs registered with the CFTC that trade index CDS (the closest analog to single-name CDS, which is likely to be the product most frequently traded on SEC-registered SBSEFs) and general industry information, the Commission preliminarily estimates that five entities will seek to register as SBSEFs and thus become subject to the collection of information requirements of these proposed rules.

The Commission preliminarily estimates that three persons would request exemption orders under one or both paragraphs[472] of proposed Rule 833.[473] The CFTC has granted three exemptions similar to those contemplated by proposed Rule 833,[474] which suggests that the number of jurisdictions having organized trading venues for swap and SBS products that overlap with products traded on similar venues in the United States is not large.

The Commission preliminarily estimates that three entities will operate as SBS exchanges. These are likely to be existing national securities exchanges that, in the future, seek

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471 *See*, *e.g.*, proposed Rule 819(d)(3) (requiring an SBSEF to establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring).

472 *See supr*a note 254.

473 The Commission anticipates that such persons could include foreign SBS trading venues, foreign authorities that license and regulate those trading venues, or covered persons (as defined in proposed Rule 832) who are members of such trading venues.

474 *See supra* note 244.

to list SBS and thereby become SBS exchanges.

The Commission considered whether any provision of proposed Regulation SE would impose any burdens (as defined in the PRA) on SBSEF members, but has determined that they would not.

D. Total annual reporting and recordkeeping burden

1. Overview

The CFTC, based on experience gained in developing rules for SEFs and regulating the SEF market, over the years has developed, refined, and received approval from OMB for paperwork burden hours estimates, both for SEF rules directly as well as for ancillary rules on which various rules in proposed Regulation SE are modelled.[475] Those estimates are presented in

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[475] *See* Core Principles and Other Requirements for Swap Execution Facilities (May 17, 2013), 78 FR 33476, 33548-49 (June 4, 2013) (Final Rule PRA for CFTC part 37); Swap Execution Facility Requirements (November 27, 2020), 85 FR 82313, 82324 (December 18, 2020) (Final Rule PRA for § 36.1); Core Principles and Other Requirements for Swap Execution Facilities: OMB Control Number 3038-0074 Supporting Statements (last updated July 26, 2021), available at *https://omb.report/omb/3038-0074* (PRA Supporting Statements for CFTC Core Principles for SEFs, § 36.1); Provisions Common to Registered Entities (July 19, 2011), 76 FR 44776, 44789-90 (July 27, 2011) (Final Rule PRA for CFTC part 40); part 40, Provisions Common to Registered Entities: OMB Control Number 3038-0093 Supporting Statements (last updated February 24, 2021), available at *https://omb.report/omb/3038-0093* (PRA Supporting Statements for CFTC part 40, § 36.1); Notification of Pending Legal Proceedings: OMB Control Number 3038-0033 Supporting Statements (last updated August 24, 2018), available at *https://omb.report/omb/3038-0033* (PRA Supporting Statements for §§ 1.60(a), (c), and (e)); Adaptation of Regulations To Incorporate Swaps (October 16, 2012), 77 FR 66288, 66306-08 (November 2, 2012) (Final Rule PRA for §§ 1.59 and 1.37(c)); Recordkeeping (May 23, 2017), 82 FR 24479, 24485 (May 30, 2017) (Final Rule PRA for § 1.31); Adaptation of Regulations to Incorporate Swaps-Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold: OMB Control Number 3038-0090 Supporting Statements (last updated July 1, 2020), available at *https://omb.report/omb/3038-0090* (PRA Supporting Statements for §§ 1.31, 1.37(c), 1.59, and 1.67); Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories (February 27, 1990), 55 FR 7884, 7890 (March 6, 1990) (Final Rule PRA for § 1.63); Final Rule and Rule Amendments Concerning Composition of Various Self-Regulatory Organization Governing Boards and Major Disciplinary Committees (June 29, 1993), 58 FR 37644, 37653 (July 13, 1993) (Final Rule PRA for § 1.64); Voting by Interested Members of Self-Regulatory Organization Governing Boards and Committees (December 23, 1998), 64 FR 16, 22 (January 4, 1999) (Final Rule PRA for § 1.69); Rules Pertaining to Contract Markets and

the form of aggregate totals for compliance with:

- *Part 37 of the CFTC regulations* regarding initial registration requirements applicable to SEFs;
- *Part 37* regarding other requirements applicable to SEFs, including the statutory Core Principles;
- *Part 40 of the CFTC regulations* regarding requirements applicable to SEFs (and other CFTC-registered entities); and
- *§§ 1.60(a), 1.60(c), 1.60(e), 36.1, 1.59, 1.63, 1.67, 15.05, 1.37(c), 1.64, and 1.69* regarding requirements applicable to SEFs (and other CFTC-registered entities).

The rules applicable to SBSEFs would be, with limited exceptions discussed above, substantively similar to those applicable to SEFs. Therefore, the Commission is basing its preliminary estimates for the paperwork burdens for SBSEFs on the CFTC's paperwork burden calculations for analog rules that apply to SEFs, which have been approved by OMB.[476] However, in certain cases, the paperwork burdens estimated by the CFTC are scaled down for SBSEFs to account for the likelihood that there will be fewer SBSEFs than SEFs and the SBS business of dually registered SEF/SBSEFs is likely to be smaller than the swap business.

Although there are minor differences between the CFTC rules and the proposed Commission rules, the Commission does not believe it needs to substantially deviate from the

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Their Members: OMB Control Number 3038-0022 Supporting Statements (last updated December 21, 2010), available at *https://omb.report/omb/3038-0022* (PRA Supporting Statements for §§ 1.63, 1.64, and 1.69); Swap Data Recordkeeping and Reporting Requirements (December 20, 2011), 77 FR 2136, 2171-76 (January 13, 2012) (Final Rule PRA for § 45.2); Swap Data Recordkeeping and Reporting Requirements: OMB Control Number 3038-0096 Supporting Statements (last updated March 16, 2021), available at *https://omb.report/omb/3038-0096* (PRA Supporting Statements for § 45.2); Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions (September 28, 2015), 80 FR 59575, 59576 (October 2, 2015) (Final Rule PRA for § 15.05).

[476] Proposed Rule 835, which would require SBSEFs to file with the Commission notices of final disciplinary actions and denials and limitations of access, is not based on a CFTC rule but rather on an existing Commission rule that imposes a similar filing requirement on SROs. Therefore, the Commission is utilizing the burden estimates in its rulemaking for SROs to estimate the burdens of this rule for SBSEFs.

CFTC's estimates of aggregated burden hours for compliance (beyond scaling back the CFTC's estimates to account for fewer SBSEFs than SEFs, and the smaller size of the SBS market relative to the swap market). These minor differences between the CFTC's existing rules for SEFs and the Commission's proposed rules for SBSEFs are prompted, in some cases, by minor differences between the statutory provisions that apply to SEFs under the CEA and the statutory provisions that apply to SBSEFs under the SEA, or, in other cases, by differences between the swap market and SBS market. In either case, however, the Commission preliminarily anticipates that the burdens on SBSEFs would be substantially similar to the burdens set out in the CFTC estimates, which serve as the basis for the Commission's estimates.[477] Furthermore, the Commission preliminarily believes that basing the burden estimates for SBSEFs on the CFTC's estimates for SEFs would be more accurate than using burden hours estimates for any other entity that the Commission currently regulates (*e.g.*, national securities exchanges) because SBSEFs share many more similarities with SEFs than they do with any other SEC-registered entities.

The Commission anticipates that most if not all entities that seek to register with the Commission as SBSEFs will also register, or will already be registered, with the CFTC as SEFs. With a few exceptions, the rules being proposed by the Commission are adapted from existing rules of the CFTC. With these proposed rules, the Commission intends to obtain comparable regulatory benefits as the CFTC rules while imposing only marginal additional burdens on

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[477] The Commission notes that, when the CFTC adopted the SEF rules in 2013, the CFTC took a similar approach to burden hours estimation. The CFTC relied on the aggregate burden hours for three types of entities that it regulated (DCMs, derivatives transaction execution facilities, and certain exempt commercial markets) and applied those burden hours to SEFs unadjusted, even though there are differences between the regulations that govern SEFs and those that govern the other entities. The CFTC noted that those entities, like SEFs, were subject to certain statutory core principles and rules thereunder, and despite variations in the applicable regulations, it was still appropriate to use the average aggregate burden number for those entities as the estimate for SEFs without adjustment. *See* CFTC, *Core Principles and Other Requirements for Swap Execution Facilities*, 78 FR at 33548-51.

SEF/SBSEFs. However, for purposes of its PRA analysis, the Commission will estimate the burdens as if a respondent were subject only to the Commission's rules.[478] The Commission requests comments on its entire proposed approach to estimating burden hours.[479]

2. Aggregate burdens for rules modelled after CFTC part 37 rules

a. Registration requirements for SBSEFs and Form SBSEF

A submission by an entity wishing to register with the Commission as an SBSEF would be required to be made on Form SBSEF, pursuant to proposed Rule 803, on a one-time basis. The Commission preliminarily estimates that five entities initially would seek to register with the Commission as SBSEFs. The Commission estimates the burdens of proposed Rule 803 and Form SBSEF to be 1,475 hours. These entities would incur initial, one-time burdens, because once an entity is registered as an SBSEF, its registration obligations are complete. The Commission's estimate regarding the initial burden that an entity would incur to file a Form SBSEF is informed by the estimates made by the CFTC for the completion of Form SEF and compliance with § 37.3 of the CFTC regulations (which governs registration of SEFs). Proposed Form SBSEF would request almost exactly the same information as required by Form SEF. Proposed Rule 803 is substantially similar to § 37.3. The CFTC has estimated that the initial compliance burden associated with its registration requirements in § 37.3 and Form SEF to be 295 hours per SEF applicant.[480] For purposes of calculating burden hours, the CFTC considered

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478 However, the Commission will note instances where a proposed rule would require an SBSEF to generate the same paperwork that is already being created pursuant to a CFTC rule. In such cases, compliance with the existing CFTC requirement would satisfy the proposed SEC requirement, and in reality there would be few or perhaps even zero marginal burdens imposed on dually registered SEF/SBSEFs.

479 The burden hours discussed below represent annual/ongoing burdens, with three exceptions that represent initial, one-time burdens: registration burdens for SBSEFs under proposed Rule 803, exemption requests regarding foreign SBS trading venues under proposed Rule 833, and certain rules under proposed Rules 834(b) and (c).

480 *See* OMB, Supporting Statement for New and Revised Information Collections: Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038-0074, Attachment A (July 7, 2021), available at *https://omb.report/icr/202107-3038-004/doc/113431800.pdf*.

the entire SEF application process to constitute a single information collection; the Commission is utilizing the same approach for SBSEFs. The Commission preliminarily believes that SBSEFs would prepare Form SBSEF internally. The Commission requests comment on the accuracy of this estimate.

b. Ongoing compliance with other requirements that are similar to the remainder of part 37

The Commission preliminarily estimates the aggregate ongoing annual hour burden for compliance with all of the proposed SBSEF rules that have analogs in part 37 to be 1,935 hours.[481] The CFTC has estimated that the compliance burden for all of the sections of part 37 combined, other than the initial burden of 295 hours per SEF for registration-related compliance discussed above, to be an ongoing annual burden of 387 hours per SEF.[482] With exception of § 37.600, which implements a CEA Core Principle for SEFs relating to position limits that is not in the SEA, every other section of part 37 has an analog in proposed Regulation SE that is substantively similar.[483] Therefore, the Commission preliminarily estimates that the aggregate CFTC estimate of 387 hours per SEF per year serves as a reasonable estimate for the annual hourly burden on each SBSEF.

As discussed in more detail below, certain SBSEF rules proposed in Regulation SE are derived from other parts of the CFTC rules (*e.g.*, part 40) and the burdens for those section will be based on the appropriate burden hours of the corresponding CFTC part. For reference, the following table lists all sections of part 37 and the corresponding proposed SBSEF rule. Please

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481 1,935 hours = 387 hours (annual burden per respondent) x 5 (number of respondents).

482 *See* OMB, Supporting Statement for New and Revised Information Collections, OMB Control Number 3038-0074, at 8 (estimating that on a net basis the total burden hours imposed on each SEF will be 387 hours).

483 As discussed previously, portions of the CFTC guidance have been incorporated into certain rules being proposed by the Commission in Regulation SE. The CFTC guidance clarifies portions of its rules by suggesting means for compliance and does not fundamentally alter those rules. Therefore, the Commission believes that no adjustments to the CFTC estimates, on which the Commission is basing its own estimates, would be appropriate despite adapting that guidance into the Commission's proposed rules.

see above for more detailed descriptions of a particular proposed SBSEF rule.

CFTC part 37 section (387 aggregate burden hours per SEF not including § 37.3 (registration)	Topic	Analogous SBSEF Rule # (387 aggregate burden hours per SBSEF not including proposed Rule 803 (registration) and certain other rules not modelled on part 37 rules (discussed separately in the following sections)
37.1	scope	800
37.2	applicable provisions	801
37.4	procedures for listing products	810
37.5	compliance	811
37.6	enforceability	812
37.7	prohibited use of data	813
37.8	entities operating as SEFs and DCMs	814
37.9	methods of execution	815
37.10	process to make swaps available for trade	816
37.11	reserved section	not applicable
37.12	trade execution compliance schedule	817
37.100	CP 1 (compliance with Core Principles)	818 (CP1)
37.200 through 37.206	CP 2 (compliance with rules)	819 (CP2)
37.300 through 37.301	CP 3 (manipulation)	820 (CP3)
37.400 through 37.408	CP 4 (monitoring of trading and trade processing)	821 (CP4)
37.500 through 37.504	CP 5 (ability to obtain information)	822 (CP5)
37.600 through 37.601	CP 6 (position limits)	no equivalent requirement in the SEA; CP numbering diverges after this point
37.700 through 37.703	CP 7 (financial integrity of transactions)	823 (CP6)
37.800 through 37.801	CP 8 (emergency authority)	824 (CP7)
37.900 through 37.901	CP 9 (publication of trading information)	825 (CP 8)
37.1000 through 37.1001	CP 10 (recordkeeping and reporting)	826 (CP 9)
37.1100 through 37.1101	CP 11 (anti-trust)	827 (CP10)
37.1200	CP 12 (conflicts of interest)	828 (CP 11)
37.1300 through 37.1307	CP 13 (financial resources)	829 (CP 12)

37.1400 through 37.1401	CP 14 (system safeguards)	830 (CP 13)
37.1500 through 1501	CP 15 (CCO)	831 (CP 14)
Appendix A (Form SEF)	Form SEF	Form SBSEF[484]
Appendix B	Guidance relating to Core Principles	guidance incorporated throughout proposed rules 818 through 831

3. Aggregate burdens for rules modelled on CFTC part 40 rules

A number of rules contained in Proposed Regulation SE are modelled after rules in part 40 of the CFTC's rules, including §§ 40.2 (Listing products for trading by certification), 40.3 (Voluntary submission of new products for Commission review and approval), 40.5 (Voluntary submission of rules for Commission review and approval), and 40.6 (Self-certification of rules). The Commission is proposing Rules 804, 805, 806, and 807—which are closely modelled on §§ 40.2, 40.3, 40.5, and 40.6, respectively—in order to harmonize with the procedures that the CFTC applies to SEFs with respect to establishing new rules and listing products. In addition, proposed Rule 808 is modelled after § 40.8 and would provide that certain information in a Form SBSEF application or a rule or product filing would be made publicly available, notwithstanding the SBSEF's request for confidential treatment. Proposed Rule 809 is loosely modelled after § 40.12 and would set forth a mechanism for a tolling of the period for consideration of a product pending the issuance by the SEC and the CFTC of joint interpretation clarifying which agency has jurisdiction over the product.

a. Rule and product filing processes for SBSEFs

Under proposed Rules 804 and 805, an SBSEF would be required to submit filings for new products that it seeks to list. Under proposed Rules 806 and 807, an SBSEF would be required to submit rule filings for new rules or rule amendments, including changes to a product's terms or conditions. The Commission's estimate regarding the burdens that an SBSEF would incur to comply with the proposed rule and product filing processes in proposed Rules

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484 The burdens of registering using Form SBSEF are discussed in the previous section.

804, 805, 806, and 807 is informed by the estimates made by the CFTC for compliance with §§ 40.2, 40.3, 40.5, and 40.6, the burden hours for which have been approved by OMB.[485] The Commission is estimating a total of five SBSEF respondents. The Commission preliminarily estimates that the aggregate ongoing annual hourly burden for all SBSEFs to prepare and submit rule and product filings under proposed Rules 804, 805, 806, and 807 (including the cover sheet[486]) would be 300 hours.

Based on the CFTC's experience with SEFs, the Commission estimates that on average an SBSEF would incur an ongoing annual burden of 2 hours of work per rule or product filing. Although the CFTC estimated an average of 100 responses per year per respondent,[487] the Commission believes that an estimate of 30 responses is appropriate given the more limited scope of the SBS market, as opposed to the swap market. This would result in a total estimated ongoing annual burden of 60 hours per respondent[488] and 300 hours for all the respondents annually.[489] The Commission solicits comments regarding the accuracy of its estimates.

b. Burdens related to rules modelled after other part 40 rules

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485 *See* 75 FR 67282 (November 2, 2010) (CFTC proposal to amend 17 CFR 40.2 through 40.5); OMB, Supporting Statement for Information Collection Renewal: OMB Control Number 3038-0093, Attachment A (July 10, 2020), available at *https://omb.report/icr/202005-3038-001/doc/101274002.pdf* (noting the estimated average number of hours to burden hours report is 2 hours, and the number of annual responses from each entity is 100).

486 Each of the filings that would be required by proposed Rules 804 through 807 would have to include a submission cover sheet that is modelled on the cover sheet and instructions used by SEFs in conjunction with analogous filings with the CFTC, with the submitting entity checking the appropriate box to indicate which type of the filing it is making. Any burden hours attributable to a respondent completing this cover sheet, which is an integral part of the filing, are not estimated separately from the paperwork burden of the substantive filing. Instead, they are contained within the aggregate burden hours estimate for rule and product filings pursuant to proposed Rules 804 through 807, which are based upon the CFTC's estimates. *See supra* note 465.

487 *See id.*

488 60 hours = 30 (number of responses per year per respondent) x 2 hours (burden per response).

489 300 hours = 60 hours (annual burden per respondent pursuant to proposed Rules 804, 805, 806, and 807) x 5 (number of respondents).

i. Rule 802

Certain definitions contained in proposed Rule 802 are modelled after provisions of part 40. These definitions would not result in any paperwork burden.

ii. Rule 809

Proposed Rule 809 is loosely modelled on § 40.12 of the CFTC's rules and would apply in situations where an SBSEF wishes to list a product and it is unclear whether the product should be classified as an SBS subject to the jurisdiction of the SEC or a swap subject to the jurisdiction of the CFTC. Proposed Rule 809 would provide that a product certification made by an SBSEF pursuant to proposed Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to proposed Rule 805 shall be tolled, upon request for a joint interpretation of whether the product is a swap, SBS, or mixed swap made pursuant to Rule 3a68-2 under the SEA[490] by the SBSEF, the SEC, or the CFTC.

Proposed Rule 809 itself does not include a process for determining whether the SEC or CFTC has jurisdiction over a product. Proposed Rule 809 would enable the SEC to stay or toll the product filing while the SEC and CFTC consider a joint interpretation under existing SEA Rule 3a68-2, the burden hours of which have already been approved by OMB.[491] The only burden imposed on an SBSEF under Rule 809 would be checking a box on the submission cover sheet if the SBSEF intends to request a joint interpretation from the Commission and the CFTC pursuant to SEA Rule 3a68-2.[492] The Commission preliminarily estimates that each such indication would impose a burden of 0.25 hours. Furthermore, the Commission preliminarily

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490 17 CFR 240.3a68-2.

491 OMB recently approved an extension without change of the collection for Rule 3a68-2. *See* Supporting Statement for the Paperwork Reduction Act New Information Collection Submission for Rule 3a68-2 (Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps) and Rule 3a68-4(c) (Process for Determining Regulatory Treatment for Mixed Swaps), OMB Control Number 3235-0685, Supporting Statement A (December 23, 2021), available at *https://omb.report/icr/202112-3235-018/doc/117438500.pdf*.

492 *See supra* section VI(E).

estimates that each SBSEF would make one such indication per year.[493] Accordingly, the aggregate ongoing annual burden for all SBSEFs to comply with Rule 809 would be 1.25 hours.[494] The Commission believes that this work, should it be required, would be conducted internally. The Commission solicits comment as to the accuracy of these estimates.

4. Aggregate burdens for rules modelled after CFTC rules other than parts 37 and 40

The proposed rules similar to rules of the CFTC other than part 37 and part 40 are proposed Rules 811(d), 816(e), 819(h), 819(i), 819(j), 819(k), 826(f), and 834. These proposed rules generate various categories of burdens for SBSEFs or market participants.

a. Rule 811(d)

Section 1.60 of the CFTC's rules requires a SEF to provide the CFTC with copies of any legal proceeding to which it is a party, or to which its property or assets is subject.

Paragraph (d) of proposed Rule 811 would adapt paragraphs (a), (c), and (e) of § 1.60 to apply to SBSEFs. Paragraph (d)(1) would require an SBSEF to provide the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the SBSEF is a party or its property or assets is subject. Paragraph (d)(2) would require an SBSEF to provide notices of similar actions against any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF alleging violations of certain enumerated actions.

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493 The Commission preliminarily believes that the establishment of a registration regime and listing procedures for SBSEFs could affect the distribution, but likely not the total number, of requests for joint interpretations under Rule 3a68-2 of the SEA. SBS products may be developed in the bilateral market before they are listed on SBSEFs, and there are incentives to resolving jurisdictional issues before they can develop traction in the market. Accordingly, requests for a joint interpretation under Rule 3a68-2 could occur before such products are listed by an SBSEF, and such requests are already considered in the approved PRA burden estimates for Rule 3a68-2.

494 1.25 hours = 1 (number of responses per year per respondent) x 0.25 hours (burden per response) x 5 (number of respondents).

The Commission preliminarily estimates that an SBSEF would provide the information required by proposed Rule 811(d) once per year, and that each submission would take 0.20 hours. Thus, the Commission preliminarily estimates that the aggregate ongoing annual burden for all SBSEFs to comply with requests for documents or information pursuant to proposed Rule 811(d) would be 1 hour.[495] The Commission is basing its estimate on the CFTC estimate included in its submission to OMB for § 1.60 of the CFTC's rules, for which the CFTC estimated that each of the 79 entities to which the rule applies makes, on average, one submission of documents to the Commission per year. The CFTC further estimated that the time required to prepare one submission is approximately 0.20 hour, totaling 15.8 hours (79 x 0.20) annually.[496]

For PRA purposes, the Commission preliminarily believes that it is reasonable to apply the CFTC's approach to proposed Rule 811(d). The Commission believes that this work, should it be required, would be conducted internally. The Commission solicits comment as to the accuracy of these estimates.

b. Rule 819(h)

Paragraph (h) of proposed Rule 819 generally would prohibit persons who are employees of an SBSEF, or who otherwise might have access to confidential information because of their role with the SBSEF, from improperly utilizing that information. Proposed Rule 819(h) is modelled on § 1.59 of the CFTC's rules. The Commission does not believe that this proposed rule would result in a paperwork burden.

c. Rule 819(i)

Paragraph (i) of proposed Rule 819 would bar persons with specified disciplinary

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495 1 (number of responses per year per respondent) x 0.20 hours (burden per response) x 5 (number of respondents) = 1 hour.

496 *See* OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038-0033 (August 23, 2018), available at *https://omb.report/icr/201808-3038-004/doc/85625801.pdf*.

histories from serving on the governing board or committees of an SBSEF, and impose certain other duties on the SBSEF associated with that fundamental requirement. Proposed Rule 819(i) is modelled on § 1.63 of the CFTC's rules.

The Commission preliminarily estimates that an SBSEF would provide the information required by proposed Rule 819(i) once per year, and that each submission would take 79.83 hours. Thus, the Commission preliminarily estimates that the aggregate ongoing annual burden for all SBSEFs to comply with proposed Rule 819(i) would be 399.15 hours.[497] The Commission is basing its estimate on the one that the CFTC included in its submission to OMB for its adoption of § 1.63, where the CFTC estimated that each respondent would make, on average, one submission to the CFTC per year. The CFTC further estimated that the time required to prepare one submission is approximately 79.83 hours.[498]

For PRA purposes, the Commission preliminarily believes that it is reasonable to apply the CFTC's approach to proposed Rule 819(i), and that this work would be conducted internally. The Commission solicits comment as to the accuracy of these estimates.

d. Rule 819(j)

Paragraph (j) of proposed Rule 819 is modelled on § 1.67 of the CFTC's rules. Rule 819(j)(1) would provide that, upon any final disciplinary action in which an SBSEF finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer, the SBSEF must promptly provide written notice of the disciplinary action to the member.

The Commission preliminarily estimates that an SBSEF would need 0.5 hours to prepare a notice and provide it to a member. This estimate is based on a previous Commission estimate

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497 1 (number of responses per year per respondent) x 79.83 hours (burden per response) x 5 (number of respondents) = 399.15 hours.

498 *See* CFTC, *Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories* (February 27, 1990), 55 FR 7884, 7890 (March 6, 1990) (final rule PRA for § 1.63).

for the time that it would take to prepare and submit a simple notice.[499] The Commission estimates that these notices would occur once per year at each SBSEF, resulting in an aggregate ongoing annual burden to comply with proposed Rule 819(j) of 2.5 hours.[500] The Commission believes that this work, should it be required, would be conducted internally. The Commission solicits comment as to the accuracy of these estimates.

e. Rule 819(k)

Paragraph (k) of proposed Rule 819 would require non-U.S. persons who trade on an SBSEF to have an agent for service process, which could be an agent of its own choosing or, by default, the SBSEF. Proposed Rule 819(k) is modelled on provisions of § 15.05 of the CFTC's rules that apply to SEFs. The Commission does not believe that this proposed rule would result in a paperwork burden.

f. Rule 826(f)

Proposed Rule 826(f) is modelled on § 1.37(c) and would require an SBSEF to keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any non-U.S. member that executes transactions on the SBSEF and must, upon request, provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such non-U.S. member.

The Commission preliminarily estimates that each SBSEF would need to update information required by Rule 826(f) once per year and that each submission would take 0.4 hours. Thus, the Commission preliminarily estimates that the aggregate ongoing annual burden

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499 Proposed Rule 819(j) would not address any of the requirements or process concerning taking final disciplinary actions; it merely would require that a notice be provided. A provision of Regulation SCI, Rule 1000(b)(4)(i), also requires providing a simple notice and the Commission estimated that it would take 0.5 hours to prepare and such a notice. *See Regulation Systems Compliance and Integrity; Final Rule*, SEA Release No. 73639 (November 19, 2014), 79 FR 72251, 72381 (December 5, 2014).

500 2.5 hours (0.5 hours of in-house counsel time) x (1 responses per year) x (5 respondents). The once per year estimate is based on a previous CFTC estimate included in its submission to OMB for § 1.67 along with other rules.

for all SBSEFs to comply with requests for documents or information pursuant to proposed Rule 826(f) would be 2 hours.[501] The Commission is basing its estimate on the estimate included by the CFTC in its submission to OMB regarding § 1.37(c), where the CFTC estimated that it would take a SEF 0.4 hours to prepare each record in accordance with § 1.37(c).

For PRA purposes, the Commission preliminarily believes that it is reasonable to apply the CFTC's approach to proposed Rule 826(f). The Commission believes that this work, should it be required, would be conducted internally. The Commission solicits comment as to the accuracy of these estimates.

g. Rule 834

Proposed Rule 834 of Regulation SE would implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges and, in addition, adapt certain CFTC rules that are designed to mitigate conflicts of interest at SEFs (and other CFTC-registered entities). Proposed Rule 834 would provide that each SBSEF and SBS exchange must create and maintain rules to mitigate conflicts of interest between SBSEFs and SBS exchanges and their members, including by prohibiting members from owning 20% or more of the voting rights of an SBSEF or SBS exchange and from exercising disproportionate influence in disciplinary proceedings. Proposed Rule 834 also would require each SBSEF and SBS exchange to submit to the Commission after every governing board election a list of each governing board's members, the groups they represent, and how the composition of the board complies with the requirements of Rule 834. Establishing such rules and submitting such lists to the Commission would result in a paperwork burden for SBSEFs and SBS exchanges.

The Commission preliminarily estimates that proposed Rules 834(b) and (c) together would have an initial, one-time paperwork burden of 15 hours per entity associated with drafting

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501 1 (number of responses per year per respondent) x 0.40 hours (burden per response) x 5 (number of respondents) = 2 hours.

and implementing any such rules, for an aggregate one-time paperwork burden of 120 hours.[502] Proposed Rules 834(b) and (c) are substantially similar to proposed Rule 702(c) of Regulation MC.[503] In its PRA analysis for proposed Rule 702(c), the Commission estimated that there would be a one-time paperwork burden of 15 hours per entity associated with drafting and implementation of any such rules by each SBSEF or SBS exchange.[504]

Additionally, the Commission preliminarily estimates that proposed Rule 834(d), proposed Rule 834(e), and proposed Rule 834(f), combined, would result in an aggregate ongoing annual paperwork burden of 10 hours.[505] Proposed Rules 834(d), (e), and (f) are substantially similar to proposed Rule 702(h) in Regulation MC in 2010[506] and CFTC § 1.64(c)(4), CFTC § 1.64(b), and CFTC § 1.64(d), respectively. The Commission is basing its estimate on the CFTC's estimate that Rules 1.41(d),[507] 1.63, 1.64, and 1.67 would result in an average annual paperwork burden of 1.25 hours per response that was included in its submission to OMB.[508]

The Commission preliminarily estimates that proposed Rule 834(g) would have an aggregate ongoing annual burden of 16 hours.[509] Proposed Rule 834(g) is substantially similar to § 1.69 of the CFTC's rules, and the Commission is basing its estimate on the CFTC's estimate

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502 1 (number of responses per respondent) x 15 hours (burden per response) x 8 (5 SBSEFs + 3 SBS exchanges) = 120 hours.

503 Regulation MC Proposal, 75 FR at 65916.

504 *See id.*

505 10 hours = 1 (number of responses per respondent) x 1.25 hours (burden per response) x 8 (number of SBSEF + SBS exchange respondents).

506 Regulation MC Proposal, 75 FR at 65932.

507 While §1.41(d) created an exemption from the requirements of section 5a(a)(12)(A) of the CEA for contract market rules not related to terms and conditions, the CFTC did not break out the portion of the burden hours for which this amendment is responsible. Therefore, to be conservative, the Commission is including it in its estimate for the burden hours of proposed Rules 834(d), (e), and (f).

508 *See* 58 FR 37644, 37653.

509 16 hours = 1 (number of responses per respondent) x 2 hours (burden per response) x 8 (number of SBSEF + SBS exchange respondents).

for § 1.69 of 2 hours per response that was included in its submission to OMB.[510]

The Commission does not believe that proposed Rule 834(h) would result in a paperwork burden not already included in the above estimates. Proposed Rule 834(h) collates into a single rule the requirements for an SBSEF to file rules to comply with proposed Rule 834. As it has already described the paperwork burdens of proposed Rules 834(b) through (g), the Commission does not believe that proposed Rule 834(h) would result in a separate paperwork burden not already included above. Thus, the total aggregate ongoing annual burden is estimated at 26 hours.[511]

5. Miscellaneous burdens

a. Rule 833

Proposed Rule 833 would describe how exemptions could be obtained for foreign SBS trading venues from the SEA definitions of "exchange," "security-based swap execution facility," and "broker" and how SBS executed on a foreign trading venue could become exempt from the SEA's trade execution requirement. Based on the CFTC's experience in the SEF market,[512] the Commission preliminarily estimates that there would be three requests for an exemption order under either or both paragraphs (a) and (b) of Rule 833 in the first year and 2 requests in each subsequent year; and that each submission would require an initial, one-time burden of 80 hours. Once an exemption has been granted to an applicant, no further action is required. The Commission preliminarily estimates the burden to submit an exemption request under one or both paragraphs of proposed Rule 833 would be 240 hours in the first year[513] and

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510 *See* 64 FR at 16, 22.

511 26 hours = 10 hours (from the second sentence of proposed Rules 834(d), 834(e), and 834(f)) + 16 hours (from proposed Rule 834(g)) + 0 hours (from proposed Rule 834(h).

512 *See supra* note 244.

513 240 hours (80 hours of in-house counsel time) x (3 respondents).

160 hours in each subsequent year.[514] The Commission solicits comment as to the accuracy of these estimates.

b. Rule 835

Proposed Rule 835 would provide that, if an SBSEF issues a final disciplinary action against a member, takes final action with respect to a denial or conditioning membership, or takes final action with respect to a denial or limitation of access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person.

The Commission preliminarily estimates that it would take 0.5 hours to prepare this notice and provide it to the Commission and the affected person. This estimate is based on a previous Commission estimate for the time that it would take to prepare and submit a simple notice.[515] The Commission preliminarily believes that it would take an additional 0.25 hours to create and serve a copy of that notice on the affected person. The Commission estimates that these notices would occur once per month at each SBSEF, resulting in an aggregate annual burden to comply with proposed Rule 835 of 45 hours.[516] The Commission believes that this work, should it be required, would be conducted internally. The Commission solicits comment

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514 160 hours (80 hours of in-house counsel time) x (2 respondents). This estimate is informed by Rule 908(c) of the Commission's Regulation SBSR, which sets forth the requirements surrounding requests under which regulatory reporting and public dissemination of SBS transactions can be satisfied by complying with the rules of a foreign jurisdiction rather than the parallel rules applicable in the United States. The materials necessary to support such a request under Rule 908(c) are broadly similar to the materials necessary to support a request for an exemption order under one or both paragraphs of proposed Rule 833. The Commission estimated that the burden of a request under Rule 908(c) would be 80 hours of in-house counsel time; therefore, the Commission preliminarily estimates that burden for submitting documents and information in support of a request for an exemption order under Rule 833 would be the same.

515 A provision of Regulation SCI, Rule 1000(b)(4)(i), also requires providing a simple notice and the Commission estimated that it would take 0.5 hours to prepare and such a notice. *See Regulation Systems Compliance and Integrity; Final Rule*, SEA Release No. 73639 (November 19, 2014), 79 FR 72251, 72381 (December 5, 2014).

516 45 hours (0.75 hours of in-house counsel time) x (12 responses per year) x (5 respondents).

as to the accuracy of these estimates.

6. Total paperwork burden under proposed Regulation SE

Based on the foregoing, the Commission preliminarily estimates that the total one-time burden for all SBSEFs, persons that seek an exemption order under proposed Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 1,995 hours. The Commission preliminarily estimates that annual ongoing burden for all SBSEFs, persons that seek an exemption order under proposed Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 2,711.9 hours.

Summary of Aggregate Burden Hours				
Proposed Rule or Provision	Burden Hours Per Respondent	One-Time or Ongoing	Respondents	Total Hours
Registration (Rule 803, Form SBSEF)	295	One-Time	5	1,475
Rules modelled on CFTC part 37 (other than registration)	387	Ongoing	5	1,935
Rule and product filing processes (Rules 804 through 807)	60	Ongoing	5	300
809	0.25	Ongoing	5	1.25
811(d)	0.2	Ongoing	5	1
819(i)	79.83	Ongoing	5	399.15
819(j)	0.5	Ongoing	5	2.5
826(f)	0.4	Ongoing	5	2
833	80	One-Time	3 & 2[517]	240 & 160
834(b) through (c)	15	One-Time	8	120
834(d) through (g)	3.25	Ongoing	8	26
835	9	Ongoing	5	45

E. Collection of information is mandatory

The collections of information imposed on SBSEFs throughout Regulation SE would be mandatory for registered SBSEFs. The collection of information with respect to proposed Rule 833 would be mandatory for persons that seek an exemption order under Rule 833. The

[517] Three respondents in the first year and then two each subsequent year.

collection of information with respect to proposed Rule 834 would be mandatory for SBS exchanges.

F. Responses to collection of information will not be confidential

The collection of information required under Regulation SE would generally not be kept confidential, unless confidential treatment is requested and granted by the Commission pursuant to Rule 24b-2 under the SEA.

G. Retention period of recordkeeping requirements

Although recordkeeping and retention requirements have not yet been established for SBSEFs, the Commission is authorized to adopt such rules under section 3D of the SEA. Proposed Rule 826 under Regulation SE would implement section 3D(d)(9) of the SEA to require an SBSEF to maintain records, for a minimum of five years, of all activities relating to the business of the SBSEF, including a complete audit trail.

H. Request for comment

The Commission solicits comment on all aspects of its PRA estimates regarding the above, particularly the following:

221. Please provide any data or analysis bearing on whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.

222. Do you believe that the Commission's estimate of the burden of the proposed collections of information is accurate? Why or why not? If not, what aspects (in your view) require adjustment? To the extent possible, please provide data to support your contention.

223. Do you believe that there are ways to enhance the quality, utility, and clarity of the information proposed to be collected? If so, please describe.

224. Do you believe that there are ways to minimize the burden of collection of information on respondents, including through the use of automated collection

techniques or other forms of information technology? If so, please describe.

225. Do you believe that the proposed rules and amendments would have any effects on any other collection of information not previously identified in this section? If so, please describe and quantify to the extent feasible.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. Persons wishing to submit comments on the collection of information requirements should direct them to the OMB Desk Officer for the Securities and Exchange Commission, *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov*, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090 with reference to File No.S7-14-22. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication; therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for the materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-14-22, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549-2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

XXI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[518] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[519] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."[520] Section 605(b) of the RFA states 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.[521]

A. SBSEFs

Most of proposed Regulation SE, and the related rules and rule amendments, would apply to registered SBSEFs (or entities that are seeking to register with the Commission as SBSEFs). In the Dodd-Frank Act, Congress defined SBSEFs as a new type of trading venue for SBS and mandated the registration of these entities. Based on its understanding of the market, and review of and consultation with industry sources, the Commission preliminarily estimates that five entities will seek to register as SBSEFs and thus would be subject to Regulation SE and the related rules and rule amendments.

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

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518 5 U.S.C. 601 *et seq.*

519 5 U.S.C. 603(a).

520 Although section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the SEA, 17 CFR 240.0-10. *See* SEA Release No. 18452 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

521 *See* 5 U.S.C. 605(b).

assets of $5 million or less;[522] 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 SEA,[523] 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 business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[524] Under the standards adopted by the Small Business Administration ("SBA"), entities in financial investments and related activities[525] are considered small entities if they have $41.5 million or less in annual receipts.

The Commission preliminarily believes that most, if not all, SBSEFs would be large business entities or subsidiaries of large business entities, and that every SBSEF (or its parent entity) would have assets in excess of $5 million and annual receipts in excess of $41,500,000. Therefore, the Commission preliminarily believes that none of the potential SBSEFs would be considered small entities.

B. Persons requesting an exemption order pursuant to Rule 833

Proposed Rule 833 would describe how foreign SBS trading venues could become exempt from the SEA definitions of "exchange," "security-based swap execution facility," and "broker" and how SBS executed on a foreign trading venue could become exempt from the SEA's trade execution requirement. Based on the fact that the CFTC has granted similar

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522 *See* 17 CFR 240.0-10(a).

523 17 CFR 240.17a-5(d).

524 *See* 17 CFR 240.0-10(c).

525 These entities would include firms involved in investment banking and securities dealing; securities brokerage; commodity contracts dealing; commodity contracts brokerage; securities and commodity exchanges; portfolio management; investment advice; trust, fiduciary and custody activities; miscellaneous intermediation; and miscellaneous financial investment activities. *See* SBA's Table of Small Business Size Standards, Subsector 523.

exemptions with respect to three foreign jurisdictions,[526] the Commission preliminarily estimates that there would be three requests under one or both paragraphs of proposed Rule 833 in the first year and two in each subsequent year. These requests would likely be submitted by foreign SBS trading venues, foreign authorities that license and regulate those trading venues, or covered persons (as defined in proposed Rule 832) who are members of such trading venues.

Based on the Commission's existing information about the SBS market, the Commission preliminarily believes that no person likely to request an exemption order pursuant to proposed Rule 833 would be considered a small entity. The Commission preliminarily believes that most, if not all, of the persons requesting exemptions would be large business entities or subsidiaries of large business entities, and on its own, or through its parent entity, would have assets in excess of $5 million (or in the case of a broker-dealer, total capital of less than $500,000) and annual receipts in excess of $41,500,000. Therefore, the Commission preliminarily believes that they would not be considered small entities.

C. SBS exchanges

Certain rules under proposed Regulation SE would apply to SBS exchanges. Currently, there are no SBS exchanges. However, the Commission preliminarily estimates that there could be up to three entities would be considered SBS exchanges and would thus be subject to certain requirements of proposed Regulation SE.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes, when used with reference to an exchange, an exchange that has been exempted from the reporting requirements of Rule 601 of Regulation NMS[527] and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[528] Under the standards adopted by the SBA, entities involved in financial investments and related

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526 *See supra* note 244.

527 17 CFR 242.601.

528 *See* 17 CFR 240.0-10(e).

activities[529] are considered small entities if they have $41.5 million or less in annual receipts.

Based on these definitions and the Commission's existing information about national securities exchanges, the Commission preliminarily believes that the entities likely to be considered SBS exchanges would not be considered small entities. Under the standard requiring exemption from the reporting requirements of Rule 601 under the SEA, none of the exchanges subject to the proposed Regulation SE is a "small entity" for the purposes of the RFA. In addition, the Commission preliminarily believes that any SBS exchange would have annual receipts in excess of $41,500,000. Therefore, the Commission preliminarily believes that no potential SBS exchange would be considered small entities.

D. Certification

For the foregoing reasons, the Commission certifies that the proposed rules, form, and cover sheet under Regulation SE and the related rules and rule amendments, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission invites commenters to address whether the proposed rules would have a significant economic impact on a substantial number of small entities, and, if so, what would be the nature of any impact on small entities. The Commission requests that commenters provide empirical data to illustrate the extent of the impact.

XXII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, ("SBREFA"),[530] the Commission requests comment on the potential effect of the proposed Regulation SE, and related proposed rules and rule amendments under the SEA, on the United

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529 These entities would include firms involved in investment banking and securities dealing, securities brokerage, commodity contracts dealing, commodity contracts brokerage, securities and commodity exchanges, miscellaneous intermediation, portfolio management, investment advice, trust, fiduciary and custody activities, and miscellaneous financial investment activities. *See* SBA's Table of Small Business Size Standards, Subsector 523.

530 Pub. L. 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).

States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Statutory Authority

Pursuant to the SEA (particularly Sections 3(b), 3C, 3D, and 36 thereof, 15 U.S.C. 78c, 78c-3, 78c-4, and 78mm, respectively) and the Dodd-Frank Act (particularly section 765 thereof, 15 U.S.C. 8343), the Commission is proposing to amend §§ 201.101, 201.202, 201.210, 201.401, 201.450, 201.460, 232.405, and 240.3a1-1 of chapter II of title 17 of the Code of Federal Regulations and is proposing new §§ 201.442, 201.443, 240.15a-12, and 242.800 through 242.835, as set forth below.

List of Subjects

17 CFR Part 201

Administrative practice and procedure.

17 CFR Part 232

Administrative practice and procedure, Confidential business information, Incorporation by reference, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Dealers, Registration, Securities.

17 CFR 242 and 249

Brokers, Security-based swap execution facilities, Reporting and recordkeeping requirements.

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

PART 201—RULES OF PRACTICE

1. The authority citation for part 201, subpart D, is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 78c(b), 78c-4, 78d-1, 78d-2, 78l, 78m, 78n, 78o(d), 78o-3, 78s, 78u-2, 78u-3, 78v, 78w, 77sss, 77ttt, 80a-8, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, 80b-12, 7202, 7215, and 7217.

§ 201.101 Definitions.

2. Amend § 201.101 by adding paragraph (a)(9)(ix) to read as follows:

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(a) ***

(9) ***

(ix) By the filing, pursuant to § 201.442, of an application for review of a determination of a security-based swap execution facility;

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3. Amend § 201.202 by revising paragraph (a) to read as follows:

§ 201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding, a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, a proceeding to review a determination of the Board pursuant to §§ 201.440 and 201.441, or a proceeding to review a determination by a security-based swap execution facility pursuant to §§ 201.442 and 201.443, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding with particular reference to:

(1) Whether there should be an initial decision by a hearing officer;

(2) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) Whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

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4. Amend § 201.210 by revising the paragraph (a) heading, paragraph (a)(1), paragraph (b) heading, paragraph (b)(1), and paragraph (c) introductory text to read as follows:

§ 201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding, a proceeding to review a self-regulatory organization determination, a proceeding to review a Board determination, or a proceeding to review a determination by a security-based swap execution facility*—(1) *Generally.* No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding, a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, a proceeding to review a determination by the Board pursuant to §§ 201.440 and 201.441, or a proceeding to review a determination by a security-based swap execution facility pursuant to §§ 201.442 and 201.443, except as authorized by paragraph (c) of this section.

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(b) *Intervention as party*—(1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, a proceeding to review a Board determination, or a proceeding to review a security-based swap execution facility determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section would be inadequate for the protection of the person's interests. In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

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(c) *Leave to participate on a limited basis*. In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, a proceeding to review a Board determination, or a proceeding to review a security-based swap execution facility determination, any person may seek leave to participate on a limited basis as a non-party participant as any matter affecting the person's interests:

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5. Amend § 201.401 by adding paragraph (f) to read as follows:

§ 201.401 Consideration of stays.

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(f) *Lifting of stay of action by a security-based swap execution facility*—(1) *Availability.* Any person aggrieved by a stay of action by a security-based swap execution facility entered in accordance with § 201.442(c) may make a motion to lift the stay. The Commission may, at any time, on its own motion determine whether to lift the automatic stay.

(2) *Summary action.* The Commission may lift a stay summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* The Commission may expedite consideration of a motion to lift a stay of action by a security-based swap execution facility, consistent with the Commission's other responsibilities. Where consideration is expedited, persons opposing the lifting of the stay may file a statement in opposition within two days of service of the motion requesting lifting of the stay unless the Commission, by written order, shall specify a different period.

6. Add § 201.442 to read as follows:

§ 201.442 Appeal of determination by security-based swap execution facility.

(a) *Application for review; when available.* An application for review by the Commission may be filed by any person who is aggrieved by a determination of a security-based swap execution facility with respect to any:

(1) Final disciplinary action, as defined in § 240.835(b)(1);

(2) Final action with respect to a denial or conditioning of membership, as defined in § 240.835(b)(2); or

(3) Final action with respect to a denial or limitation of access to any service offered by the security-based swap execution facility, as defined in § 240.835(b)(2).

(b) *Procedure.* An aggrieved person may file an application for review with the Commission pursuant to § 201.151 within 30 days after the notice filed with the Commission pursuant to § 242.835 by the security-based swap execution facility of the determination is received by the aggrieved person. The aggrieved person shall serve the application on the security-based swap execution facility at the same time. The application shall identify the determination complained of, set forth in summary form a statement of alleged errors in the action and supporting reasons therefor, and state an address where the applicant can be served. The application should not exceed two pages in length. If the applicant will be represented by a representative, the application shall be accompanied by the notice of appearance required by § 201.102(d). Any exception to an action not supported in an opening brief that complies with § 201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant.

(c) *Stay of determination.* Filing an application for review with the Commission pursuant to paragraph (b) of this section operates as a stay of the security-based swap execution facility's determination, unless the Commission otherwise orders either pursuant to a motion filed in accordance with § 201.401(f) or upon its own motion.

(d) *Certification of the record; service of the index.* Within 14 days after receipt of an application for review, the security-based swap execution facility shall certify and file electronically in the form and manner specified by the Office of the Secretary one unredacted copy of the record upon which it took the complained-of action.

(1) The security-based swap execution facility shall file electronically with the

Commission one copy of an index of such record in the form and manner specified by the Commission, and shall serve one copy of the index on each party. If such index contains any sensitive personal information, as defined in paragraph (d)(2) of this section, the security-based swap execution facility also shall file electronically with the Commission one redacted copy of such index, subject to the requirements of paragraph (d)(2).

(2) *Sensitive personal information* includes a Social Security number, taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, State-issued identification number, home address (other than city and State), telephone number, date of birth (other than year), names and initials of minor children, as well as any unnecessary health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, all filings.

(i) *Exceptions.* The following information may be included and is not required to be redacted from filings:

(A) The last four digits of a financial account number, credit card or debit card number, passport number, driver's license number, and State-issued identification number;

(B) Home addresses and telephone numbers of parties and persons filing documents with the Commission; and

(C) Business telephone numbers.

(ii) [Reserved]

(e) *Certification.* Any filing made pursuant to this section, other than the record upon which the action complained of was taken, must include a certification that any information described in paragraph (d)(2) of this section has been omitted or redacted from the filing.

7. Add § 201.443 to read as follows:

§ 201.443 Commission consideration of security-based swap execution facility determinations.

(a) *Commission review other than pursuant to an application for review.* The Commission may, on its own initiative, order review of any determination by a security-based swap execution facility that could be subject to an application for review pursuant to § 201.442(a) within 40 days after the security-based swap execution facility provided notice to the Commission thereof.

(b) *Supplemental briefing.* The Commission may at any time before issuing its decision raise or consider any matter that it deems material, whether or not raised by the parties. The Commission will give notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties where the Commission believes that such briefing could significantly aid the decisional process.

8. Amend §201.450, by redesignating paragraphs (a)(2)(iv) and (a)(2)(v) as paragraphs (a)(2)(v) and (a)(2)(vi) and adding new paragraph (a)(2)(iv).

The addition reads as follows:

§ 201.450 Briefs filed with the Commission.

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(a) ***

(2) ***

(iv) Receipt by the Commission of an index to the record of a determination by a security-based swap execution facility filed pursuant to § 201.442(d).

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9. Amend §201.460 by adding paragraph (a)(4) to read as follows:

§ 201.460 Record before the Commission.

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(a) ***

(4) In a proceeding for final decision before the Commission reviewing a determination of a security-based swap execution facility, the record shall consist of:

(i) The record certified pursuant to § 201.442(d) by the security-based swap execution facility;

(ii) Any application for review; and

(iii) Any submissions, moving papers, and briefs filed on appeal or review.

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PART 232—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS.

10. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

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11. Amend §232.405 by:

a. Revising the introductory text and paragraphs (a)(2) and (4);

b. Adding paragraph (b)(1)(iii); and

c. Revising Note 1 to § 232.405.

The revisions and addition read as follows:

§ 232.405 Interactive Data File submissions.

This section applies to electronic filers that submit Interactive Data Files. Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F-10 (§ 239.40 of this chapter), paragraph 101 of the Instructions as to Exhibits of Form 20-F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40-F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6-K (§ 249.306 of this chapter), General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), General Instruction C.3.(h) of Form N-3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N-4

(§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N-6 (§§ 239.17c and 274.11d of this chapter), General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), Rules 803(b)(1)(i), 803(b)(3), 803(e), 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), 807(d), 829(g)(6), and 831(j)(2) of Regulation SE (§§ 242.803 through 807, 829, and 831 of this chapter), Registration Instructions to Form SBSEF (§ 249.2001 of this chapter), and Instruction A to the Security-Based Swap Execution Facility Submission Cover Sheet (§ 249.2002 of this chapter) specify when electronic filers are required or permitted to submit an Interactive Data File (§ 232.11), as further described in note 1 to this section. This section imposes content, format, and submission requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (§ 232.11).

(a) ***

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F-10 (§ 239.40 of this chapter), paragraph 101 of the Instructions as to Exhibits of Form 20-F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40-F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6-K (§ 249.306 of this chapter), General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), General Instruction C.3.(h) of Form N-3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N-4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N-6 (§§ 239.17c and 274.11d of this chapter), General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), Rules 803(b)(1)(i), 803(b)(3), 803(e), 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), 807(d), 829(g)(6), and 831(j)(2) of Regulation SE (§§ 242.803 through 242.807, 242.829, and 242.831 of this chapter), Registration

Instructions to Form SBSEF (§ 249.2001 of this chapter), and Instruction A to the Security-Based Swap Execution Facility Submission Cover Sheet (§ 249.2002 of this chapter), as applicable;

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(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, Item 601(b)(101) of Regulation S-K (§ 229.601(b)(101) of this chapter), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F-10 (§ 239.40 of this chapter), paragraph 101 of the Instructions as to Exhibits of Form 20-F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40-F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6-K (§ 249.306 of this chapter), General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), General Instruction C.3.(h) of Form N-3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N-4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N-6 (§§ 239.17c and 274.11d of this chapter), General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), Rules 803(b)(1)(i), 803(b)(3), 803(e), 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), 807(d), 829(g)(6), and 831(j)(2) of Regulation SE (§§ 242.803 through 242.807, 242.829, and 242.831 of this chapter), Registration Instructions to Form SBSEF (§ 249.2001 of this chapter), or Instruction A to the Security-Based Swap Execution Facility Submission Cover Sheet (§ 249.2002 of this chapter), as applicable.

(b) ***

(1) ***

(iii) For electronic filers subject to Regulation SE (§§ 242.800 *et seq.*), the content of documents required to be filed electronically under Rules 803(b)(1)(i), 803(b)(3), 803(e), 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), 807(d), 829(g)(6), and 831(j)(2) of Regulation SE (§§ 242.803 through 807, 829, and 831 of this chapter), Registration Instructions to Form SBSEF

(§ 249.2001 of this chapter), and Instruction A to the Security-Based Swap Execution Facility Submission Cover Sheet (§ 249.2002 of this chapter), as applicable.

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Note 1 to § 232.405: Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 239.11 of this chapter (Form S-1), § 239.13 of this chapter (Form S-3), § 239.25 of this chapter (Form S-4), § 239.18 of this chapter (Form S-11), § 239.31 of this chapter (Form F-1), § 239.33 of this chapter (Form F-3), § 239.34 of this chapter (Form F-4), § 249.310 of this chapter (Form 10-K), § 249.308a of this chapter (Form 10-Q), and § 249.308 of this chapter (Form 8-K). Paragraph (101) of Part II—Information not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F-10) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form F-10. Paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20-F) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form 20-F. Paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40-F) and Paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6-K) specify the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 249.240f of this chapter (Form 40-F) and § 249.306 of this chapter (Form 6-K). Rules 803(b)(1)(i), 803(b)(3), 803(e), 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), 807(d), 829(g)(6), and 831(j)(2) of Regulation SE (§§ 242.803 through 242.807, 242.829, and 242.831 of this chapter), Registration Instructions to Form SBSEF (§ 249.2001 of this chapter), and Instruction A to the Security-Based Swap Execution Facility Submission Cover Sheet (§ 249.2002 of this chapter), as applicable. Section 229.601(b)(101) (Item 601(b)(101) of Regulation S-K), paragraph (101) of Part II—Information

not Required to be Delivered to Offerees or Purchasers of Form F-10, paragraph 101 of the Instructions as to Exhibits of Form 20-F, paragraph B.(15) of the General Instructions to Form 40-F, and paragraph C.(6) of the General Instructions to Form 6-K all prohibit submission of an Interactive Data File by an issuer that prepares its financial statements in accordance with 17 CFR 210.6-01 through 210.6-10 (Article 6 of Regulation S-X). For an issuer that is a management investment company or separate account registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), General Instruction C.3.(h) of Form N-3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N-4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N-6 (§§ 239.17c and 274.11d of this chapter), and General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), as applicable, specifies the circumstances under which an Interactive Data File must be submitted.

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

12. The general authority citation for part 240 continues to read 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, 78o, 78o-4, 78o-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; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

13. Amend §240.3a1-1 by adding paragraphs (a)(4) and (5) and revising paragraph (b) introductory text to read as follows:

§ 240.3a1-1 Exemption from the definition of "exchange" under Section 3(a)(1) of the Act.

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(a) ***

(4) Has registered with the Commission as a security-based swap execution facility pursuant § 242.803 and provides a market place for no securities other than security-based swaps; or

(5) Has registered with the Commission as a clearing agency pursuant to section 17A of the Act (15 U.S.C. 78q-1) and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations.

(b) Notwithstanding paragraphs (a)(1) through (a)(3) of this section, an organization, association, or group of persons shall not be exempt under this section from the definition of "exchange," if:

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14. Add § 240.15a-12 to read as follows:

§ 240.15a-12 Exemption for certain security-based swap execution facilities from certain broker requirements

(a) For purposes of this section, an *SBSEF-B* means a security-based swap execution facility that does not engage in any securities activity other than facilitating the trading of security-based swaps on or through the security-based swap execution facility.

(b) An SBSEF-B that registers with the Commission pursuant to § 242.803 shall be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the Act (15 U.S.C. 78o(a)(1) and (b)).

(c) Except as provided in paragraph (d) of this section, an SBSEF-B shall be exempt from any provision of the Act or the Commission's rules thereunder applicable to brokers that, by its

terms, requires, prohibits, restricts, limits, conditions, or affects the activities of a broker, unless such provision specifies that it applies to a security-based swap execution facility.

(d) Notwithstanding paragraph (c) of this section, the following provisions of the Act and the Commission's rules thereunder shall apply to an SBSEF-B:

(1) Section 15(b)(4) of the Act (15 U.S.C. 78o(b)(4));

(2) Section 15(b)(6) of the Act (15 U.S.C. 78o(b)(6)); and

(3) Section 17(b) of the Act (15 U.S.C. 78q(b)).

(e) An SBSEF-B shall be exempt from the Securities Investor Protection Act.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SE AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

15. The general authority citation for part 242 is revised and an authority citation for §§ 242.800 through 242.835 is added to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78c-4, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, 80a-37, and 8343.

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Sections 242.800 through 242.835 are also issued under sec. 943, Pub. L. 111–203, Section 763.

16. The heading for part 242 is revised to read as set forth above.

17. Sections 242.800 through 242.835 are added to read as follows:

Sec.

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242.800	Scope.
242.801	Applicable provisions.
242.802	Definitions.
242.803	Requirements and procedures for registration.
242.804	Listing products for trading by certification.
242.805	Voluntary submission of new products for Commission review and approval.
242.806	Voluntary submission of rules for Commission review and approval.

242.807 Self-certification of rules.
242.808 Availability of public information.
242.809 Stay of certification and tolling of review period pending jurisdictional determination.
242.810 Product filings by security-based swap execution facilities that are not yet registered and by dormant security-based swap execution facilities.
242.811 Information relating to security-based swap execution facility compliance.
242.812 Enforceability.
242.813 Prohibited use of data collected for regulation purposes.
242.814 Entity operating both a national securities exchange and security-based swap execution facility.
242.815 Methods of execution for Required and Permitted Transactions.
242.816 Trade execution requirement and exemptions therefrom.
242.817 Trade execution compliance schedule.
242.818 Core Principle 1—Compliance with core principles.
242.819 Core Principle 2—Compliance with rules.
242.820 Core Principle 3—Security-based swaps not readily susceptible to manipulation.
242.821 Core Principle 4—Monitoring of trading and trade processing.
242.822 Core Principle 5—Ability to obtain information.
242.823 Core Principle 6—Financial integrity of transactions.
242.824 Core Principle 7—Emergency authority.
242.825 Core Principle 8—Timely publication of trading information.
242.826 Core Principle 9—Recordkeeping and reporting.
242.827 Core Principle 10—Antitrust considerations.
242.828 Core Principle 11—Conflicts of interest.
242.829 Core Principle 12—Financial resources.
242.830 Core Principle 13—System safeguards.
242.831 Core Principle 14—Designation of chief compliance officers.
242.832 Application of the trade execution requirement to cross-border security-based swap transactions.
242.833 Cross-border exemptions.
242.834 Mitigation of conflicts of interest of security-based swap execution facilities and certain exchanges.
242.835 Notice to Commission by security-based swap execution facility of final disciplinary action or denial or limitation of access.

§ 242.800 Scope.

The provisions of this section shall apply to every security-based swap execution facility that is registered or is applying to become registered as a security-based swap execution facility under section 3D of the Securities Exchange Act (the "Act").

§ 242.801 Applicable provisions.

A security-based swap execution facility shall comply with the requirements of this section and all other applicable Commission rules, including any related definitions and cross-referenced sections.

§ 242.802 Definitions.

The following terms, and any other terms defined within a rule in this chapter, are defined as follows solely for purposes of this chapter:

Block trade means a security-based swap transaction that is subject to public dissemination pursuant to § 242.902 and:

(1) Involves a security-based swap that is listed on a security-based swap execution facility or national securities exchange;

(2) Is executed on a security-based swap execution facility's trading system or platform that is not an order book or occurs away from the security-based swap execution facility's or national securities exchange's system or platform and is executed pursuant to the rules and procedures of the security-based swap execution facility or national securities exchange;

(3) Is a security-based swap based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of $5 million or greater; and

(4) Is reported subject to the rules and procedures of the security-based swap execution facility or national securities exchange.

Business day means the intraday period of time starting at 8:15 a.m. and ending at 4:45 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect in Washington DC, on all days except Saturdays, Sundays, and Federal holidays in Washington DC.

Committee member means a member, or functional equivalent thereof, of any committee of a security-based swap execution facility.

Correcting trade means a trade executed and submitted for clearing to a registered clearing agency with the same terms and conditions as an error trade other than any corrections to any operational or clerical error and the time of execution.

Disciplinary committee means any person or committee of persons, or any subcommittee

thereof, that is authorized by a security-based swap execution facility or SBS exchange to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the security-based swap execution facility or SBS exchange, except those cases where the person or committee is authorized summarily to impose minor penalties for violating rules regarding decorum, attire, the timely submission of accurate records for clearing or verifying each day's transactions, or other similar activities.

Dormant product means:

(1) Any security-based swap listed on security-based swap execution facility that has no open interest and in which no trading has occurred for a period of 12 complete calendar months following a certification to, or approval by, the Commission; provided, however, that no security-based swap initially and originally certified to, or approved by, the Commission within the preceding 36 complete calendar months shall be considered to be a dormant product;

(2) Any security-based swap of a dormant security-based swap execution facility; or

(3) Any security-based swap not otherwise a dormant product that a security-based swap execution facility self-declares through certification to be a dormant product.

Dormant security-based swap execution facility means a security-based swap execution facility on which no trading has occurred for the previous 12 consecutive calendar months; provided, however, that no security-based swap execution facility shall be considered to be a dormant security-based swap execution facility if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months.

Dormant rule means:

(1) Any rule of a security-based swap execution facility which remains unimplemented for 12 consecutive calendar months following a certification with, or an approval by, the Commission; or

(2) Any rule or rule amendment of a dormant security-based swap execution facility.

Electronic trading facility means a trading facility that operates by means of an electronic or telecommunications network and maintains an automated audit trail of bids, offers, and the matching orders or the execution of transactions on the facility.

Emergency means any occurrence or circumstance that, in the opinion of the governing board of a security-based swap execution facility, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of the security-based swap execution facility under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any security-based swaps, including:

(1) Any manipulative or attempted manipulative activity;

(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;

(3) Any circumstances which may materially affect the performance of security-based swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any market participant;

(4) Any action taken by any governmental body, or any other security-based swap execution facility, market, or facility which may have a direct impact on trading or clearing and settlement; and

(5) Any other circumstance which may have a severe, adverse effect upon the functioning of the security-based swap execution facility.

Employee means any person hired or otherwise employed on a salaried or contract basis by a security-based swap execution facility, but does not include:

(1) Any governing board member compensated by the security-based swap execution facility solely for governing board activities; or

(2) Any committee member compensated by a security-based swap execution facility solely for committee activities; or

(3) Any consultant hired by a security-based swap execution facility.

Error trade means any trade executed on or subject to the rules of a security-based swap execution facility that contains an operational or clerical error.

Governing board means the board of directors of a security-based swap execution facility, or for a security-based swap execution facility whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

Governing board member means a member, or functional equivalent thereof, of the governing board of a security-based swap execution facility.

Member, with respect to a national securities exchange, has the same meaning as in section 3(a)(3) of the Act. *Member*, with respect to a security-based swap execution facility, means an individual, association, partnership, corporation, or trust owning or holding a membership in, admitted to membership representation on, or having trading privileges on the security-based swap execution facility.

Non-U.S. member means a member of a security-based swap execution facility that is not a U.S. person.

Offsetting trade means a trade executed and submitted for clearing to a registered clearing agency with terms and conditions that economically reverse an error trade that was accepted for clearing.

Order book means an electronic trading facility, a trading facility, or a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.

Oversight panel means any panel, or any subcommittee thereof, authorized by an SBSEF or SBS exchange to recommend or establish policies or procedures with respect to the surveillance, compliance, rule enforcement, or disciplinary responsibilities of the SBSEF or SBS exchange.

Records has the meaning as in section 3(a)(37) of the Act (15 U.S.C. 78c(a)(37)).

Rule means any constitutional provision, article of incorporation, by-law, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement, or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a security-based swap execution facility or by the governing board thereof or any committee thereof, in whatever form adopted.

SBS exchange means a national securities exchange that posts or makes available for trading security-based swaps.

Security-based swap execution facility has the same meaning as in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) but does not include an entity that is registered with the Commission as a clearing agency pursuant to section 17A of the Act (15 U.S.C. 78q-1) and limits its security-based swap execution facility functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations.

Senior officer means the chief executive officer or other equivalent officer of a security-based swap execution facility.

Terms and conditions means any definition of the trading unit or the specific asset underlying a security-based swap, description of the payments to be exchanged under a security-based swap, specification of cash settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the security-based swap. Terms and conditions of a security-based swap include provisions relating to the following:

(1) Identification of the major group, category, type, or class in which the security-based swap falls (such as a credit or equity security-based swap) and of any further sub-group, category, type, or class that further describes the security-based swap;

(2) Notional amounts, quantity standards, or other unit size characteristics;

(3) Any applicable premiums or discounts for delivery of a non-par product;

(4) Trading hours and the listing of security-based swaps;

(5) Pricing basis for establishing the payment obligations under, and mark-to-market value of, the security-based swap including, as applicable, the accrual start dates, termination, or maturity dates, and, for each leg of the security-based swap, the initial cash flow components, spreads, and points, and the relevant indexes, prices, rates, coupons, or other price reference measures;

(6) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(7) Payment and reset frequency, day count conventions, business calendars, and accrual features;

(8) If physical delivery applies, delivery standards and procedures, including fees related to delivery or the delivery process, alternatives to delivery, and applicable penalties or sanctions for failure to perform;

(9) If cash-settled, the definition, composition, calculation, and revision of the cash settlement price, and the settlement currency;

(10) Payment or collection of option premiums or margins;

(11) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(12) Threshold prices for an option, the existence of which is contingent upon those prices;

(13) Any restrictions or requirements for exercising an option; and

(14) Life cycle events.

Trading facility—(1) *In general*. The term *trading facility* means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions—

(i) By accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or

(ii) Through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm.

(2) *Exclusions*. (i) The term *trading facility* does not include:

(A) A person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;

(B) A government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities (as the terms *government securities dealer*, *government securities broker*, and *government securities* are defined in section 3(a) of the Act); or

(C) A facility on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding.

(ii) Any person, group of persons, dealer, broker, or facility described in paragraphs (z)(2)(i)(A) through (C) is excluded from the meaning of the term "trading facility" for the purposes of this chapter without any prior specific approval, certification, or other action by the Commission.

(3) *Special rule*. A person or group of persons that would not otherwise constitute a trading facility shall not be considered to be a trading facility solely as a result of the submission to a registered clearing agency of transactions executed on or through the person or group of persons.

U.S. person has the same meaning as in § 240.3a71-3(a)(4).

§ 242.803 Requirements and procedures for registration.

(a) *Requirements for registration.* (1) Any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade security-based swaps with more than one other market participant on the system or platform shall register the facility as a security-based swap execution facility under this section or as a national securities exchange pursuant to section 6 of the Act.

(2) *Minimum trading functionality.* A security-based swap execution facility shall, at a minimum, offer an order book.

(3) A security-based swap execution facility is not required to provide an order book under this section for transactions defined in § 242.815(d)(2), (3), and (4) except that a security-based swap execution facility must provide an order book under this section for Required Transactions that are components of transactions defined in § 242.815(d)(2), (3), and (4) when such Required Transactions are not executed as components of transactions defined in § 242.815(d)(2), (3), and (4).

(b) *Procedures for full registration.* (1) An entity requesting registration as a security-based swap execution facility shall:

(i) File electronically a complete Form SBSEF as set forth in § 249.2001, or any successor forms, and all information and documentation described in such forms with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405; and

(ii) Provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application.

(2) *Request for confidential treatment.* (i) An applicant requesting registration as a security-based swap execution facility shall identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 240.24b-2.

(ii) As set forth in § 242.808, certain information provided in an application shall be made publicly available.

(3) *Amendment of application prior to full registration.* An applicant amending a pending application for registration as a security-based swap execution facility or requesting an amendment to an order of registration shall file an amended application electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405.

(4) *Effect of incomplete application.* If an application is incomplete pursuant to paragraph (b)(1) of this section, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

(5) *Commission review period.* The Commission shall approve or deny an application for registration as a security-based swap execution facility within 180 days of the filing of the application. If the Commission notifies the person that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period shall be stayed from the time of such notification until the application is resubmitted in completed form, *provided* that the Commission shall have not less than 60 days to approve or deny the application from the time the application is resubmitted in completed form.

(6) *Commission determination.* (i) The Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's rules applicable to security-based swap execution facilities. If deemed appropriate, the Commission may issue an order granting registration subject to conditions.

(ii) The Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the Act and the Commission's rules applicable to security-based swap execution facilities. If the Commission denies an application, it shall specify the grounds for the denial.

(c) *Reinstatement of dormant registration.* A dormant security-based swap execution

facility may reinstate its registration under the procedures of paragraph (b) of this section. The applicant may rely upon previously submitted materials if such materials accurately describe the dormant security-based swap execution facility's conditions at the time that it applies for reinstatement of its registration.

(d) *Request for transfer of registration.* (1) A security-based swap execution facility seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Commission in the form and manner specified by the Commission.

(2) A request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the security-based swap execution facility could not have known of the anticipated change three months prior to the anticipated change, as soon as it knows of such change.

(3) The request for transfer of registration shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A description of the corporate change, including the reason for the change and its impact on the security-based swap execution facility, including its governance and operations, and its impact on the rights and obligations of members;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to security-based swap execution facilities and the Commission's rules thereunder;

(iv) The governing documents of the transferee, including, but not limited to, articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the security-based swap execution facility;

(vi) A representation by the transferee that it:

(A) Will be the surviving entity and successor-in-interest to the transferor security-based

swap execution facility and will retain and assume, without limitation, all of the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's rules thereunder;

(C) Will assume, maintain, and enforce all rules implementing and complying with the core principles applicable to security-based swap execution facilities, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to § 242.806 or § 242.807;

(D) Will comply with all regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all regulatory programs; and

(E) Will notify members of all changes to the transferor's rulebook prior to the transfer and will further notify members of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

(vii) A representation by the transferee that upon the transfer:

(A) It will assume responsibility for and maintain compliance with core principles for all security-based swaps previously made available for trading through the transferor, whether by certification or approval; and

(B) None of the proposed rule changes will affect the rights and obligations of any member.

(4) Upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

(e) *Request for withdrawal of application for registration.* An applicant for registration as a security-based swap execution facility may withdraw its application submitted pursuant to paragraph (b) of this section by filing a withdrawal request electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405. Withdrawal of an application for registration shall not affect any action taken or to be taken by

the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

(f) *Request for vacation of registration.* A security-based swap execution facility may request that its registration be vacated by filing a vacation request electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405 at least 90 days prior to the date that the vacation is requested to take effect. Upon receipt of such request, the Commission shall promptly order the vacation to be effective upon the date named in the request and send a copy of the request and its order to all other security-based swap execution facilities, SBS exchanges, and registered clearing agencies that clear security-based swaps. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the security-based swap execution facility was registered by the Commission. From and after the date upon which the vacation became effective the said security-based swap execution facility can thereafter be registered again by applying to the Commission in the manner provided in paragraph (b) of this section for an original application.

§ 242.804 Listing products for trading by certification.

(a) *General.* A security-based swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under § 242.805 or that remains a dormant product subsequent to being submitted under this section or approved under § 242.805 of this section. A submission shall comply with the following conditions:

(1) The security-based swap execution facility has filed its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405;

(2) The Commission has received the submission by the open of business on the business day that is ten business days preceding the product's listing; and

(3) The submission includes:

(i) A copy of the submission cover sheet in accordance with the instructions in § 249.2002;

(ii) A copy of the product's rules, including all rules related to its terms and conditions;

(iii) The intended listing date;

(iv) A certification by the security-based swap execution facility that the product to be listed complies with the Act and the Commission's rules thereunder;

(v) A concise explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission's rules thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(vi) A certification that the security-based swap execution facility posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution's website but must be republished consistent with any determination made pursuant to § 240.24b-2; and

(vii) A request for confidential treatment, if appropriate, as permitted under § 240.24b-2.

(b) *Additional information.* If requested by Commission staff, a security-based swap execution facility shall provide any additional evidence, information, or data that demonstrates that the security-based swap meets, initially or on a continuing basis, the requirements of the Act or the Commission's rules or policies thereunder.

(c) *Stay of certification of product.* (1) *General.* The Commission may stay the certification of a product submitted pursuant to paragraph (a) of this section by issuing a

notification informing the security-based swap execution facility that the Commission is staying the certification of the product on the grounds that the product presents novel or complex issues that require additional time to analyze, the product is accompanied by an inadequate explanation, or the product is potentially inconsistent with the Act or the Commission's rules thereunder. The Commission will have an additional 90 days from the date of the notification to conduct the review.

(2) *Public comment.* The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect, as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission's website. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of product.* A product subject to a stay pursuant to this paragraph shall become effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section, unless the Commission withdraws the stay prior to that time, or the Commission notifies the security-based swap execution facility during the 90-day time period that it objects to the proposed certification on the grounds that the product is inconsistent with the Act or the Commission's rules.

§ 242.805 Voluntary submission of new products for Commission review and approval.

(a) *Request for approval.* A security-based swap execution facility may request that the Commission approve a new or dormant product prior to listing the product for trading, or if a product was initially submitted under § 242.804, subsequent to listing the product for trading. A submission requesting approval shall:

(1) Be filed electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405;

(2) Include a copy of the submission cover sheet in accordance with the instructions in § 249.2002;

(3) Include a copy of the rules that set forth the security-based swap's terms and

conditions;

(4) Include an explanation and analysis of the product and its compliance with applicable provisions of the Act, including the core principles and the Commission's rules thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(5) Describe any agreements or contracts entered into with other parties that enable the security-based swap execution facility to carry out its responsibilities;

(6) Include, if appropriate, a request for confidential treatment as permitted under § 240.24b-2;

(7) Certify that the security-based swap execution facility posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website but must be republished consistent with any determination made pursuant to § 240.24b-2; and

(8) Include, if requested by Commission staff, additional evidence, information, or data demonstrating that the security-based swap meets, initially or on a continuing basis, the requirements of the Act, or other requirement for registration under the Act, or the Commission's rules or policies thereunder. The security-based swap execution facility shall submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the security-based swap execution facility.

(b) *Standard for review and approval.* The Commission shall approve a new product

unless the terms and conditions of the product violate the Act or the Commission's rules thereunder.

(c) *45-day review.* A product submitted for Commission approval under this paragraph shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under paragraph (d) of this section, unless notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section; and

(2) The submitting security-based swap execution facility does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering, or other non-substantive revisions, during that period. Any voluntary, substantive amendment by the security-based swap execution facility will be treated as a new submission under this section.

(d) *Extension of time.* The Commission may extend the 45-day review period in paragraph (c) of this section for:

(1) An additional 45 days, if the product raises novel or complex issues that require additional time to analyze, in which case the Commission shall notify the security-based swap execution facility within the initial 45-day review period and shall briefly describe the nature of the specific issue(s) for which additional time for review is required; or

(2) Any extended review period to which the security-based swap execution facility agrees in writing.

(e) *Notice of non-approval.* The Commission, at any time during its review under this section, may notify the security-based swap execution facility that it will not, or is unable to, approve the product. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements of paragraph (a) of this section, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.

(f) *Effect of non-approval.* (1) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's determination not to approve a product does not prejudice the security-based swap execution facility from subsequently submitting a revised version of the product for Commission approval, or from submitting the product as initially proposed pursuant to a supplemented submission.

(2) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's refusal to approve a product shall be presumptive evidence that the security-based swap execution facility may not truthfully certify under § 242.804 that the same, or substantially the same, product does not violate the Act or the Commission's rules thereunder.

§ 242.806 Voluntary submission of rules for Commission review and approval.

(a) *Request for approval of rules.* A security-based swap execution facility may request that the Commission approve a new rule, rule amendment, or dormant rule prior to implementation of the rule, or if the request was initially submitted under § 242.806 or 242.807, subsequent to implementation of the rule. A request for approval shall:

(1) Be filed electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405;

(2) Include a copy of the submission cover sheet in accordance with the instructions in appendix B to Regulation SE (17 CFR 242.800 through 242.835);

(3) Set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated);

(4) Describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the security-based swap execution facility or by its governing board or by any committee thereof, and cite the rules of the security-based swap execution facility that authorize the adoption of the proposed rule;

(5) Provide an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act,

including the core principles relating to security-based swap execution facilities and the Commission's rules thereunder and, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the security-based swap execution facility's framework of regulation;

(6) Certify that the security-based swap execution facility posted a notice of pending rule with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website but must be republished consistent with any determination made pursuant to § 240.24b-2;

(7) Provide additional information which may be beneficial to the Commission in analyzing the new rule or rule amendment. If a proposed rule affects, directly or indirectly, the application of any other rule of the security-based swap execution facility, the pertinent text of any such rule must be set forth and the anticipated effect described;

(8) Provide a brief explanation of any substantive opposing views expressed to the security-based swap execution facility by governing board or committee members, members of the security-based swap execution facility, or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed; and

(9) As appropriate, include a request for confidential treatment as permitted under § 240.24b-2.

(b) *Standard for review and approval.* The Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the Act or the Commission's rules thereunder.

(c) *45-day review.* A rule or rule amendment submitted for Commission approval under paragraph (a) of this section shall be deemed approved by the Commission 45 days after

receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the security-based swap execution facility is notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section;

(2) The security-based swap execution facility does not amend the proposed rule or supplement the submission, except as requested by the Commission, during the pendency of the review period, other than for correction of typographical errors, renumbering, or other non-substantive revisions. Any amendment or supplementation not requested by the Commission will be treated as the submission of a new filing under this section.

(d) *Extension of time for review.* The Commission may further extend the review period in paragraph (c) of this section for:

(1) An additional 45 days, if the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting security-based swap execution facility within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required; or

(2) Any period, beyond the additional 45 days provided in paragraph (d)(1) of this section, to which the security-based swap execution facility agrees in writing.

(e) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the security-based swap execution facility that it will not, or is unable to, approve the new rule or rule amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's rules thereunder.

(f) *Effect of non-approval.* (1) Notification to a security-based swap execution facility under paragraph (e) of this section does not prevent the security-based swap execution facility from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission. The revised submission will be reviewed without prejudice.

(2) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's determination not to approve a proposed rule or rule amendment shall be presumptive evidence that the security-based swap execution facility may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under § 242.807(a).

(g) *Expedited approval.* Notwithstanding the provisions of paragraph (c) of this section, changes to a proposed rule or a rule amendment, including changes to terms and conditions of a product that are consistent with the Act and the Commission's rules thereunder, may be approved by the Commission at such time and under such conditions as the Commission shall specify in the written notification; provided, however, that the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.

§ 242.807 Self-certification of rules.

(a) *Required certification.* A security-based swap execution facility shall comply with the following conditions prior to implementing any rule—other than a rule delisting or withdrawing the certification of a product with no open interest and submitted in compliance with paragraphs (a)(1), (2) and (6) of this section—that has not obtained Commission approval under § 242.806, or that remains a dormant rule subsequent to being submitted under this section or approved under § 242.806.

(1) The security-based swap execution facility has filed its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405 of this chapter.

(2) The security-based swap execution facility has provided a certification that it posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website but it must be republished consistent with any determination made pursuant to § 240.24b-2 of this chapter.

(3) The Commission has received the submission not later than the open of business on the business day that is ten business days prior to the security-based swap execution facility's implementation of the rule or rule amendment.

(4) The Commission has not stayed the submission pursuant to § 242.807(c).

(5) A new rule or rule amendment that establishes standards for responding to an emergency shall be submitted pursuant to § 242.807(a). A rule or rule amendment implemented under procedures of the governing board to respond to an emergency shall, if practicable, be filed with the Commission prior to implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than 24 hours after implementation. Any such submission shall be subject to the certification and stay provisions of paragraphs (b) and (c) of this section.

(6) The rule submission shall include:

(i) A copy of the submission cover sheet in accordance with the instructions in § 249.2002 of this chapter (in the case of a rule or rule amendment that responds to an emergency, "Emergency Rule Certification" should be noted in the description section of the submission cover sheet);

(ii) The text of the rule (in the case of a rule amendment, deletions and additions must be indicated);

(iii) The date of intended implementation;

(iv) A certification by the security-based swap execution facility that the rule complies with the Act and the Commission's rules thereunder;

(v) A concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles relating to security-based swap execution facilities and the Commission's rules thereunder;

(vi) A brief explanation of any substantive opposing views expressed to the security-based swap execution facility by governing board or committee members, members of the security-based swap execution facility, or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed; and

(vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in § 240.24b-2 of this chapter.

(7) The security-based swap execution facility shall provide, if requested by Commission staff, additional evidence, information, or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the security-based swap execution facility's compliance with any of the requirements of the Act or the Commission's rules or policies thereunder.

(b) *Review by the Commission.* The Commission shall have ten business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can be made effective, unless the Commission notifies the security-based swap execution facility during the ten-business-day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

(c) *Stay*—(1) *Stay of certification of new rule or rule amendment.* The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the security-based swap execution facility that the Commission is staying the certification of the rule or rule amendment on the grounds that the

rule or rule amendment presents novel or complex issues that require additional time to analyze, the rule or rule amendment is accompanied by an inadequate explanation, or the rule or rule amendment is potentially inconsistent with the Act or the Commission's rules thereunder. The Commission will have an additional 90 days from the date of the notification to conduct the review.

(2) *Public comment.* The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect, as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission website. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of new rule or rule amendment.* A new rule or rule amendment subject to a stay pursuant to this paragraph shall become effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section, unless the Commission withdraws the stay prior to that time, or the Commission notifies the security-based swap execution facility during the 90-day time period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's rules thereunder.

(d) *Notification of rule amendments.* Notwithstanding the rule certification requirement of paragraph (a) of this section, a security-based swap execution facility may place the following rules or rule amendments into effect without certification to the Commission if the following conditions are met:

(1) The security-based swap execution facility provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph during the preceding week. Such notice must be labeled "Weekly Notification of Rule Amendments" and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically using the EDGAR system as an Interactive Data File in accordance with § 232.405; and

(2) The rule governs:

(i) *Non-substantive revisions.* Corrections of typographical errors, renumbering, periodic routine updates to identifying information about the security-based swap execution facility, and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product;

(ii) *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(A) Total $1.00 or more per contract, and

(B) Are established by an independent third party or are unrelated to delivery, trading, clearing, or dispute resolution.

(iii) *Survey lists.* Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;

(iv) *Approved brands.* Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

(v) *Trading months.* The initial listing of trading months, which may qualify for implementation without notice pursuant to paragraph (d)(3)(ii)(F) of this section, within the currently established cycle of trading months; or

(vi) *Minimum tick.* Reductions in the minimum price fluctuation (or "tick").

(3) *Notification of rule amendments not required.* Notwithstanding the rule certification requirements of paragraph (a) of this section, a security-based swap execution facility may place the following rules or rule amendments into effect without certification or notice to the Commission if the following conditions are met:

(i) The security-based swap execution facility maintains documentation regarding all changes to rules; and

(ii) The rule governs:

(A) *Transfer of membership or ownership.* Procedures and forms for the purchase, sale, or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership, or dues or assessments;

(B) *Administrative procedures.* The organization and administrative procedures of a security-based swap execution facility's governing bodies such as a governing board, officers, and committees, but not voting requirements, governing board, or committee composition requirements or procedures, decision-making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

(C*) Administration.* The routine daily administration, direction, and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays; and changes to facilities housing the market, trading floor, or trading area;

(D) *Standards of decorum.* Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules; and

(E) *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(*1*) Are less than $1.00; or

(*2*) Relate to matters such as dues, badges, telecommunication services, booth space, real-time quotations, historical information, publications, software licenses, or other matters that are administrative in nature.

(F) *Trading months.* The initial listing of trading months which are within the currently established cycle of trading months.

§ 242.808 Availability of public information.

(a) The Commission shall make publicly available on its website the following parts of an

application to register as a security-based swap execution facility, unless confidential treatment is obtained pursuant to § 240.24b-2 of this chapter:

(1) Transmittal letter and first page of the application cover sheet;

(2) Exhibit C;

(3) Exhibit G;

(4) Exhibit L; and

(5) Exhibit M.

(b) The Commission shall make publicly available on its website, unless confidential treatment is obtained pursuant to § 240.24b-2 of this chapter, a security-based swap execution facility's filing of new products pursuant to the self-certification procedures of § 242.804, new products for Commission review and approval pursuant to § 242.805, new rules and rule amendments for Commission review and approval pursuant to § 242.806, and new rules and rule amendments pursuant to the self-certification procedures of § 242.807.

(c) The terms and conditions of a product submitted to the Commission pursuant to § 242.804, 242.805, 242.806, or 242.807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to § 240.24b-2 of this chapter.

§ 242.809 Staying of certification and tolling of review period pending jurisdictional determination.

(a) A product certification made by a security-based swap execution facility pursuant to § 242.804 shall be stayed, or the review period for a product that has been submitted for Commission approval by a security-based swap execution facility pursuant to § 242.805 shall be tolled, upon request for a joint interpretation of whether the product is a swap, security-based swap, or mixed swap made pursuant to § 240.3a68-2 of this chapter by the security-based swap execution facility, the Commission, or the Commodity Futures Trading Commission.

(b) The Commission shall provide the security-based swap execution facility with a written notice of the stay or tolling pending issuance of a joint interpretation.

(c) The stay shall be withdrawn, or the approval review period shall resume, if a joint interpretation finding that the Commission has jurisdiction over the product is issued.

§ 242.810 Product filings by security-based swap execution facilities that are not yet registered and by dormant security-based swap execution facilities.

(a) An applicant for registration as a security-based swap execution facility may submit a security-based swap's terms and conditions prior to listing the product as part of its application for registration.

(b) Any security-based swap terms and conditions or rules submitted as part of a security-based swap execution facility's application for registration shall be considered for approval by the Commission at the time the Commission issues the security-based swap execution facility's order of registration.

(c) After the Commission issues the order of registration, the security-based swap execution facility shall submit a security-based swap's terms and conditions, including amendments to such terms and conditions, new rules, or rule amendments pursuant to the procedures in §§ 242.804, 242.805, 242.806, and 242.807.

(d) Any security-based swap terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant security-based swap execution facility shall be considered for approval by the Commission at the time the Commission approves the reinstatement of registration of the dormant security-based swap execution facility.

§ 242.811 Information relating to security-based swap execution facility compliance.

(a) *Request for information.* Upon the Commission's request, a security-based swap execution facility shall file with the Commission information related to its business as a security-based swap execution facility in the form and manner, and within the timeframe, specified by the Commission.

(b) *Demonstration of compliance.* Upon the Commission's request, a security-based swap execution facility shall file with the Commission a written demonstration, containing

supporting data, information, and documents, that it is in compliance with one or more core principles or with its other obligations under the Act or the Commission's rules thereunder, as the Commission specifies in its request. The security-based swap execution facility shall file such written demonstration in the form and manner, and within the timeframe, specified by the Commission.

(c) *Equity interest transfer*—(1) *Equity interest transfer notification.* A security-based swap execution facility shall file with the Commission a notification of any transaction involving the direct or indirect transfer of 50 percent or more of the equity interest in the security-based swap execution facility. The Commission may, upon receiving such notification, request supporting documentation of the transaction.

(2) *Timing of notification.* The equity interest transfer notice described in paragraph (c)(1) of this section shall be filed with the Commission in a form and manner specified by the Commission at the earliest possible time, but in no event later than the open of business ten business days following the date upon which the security-based swap execution facility enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, if any aspect of an equity interest transfer described in paragraph (c)(1) of this section requires a security-based swap execution facility to file a rule, the security-based swap execution facility shall comply with the applicable rule filing requirements of § 242.806 or § 242.807.

(4) *Certification.* Upon a transfer of an equity interest of 50 percent or more in a security-based swap execution facility, the security-based swap execution facility shall file with the Commission, in a form and manner specified by the Commission, a certification that the security-based swap execution facility meets all of the requirements of section 3D of the Act and the Commission rules thereunder, no later than two business days following the date on which the equity interest of 50 percent or more was acquired.

(d) *Pending legal proceedings*. (1) A security-based swap execution facility shall submit

to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject.

(2) A security-based swap execution facility shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any officer, director, or other official of the security-based swap execution facility from conduct in such person's capacity as an official of the security-based swap execution facility and alleging violations of:

(i) The Act or any rule, regulation, or order thereunder;

(ii) The constitution, bylaws, or rules of the security-based swap execution facility; or

(iii) The applicable provisions of State law relating to the duties of officers, directors, or other officials of business organizations.

(3) All documents required by this paragraph (d) to be submitted to the Commission shall be submitted electronically in a form and manner specified by the Commission within ten days after the initiation of the legal proceedings to which they relate, after the date of issuance, or after receipt by the security-based swap execution facility of the notice of appeal, as the case may be.

(4) For purposes of this paragraph (d), a "material legal proceeding" includes but is not limited to actions involving alleged violations of the Act or the Commission rules thereunder. However, a legal proceeding is not "material" for the purposes of this rule if the proceeding is not in a Federal or State court or if the Commission is a party.

§ 242.812 Enforceability.

(a) A transaction entered into on or pursuant to the rules of a security-based swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or

rendered unenforceable as a result of a violation by the security-based swap execution facility of the provisions of section 3D of the Act or the Commission's rules thereunder.

(b) A security-based swap execution facility shall, as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms.

§ 242.813 Prohibited use of data collected for regulatory purposes.

A security-based swap execution facility shall not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; provided, however, that a security-based swap execution facility may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the security-based swap execution facility's use of such data or information in such manner. A security-based swap execution facility shall not condition access to its market(s) or market services on a person's consent to the security-based swap execution facility's use of proprietary data or personal information for business or marketing purposes. A security-based swap execution facility, where necessary for regulatory purposes, may share such data or information with one or more security-based swap execution facilities or national securities exchanges registered with the Commission.

§ 242.814 Entity operating both a national securities exchange and security-based swap execution facility.

(a) An entity that intends to operate both a national securities exchange and a security-based swap execution facility shall separately register the two facilities pursuant to section 6 of the Act and § 242.803, respectively.

(b) A national securities exchange shall, to the extent that the exchange also operates a

security-based swap execution facility and uses the same electronic trade execution system for listing and executing trades of security-based swaps on or through the exchange and the facility, identify whether electronic trading of such security-based swaps is taking place on or through the national securities exchange or the security-based swap execution facility.

§ 242.815 Methods of execution for Required and Permitted Transactions.

(a) *Execution methods for Required Transactions*—(1) *Required Transaction* means any transaction involving a security-based swap that is subject to the trade execution requirement in section 3C(h) of the Act.

(2) *Execution methods.* (i) Each Required Transaction that is not a block trade shall be executed on a security-based swap execution facility in accordance with one of the following methods of execution, except as provided in paragraph (d) or (e) of this section:

(A) An order book; or

(B) A request-for-quote system that operates in conjunction with an order book.

(ii) In providing either one of the execution methods set forth in paragraph (a)(2)(i)(A) or (B) of this section, a security-based swap execution facility may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements for order books in § 242.800(x) or in paragraph (a)(3) of this section for request-for-quote systems.

(3) *Request-for-quote system* means a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond. The three market participants shall not be affiliates of or controlled by the requester and shall not be affiliates of or controlled by each other. A security-based swap execution facility that offers a request-for-quote system in connection with Required Transactions shall provide the following functionality:

(i) At the same time that the requester receives the first responsive bid or offer, the security-based swap execution facility shall communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the security-based swap execution facility's order books;

(ii) The security-based swap execution facility shall provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders; and

(iii) The security-based swap execution facility shall ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

(b) *Time delay requirement for Required Transactions on an order book*—(1) *Time delay requirement.* A security-based swap execution facility shall require that a broker or dealer who seeks to either execute against its customer's order or execute two of its customers' orders against each other through the security-based swap execution facility's order book, following some form of pre-arrangement or pre-negotiation of such orders, be subject to at least a 15-second time delay between the entry of those two orders into the order book, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction, whether for the broker's or dealer's own account or for a second customer, is submitted for execution.

(2) *Adjustment of time delay requirement.* A security-based swap execution facility may adjust the time period of the 15-second time delay requirement described in paragraph (b)(1) of this section, based upon a security-based swap's liquidity or other product-specific considerations; however, the time delay shall be set for a sufficient period of time so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against such order.

(c) *Execution methods for Permitted Transactions*—(1) *Permitted Transaction* means any transaction not involving a security-based swap that is subject to the trade execution requirement

in section 3C(h) of the Act.

(2) *Execution methods.* A security-based swap execution facility may offer any method of execution for each Permitted Transaction.

(d) *Exceptions to required methods of execution for package transactions.* (1) For purposes of this paragraph, a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) At least one component transaction is a Required Transaction;

(ii) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(iii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(2) A Required Transaction that is executed as a component of a package transaction that includes a component security-based swap that is subject exclusively to the Commission's jurisdiction, but is not subject to the clearing requirement under section 3C of the Act, may be executed on a security-based swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction;

(3) A Required Transaction that is executed as a component of a package transaction that includes a component that is not a security-based swap may be executed on a security-based swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction. This provision shall not apply to:

(i) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are U.S. Treasury securities;

(ii) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are contracts for the purchase or sale of a commodity for future delivery;

(iii) A Required Transaction that is executed as a component of a package transaction in

which all other non-security-based swap components are agency mortgage-backed securities; and

(iv) A Required Transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market.

(4) A Required Transaction that is executed as a component of a package transaction that includes a component security-based swap that is not exclusively subject to the Commission's jurisdiction may be executed on a security-based swap in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction.

(e) *Resolution of operational and clerical error trades.* (1) A security-based swap execution facility shall maintain rules and procedures that facilitate the resolution of error trades. Such rules shall be fair, transparent, and consistent; allow for timely resolution; require members to provide prompt notice of an error trade—and, as applicable, offsetting and correcting trades—to the security-based swap execution facility; and permit members to:

(i) Execute a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that has been rejected from clearing as soon as technologically practicable, but no later than one hour after a registered clearing agency provides notice of the rejection; or

(ii) Execute an offsetting trade and a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that was accepted for clearing as soon as technologically practicable, but no later than three days after the error trade was accepted for clearing at a registered clearing agency.

(2) If a correcting trade is rejected from clearing, then the security-based swap execution facility shall not allow the counterparties to execute another correcting trade.

(f) *Counterparty anonymity.* (1) Except as otherwise required under the Act or the Commission's rules thereunder, a security-based swap execution facility shall not directly or indirectly, including through a third-party service provider, disclose the identity of a counterparty to a security-based swap that is executed anonymously and intended to be cleared.

(2) A security-based swap execution facility shall establish and enforce rules that prohibit any person from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a security-based swap execution facility that is executed anonymously and intended to be cleared.

(3) For purposes of paragraphs (f)(1) and (2) of this section, "executed anonymously" shall include a security-based swap that is pre-arranged or pre-negotiated anonymously, including by a member of the security-based swap execution facility.

(4) For a package transaction that includes a component transaction that is not a security-based swap intended to be cleared, disclosing the identity of a counterparty shall not violate paragraph (f)(1) or (2) of this section. For purposes of this paragraph (f), a "package transaction" consists of two or more component transactions executed between two or more counterparties where:

(i) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(ii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

§ 242.816 Trade execution requirement and exemptions therefrom.

(a) General. (1) *Required submission.* A security-based swap execution facility that makes a security-based swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such security-based swap as a rule, pursuant to the procedures under § 242.806 or 242.807.

(2) *Listing requirement.* A security-based swap execution facility that makes a security-based swap available to trade must demonstrate that it lists or offers that security-based swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a security-based swap available to trade for purposes of section 3C(h) of the Act, a security-based swap execution facility shall consider, as appropriate,

the following factors with respect to such security-based swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* Upon a determination that a security-based swap is available to trade on a security-based swap execution facility or national securities exchange, all other security-based swap execution facilities and SBS exchanges shall comply with the requirements of section 3C(h) of the Act in listing or offering such security-based swap for trading.

(d) *Removal*. The Commission may issue a determination that a security-based swap is no longer available to trade upon determining that no security-based swap execution facility or SBS exchange lists such security-based swap for trading.

(e) *Exemptions to trade execution requirement*. (1) A security-based swap transaction that is executed as a component of a package transaction that also includes a component transaction that is the issuance of a bond in a primary market is exempt from the trade execution requirement in section 3C(h) of the Act. For purposes of paragraph (e) of this section, a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) At least one component transaction is subject to the trade execution requirement in section 3C(h) of the Act;

(ii) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(iii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(2) Section 3C(h) of the Act does not apply to a security-based swap transaction that qualifies for an exception under section 3C(g) of the Act, or any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met.

(3)(i) Section 3C(h) of the Act does not apply to a security-based swap transaction that is executed between counterparties that qualify as "eligible affiliate counterparties," as defined below.

(ii) For purposes of this paragraph (e)(3), counterparties will be "eligible affiliate counterparties" if:

(A) One counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the counterparty that holds the majority interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned counterparty; or

(B) A third party, directly or indirectly, holds a majority ownership interest in both counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the counterparties.

(iii) For purposes of this paragraph (e)(3), a counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

§ 242.817 Trade execution compliance schedule.

(a) A security-based swap transaction shall be subject to the requirements of section 3C(h) of the Act upon the later of:

(1) A determination by the Commission that the security-based swap is required to be cleared as set forth in section 3C(a) or any later compliance date that the Commission may

establish as a term or condition of such determination or following a stay and review of such determination pursuant to section 3C(c) of the Act and § 240.3Ca-1 of this chapter thereunder; and

(2) Thirty days after the available-to-trade determination submission or certification for that security-based swap is, respectively, deemed approved under § 242.806 or deemed certified under § 242.807.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 3C(h) of the Act sooner than as provided in paragraph (a) of this section.

§ 242.818 Core Principle 1—Compliance with core principles.

(a) *In general.* To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with the core principles described in section 3D of the Act, and any requirement that the Commission may impose by rule or regulation.

(b) *Reasonable discretion of security-based swap execution facility.* Unless otherwise determined by the Commission, by rule or regulation, a security-based swap execution facility described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which it complies with the core principles described in section 3D of the Act.

§ 242.819 Core Principle 2—Compliance with rules.

(a) *General*. A security-based swap execution facility shall:

(1) Establish and enforce compliance with any rule established by such security-based swap execution facility, including the terms and conditions of the security-based swaps traded or processed on or through the facility, and any limitation on access to the facility;

(2) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that

may be used in establishing whether rule violations have occurred; and

(3) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.

(b) *Operation of security-based swap execution facility and compliance with rules*. (1) A security-based swap execution facility shall establish rules governing the operation of the security-based swap execution facility, including, but not limited to, rules specifying trading procedures to be followed by members when entering and executing orders traded or posted on the security-based swap execution facility, including block trades, if offered.

(2) A security-based swap execution facility shall establish and impartially enforce compliance with the rules of the security-based swap execution facility, including, but not limited to:

(i) The terms and conditions of any security-based swaps traded or processed on or through the security-based swap execution facility;

(ii) Access to the security-based swap execution facility;

(iii) Trade practice rules;

(iv) Audit trail requirements;

(v) Disciplinary rules; and

(vi) Mandatory trading requirements.

(c) *Access requirements*—(1) *Impartial access to markets and market services.* A security-based swap execution facility shall provide any eligible contract participant and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays, provided that the facility has:

(i) Criteria governing such access that are impartial, transparent, and applied in a fair and non-discriminatory manner;

(ii) Procedures whereby eligible contract participants provide the security-based swap execution facility with written or electronic confirmation of their status as eligible contract participants, as defined by the Act and Commission rules thereunder, prior to obtaining access; and

(iii) Comparable fee structures for eligible contract participants and independent software vendors receiving comparable access to, or services from, the security-based swap execution facility.

(2) *Jurisdiction.* Prior to granting any eligible contract participant access to its facilities, a security-based swap execution facility shall require that the eligible contract participant consent to its jurisdiction.

(3) *Limitations on access.* A security-based swap execution facility shall establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar an eligible contract participant's access to the security-based swap execution facility, including when a decision is made as part of a disciplinary or emergency action taken by the security-based swap execution facility.

(d) *Rule enforcement program*. A security-based swap execution facility shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules.

(1) *Abusive trading practices prohibited.* A security-based swap execution facility shall prohibit abusive trading practices on its markets by members. A security-based swap execution facility that permits intermediation shall prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading (except for block trades or other types of transactions approved by or certified to the Commission pursuant § 242.806 or § 242.807, respectively), fraudulent trading, money passes, and any other trading practices that a security-

based swap execution facility deems to be abusive. A security-based swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

(2) *Capacity to detect and investigate rule violations.* A security-based swap execution facility shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the security-based swap execution facility's members and by persons under investigation. A security-based swap execution facility's arrangements and resources shall also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.

(3) *Compliance staff and resources.* A security-based swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The security-based swap execution facility's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in paragraph (d)(6) of this section.

(4) *Automated trade surveillance system.* A security-based swap execution facility shall maintain an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

(5) *Real-time market monitoring.* A security-based swap execution facility shall conduct

real-time market monitoring of all trading activity on its system(s) or platform(s) to identify any market or system anomalies. A security-based swap execution facility shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair, and publicly available.

(6) *Investigations and investigation reports*—(i) *Procedures.* A security-based swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation shall be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the security-based swap execution facility that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(ii) *Timeliness.* Each compliance staff investigation shall be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(iii) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(iv) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a rule violation, it shall prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(v) *Warning letters.* The rules of a security-based swap execution facility may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.

(e) *Regulatory services provided by a third party*—(1) *Use of regulatory service provider permitted.* A security-based swap execution facility may choose to contract with a registered futures association (under section 17 of the Commodity Exchange Act), a national securities exchange, a national securities association, or another security-based swap execution facility (each a "regulatory service provider"), for the provision of services to assist in complying with the Act and Commission rules thereunder, as approved by the Commission. A security-based swap execution facility that chooses to contract with a regulatory service provider shall ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A security-based swap execution facility shall at all times remain responsible for the performance of any regulatory services received, for compliance with the security-based swap execution facility's obligations under the Act and Commission rules thereunder, and for the regulatory service provider's performance on its behalf.

(2) *Duty to supervise regulatory service provider.* A security-based swap execution facility that elects to use the service of a regulatory service provider shall retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on

its behalf. Compliance staff of the security-based swap execution facility shall hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A security-based swap execution facility shall also conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews shall be documented carefully and made available to the Commission upon request.

(3) *Regulatory decisions required from the security-based swap execution facility.* A security-based swap execution facility that elects to use the service of a regulatory service provider shall retain exclusive authority in all substantive decisions made by its regulatory service provider, including, but not limited to, decisions involving the cancellation of trades, the issuance of disciplinary charges against members, and denials of access to the trading platform for disciplinary reasons. A security-based swap execution facility shall document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the security-based swap execution facility chose a different course of action.

(f) *Audit trail*. A security-based swap execution facility shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred.

(1) *Audit trail required.* A security-based swap execution facility shall capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the security-based swap execution facility. An acceptable audit trail shall also permit the security-based swap execution facility to track a customer order from the time of receipt through execution on the security-based swap execution facility.

(2) *Elements of an acceptable audit trail program*—(i) *Original source documents.* A

security-based swap execution facility's audit trail shall include original source documents. Original source documents include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) shall reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), the time of order entry, and the time of trade execution. A security-based swap execution facility shall require that all orders, indications of interest, and requests for quotes be immediately captured in the audit trail.

(ii) *Transaction history database.* A security-based swap execution facility's audit trail program shall include an electronic transaction history database. An adequate transaction history database shall include a history of all indications of interest, requests for quotes, orders, and trades entered into a security-based swap execution facility's trading system or platform, including all order modifications and cancellations. An adequate transaction history database shall also include:

(A) All data that are input into the trade entry or matching system for the transaction to match and clear;

(B) The customer type indicator code; and

(C) Timing and sequencing data adequate to reconstruct trading.

(iii) *Electronic analysis capability.* A security-based swap execution facility's audit trail program shall include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability shall ensure that the security-based swap execution facility has the ability to reconstruct indications of interest, requests for quotes, orders, and trades, and identify possible trading violations with respect to both customer and market abuse.

(iv) *Safe-storage capability.* A security-based swap execution facility's audit trail program shall include the capability to safely store all audit trail data retained in its transaction

history database. Such safe-storage capability shall include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data shall be retained in accordance with the recordkeeping requirements of Core Principle 9 and § 242.826.

(3) *Enforcement of audit trail requirements*—(i) *Annual audit trail and recordkeeping reviews.* A security-based swap execution facility shall enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to the security-based swap execution facility's recordkeeping rules to verify their compliance with the security-based swap execution facility's audit trail and recordkeeping requirements. Such reviews shall include, but are not limited to, reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(ii) *Enforcement program required.* A security-based swap execution facility shall establish a program for effective enforcement of its audit trail and recordkeeping requirements. An effective program shall identify members, persons, and firms subject to the security-based swap execution facility's recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and impose meaningful sanctions when deficiencies are found. Sanctions shall be sufficient to deter recidivist behavior. No more than one warning letter shall be issued to the same person or entity found to have committed the same violation of audit trail or recordkeeping requirements within a rolling 12-month period.

(g) *Disciplinary procedures and sanctions*. A security-based swap execution facility shall establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including

suspension or expulsion of members that violate the rules of the security-based swap execution facility.

(1) *Enforcement staff.* (i) A security-based swap execution facility shall establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the security-based swap execution facility.

(ii) The enforcement staff of a security-based swap execution facility shall not include members or other persons whose interests conflict with their enforcement duties.

(iii) A member of the enforcement staff shall not operate under the direction or control of any person or persons with trading privileges at the security-based swap execution facility.

(iv) The enforcement staff of a security-based swap execution facility may operate as part of the security-based swap execution facility's compliance department.

(2) *Disciplinary panels.* A security-based swap execution facility shall establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this section. Disciplinary panels shall meet the composition requirements of § 242.834(d), and shall not include any members of the security-based swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

(3) *Notice of charges.* If compliance staff authorized by a security-based swap execution facility or disciplinary panel thereof determines that a reasonable basis exists for finding a violation and adjudication is warranted, it shall direct that the person or entity alleged to have committed the violation be served with a notice of charges. A notice of charges shall adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule or rules alleged to have been violated (or about to be violated); advise the respondent that it is entitled, upon request, to a hearing on the charges; and prescribe the period within which a hearing on the charges may be requested. If the rules of the security-based swap execution facility so provide, a notice may also advise:

(i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and

(ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(4) *Right to representation.* Upon being served with a notice of charges, a respondent shall have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except by any member of the security-based swap execution facility's governing board or disciplinary panel, any employee of the security-based swap execution facility, or any person substantially related to the underlying investigations, such as a material witness or respondent.

(5) *Answer to charges.* A respondent shall be given a reasonable period of time to file an answer to a notice of charges. The rules of a security-based swap execution facility governing the requirements and timeliness of a respondent's answer to a notice of charges shall be fair, equitable, and publicly available.

(6) *Admission or failure to deny charges.* The rules of a security-based swap execution facility may provide that, if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the security-based swap execution facility's rules so provide, then:

(i) The disciplinary panel may impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel shall promptly notify the respondent in writing of any sanction to be imposed and shall advise the respondent that the respondent may request a hearing on such sanction within the period of time, which shall be stated in the notice; and

(iii) The rules of a security-based swap execution facility may provide that, if a respondent fails to request a hearing within the period of time stated in the notice, the respondent

will be deemed to have accepted the sanction.

(7) *Denial of charges and right to hearing.* Where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent shall be given an opportunity for a hearing in accordance with the rules of the security-based swap execution facility.

(8) *Settlement offers.* (i) The rules of a security-based swap execution facility may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a security-based swap execution facility may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer shall issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which shall include full customer restitution where customer harm is demonstrated, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision shall adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision shall also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw its offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent shall not be deemed to have made any admissions by reason of the offer of settlement and shall not be otherwise prejudiced by having submitted the offer of settlement.

(9) *Hearings.* A security-based swap execution facility shall adopt rules that provide for the following minimum requirements for any hearing:

(i) The hearing shall be fair, shall be conducted before members of the disciplinary panel, and shall be promptly convened after reasonable notice to the respondent. A security-based swap execution facility need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing;

(ii) No member of the disciplinary panel for the hearing may have a financial, personal, or other direct interest in the matter under consideration;

(iii) In advance of the hearing, the respondent shall be entitled to examine all books, documents, or other evidence in the possession or under the control of the security-based swap execution facility. The security-based swap execution facility may withhold documents that are privileged or constitute attorney work product; were prepared by an employee of the security-based swap execution facility but will not be offered in evidence in the disciplinary proceedings; may disclose a technique or guideline used in examinations, investigations, or enforcement proceedings; or disclose the identity of a confidential source;

(iv) The security-based swap execution facility's enforcement and compliance staffs shall be parties to the hearing, and the enforcement staff shall present their case on those charges and sanctions that are the subject of the hearing;

(v) The respondent shall be entitled to appear personally at the hearing, to cross-examine any persons appearing as witnesses at the hearing, to call witnesses, and to present such evidence as may be relevant to the charges;

(vi) The security-based swap execution facility shall require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence. The security-based swap execution facility shall make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant. The rules of a security-based swap execution facility may provide that a sanction may be summarily imposed upon any

person within its jurisdiction whose actions impede the progress of a hearing; and

(vii) If the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. The record shall not be required to be transcribed unless:

(A) The transcript is requested by Commission staff or the respondent;

(B) The decision is appealed pursuant to the rules of the security-based swap execution facility; or

(C) The decision is reviewed by the Commission pursuant to § 201.442 of this chapter. In all other instances, a summary record of a hearing is permitted.

(10) *Decisions.* Promptly following a hearing conducted in accordance with the rules of the security-based swap execution facility, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include:

(i) The notice of charges or a summary of the charges;

(ii) The answer, if any, or a summary of the answer;

(iii) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(iv) A statement of findings and conclusions with respect to each charge and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(v) An indication of each specific rule that the respondent was found to have violated; and

(vi) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

(11) *Emergency disciplinary actions.* (i) A security-based swap execution facility may impose a sanction, including suspension, or take other summary action against a person or entity

subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place.

(ii) Any emergency disciplinary action shall be taken in accordance with a security-based swap execution facility's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice shall state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent shall have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent shall be given the opportunity for a hearing as soon as reasonably practicable and the hearing shall be conducted before the disciplinary panel pursuant to the rules of the security-based swap execution facility.

(C) Promptly following the hearing, the security-based swap execution facility shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(12) *Right to appeal.* The rules of a security-based swap execution facility may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a security-based swap execution facility permit appeals, then both the respondent and the enforcement staff shall have the opportunity to appeal and:

(i) The security-based swap execution facility shall establish an appellate panel that is

authorized to hear appeals. The rules of the security-based swap execution facility may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered;

(ii) The composition of the appellate panel shall be consistent with § 242.834(d) and shall not include any members of the security-based swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding. The rules of a security-based swap execution facility shall provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof;

(iii) Except for good cause shown, the appeal or review shall be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties; and

(iv) Promptly following the appeal or review proceeding, the appellate panel shall issue a written decision and shall provide a copy to the respondent. The decision issued by the appellate panel shall adhere to all the requirements of paragraph (g)(10) of this section to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(13) *Disciplinary sanctions*—(i) *In general*. All disciplinary sanctions imposed by a security-based swap execution facility or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other members. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, shall take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction shall also include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined.

(ii) *Summary fines for violations of rules regarding timely submission of records.* A security-based swap execution facility may adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each

day's transactions. A security-based swap execution facility may permit its compliance staff, or a designated panel of security-based swap execution facility officials, to summarily impose minor sanctions against persons within the security-based swap execution facility's jurisdiction for violating such rules. A security-based swap execution facility's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule shall provide for progressively larger fines for recurring violations.

(h) *Activities of security-based swap execution facility's employees, governing board members, committee members, and consultants*—(1) *Definitions*. The following definitions shall apply only in this paragraph (h) of this section:

(i) *Covered interest*, with respect to a security-based swap execution facility, means:

(A) A security-based swap that trades on the security-based swap execution facility;

(B) A security of an issuer that has issued a security that underlies a security-based swap that is listed on that facility; or

(C) A derivative based on a security that falls within paragraph (h)(1)(i)(B) of this section.

(ii) *Pooled investment vehicle* means an investment company registered under the Investment Company Act of 1940 in which no covered interest constitutes more than ten percent of the investment company's assets.

(2) *Required rules.* A security-based swap execution facility must maintain in effect rules which have been submitted to the Commission pursuant to § 242.806 or 242.807 that, at a minimum, prohibit an employee of the security-based swap execution facility from:

(i) Trading, directly or indirectly, any covered interest; and

(ii) Disclosing to any other person any material, non-public information which such employee obtains as a result of their employment at the security-based swap execution facility, where such employee has or should have a reasonable expectation that the information disclosed may assist another person in trading any covered interest; provided, however, that such rules

shall not prohibit disclosures made in the course of an employee's duties, or disclosures made to another security-based swap execution facility, court of competent jurisdiction, or representative of any agency or department of the Federal or State government acting in their official capacity.

(3) *Possible exemptions.* A security-based swap execution facility may adopt rules, which must be submitted to the Commission pursuant to § 242.806 or § 242.807, which set forth circumstances under which exemptions from the trading prohibition contained in paragraph (h)(2)(i) of this section may be granted; such exemptions are to be administered by the security-based swap execution facility on a case-by-case basis. Specifically, such circumstances may include:

(i) Participation by an employee in a pooled investment vehicle where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicle;

(ii) Trading by an employee in a derivative based on a pooled investment vehicle that falls within paragraph (h)(3)(i) of this section;

(iii) Trading by an employee in a derivative based on an index in which no covered interest constitutes more than ten percent of the index; and

(iv) Trading by an employee under circumstances enumerated by the security-based swap execution facility in rules which the security-based swap execution facility determines are not contrary to applicable law, the public interest, or just and equitable principles of trade.

(4) *Prohibited conduct.* (i) No employee, governing board member, committee member, or consultant of a security-based swap execution facility shall:

(A) Trade for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information obtained through special access related to the performance of such person's official duties as an employee, governing board member, committee member, or consultant; or

(B) Disclose for any purpose inconsistent with the performance of such person's official

duties as an employee, governing board member, committee member, or consultant any material, non-public information obtained through special access related to the performance of such duties.

(ii) No person shall trade for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information that such person knows was obtained in violation of this paragraph (h)(4) from an employee, governing board member, committee member, or consultant.

(*i*) *Service on security-based swap execution facility governing boards or committees by persons with disciplinary histories*. (1) A security-based swap execution facility shall maintain in effect rules which have been submitted to the Commission pursuant to § 242.806 or § 242.807 that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels, or governing board who:

(i) Was found within the prior three years by a final decision of a security-based swap execution facility, a self-regulatory organization, an administrative law judge, a court of competent jurisdiction, or the Commission to have committed a disciplinary offense;

(ii) Entered into a settlement agreement with a security-based swap execution facility, a court of competent jurisdiction, or the Commission within the prior three years in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense;

(iii) Currently is suspended from trading on any security-based swap execution facility, is suspended or expelled from membership with a self-regulatory organization, is serving any sentence of probation, or owes any portion of a fine imposed pursuant to:

(A) A finding by a final decision of a security-based swap execution facility, a self-regulatory organization, an administrative law judge, a court of competent jurisdiction, or the Commission that such person committed a disciplinary offense; or

(B) A settlement agreement with a security-based swap execution facility, a court of

competent jurisdiction, or the Commission in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense;

(iv) Currently is subject to an agreement with the Commission, a security-based swap execution facility, or a self-regulatory organization not to apply for registration with the Commission or membership in any self-regulatory organization;

(v) Currently is subject to or has had imposed on him or her within the prior three years a Commission registration revocation or suspension in any capacity for any reason, or has been convicted within the prior three years of any felony; or

(vi) Currently is subject to a denial, suspension, or disqualification from serving on a disciplinary committee, arbitration panel, or governing board of any security-based swap execution facility or self-regulatory organization.

(2) No person may serve on a disciplinary committee, arbitration panel, oversight panel or governing board of a security-based swap execution facility if such person is subject to any of the conditions listed in paragraphs (i)(1)(i) through (vi) of this section.

(3) A security-based swap execution facility shall submit to the Commission a schedule listing all those rule violations which constitute disciplinary offenses and, to the extent necessary to reflect revisions, shall submit an amended schedule within 30 days of the end of each calendar year. A security-based swap execution facility shall maintain and keep current the schedule required by this section, and post the schedule on the security-based swap execution facility's website so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public.

(4) A security-based swap execution facility shall submit to the Commission within 30 days of the end of each calendar year a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels, or governing board pursuant to the requirements of this section during the prior year.

(5) Whenever a security-based swap execution facility finds by final decision that a

person has committed a disciplinary offense and such finding makes such person ineligible to serve on that security-based swap execution facility's disciplinary committees, arbitration panels, oversight panels, or governing board, the security-based swap execution facility shall inform the Commission of that finding and the length of the ineligibility in a form and manner specified by the Commission.

(6) For purposes of this paragraph:

(i) *Arbitration panel* means any person or panel empowered by a security-based swap execution facility to arbitrate disputes involving the security-based swap execution facility's members or their customers.

(ii) *Disciplinary offense* means:

(A) Any violation of the rules of a security-based swap execution facility, except a violation resulting in fines aggregating to less than $5000 within a calendar year involving:

(*1*) Decorum or attire;

(*2*) Financial requirements; or

(*3*) Reporting or recordkeeping;

(B) Any rule violation which involves fraud, deceit, or conversion or results in a suspension or expulsion;

(C) Any violation of the Act or the Commission's rules thereunder; or

(D) Any failure to exercise supervisory responsibility when such failure is itself a violation of either the rules of the security-based swap execution facility, the Act, or the Commission's rules thereunder.

(E) A disciplinary offense must arise out of a proceeding or action which is brought by a security-based swap execution facility, the Commission, any Federal or State agency, or other governmental body.

(iii) *Final decision* means:

(A) A decision of a security-based swap execution facility which cannot be further

appealed within the security-based swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction; or

(B) Any decision by an administrative law judge, a court of competent jurisdiction, or the Commission which has not been stayed or reversed.

(j) *Notification of final disciplinary action involving financial harm to a customer*. (1) Upon any final disciplinary action in which a security-based swap execution facility finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer:

(i) The security-based swap execution facility shall promptly provide written notice of the disciplinary action to the member; and

(ii) The security-based swap execution facility shall have established a rule pursuant to § 242.806 or 242.807 that requires a member that receives such a notice to promptly provide written notice of the disciplinary action to the customer, as disclosed on the member's books and records.

(2) A written notice required by paragraph (j)(1) of this section must include the principal facts of the disciplinary action and a statement that the security-based swap execution facility has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer.

(3) Solely for purposes of this paragraph (j):

(i) *Customer* means a person that utilizes an agent in connection with trading on a security-based swap execution facility.

(ii) *Final disciplinary action* means any decision by or settlement with a security-based swap execution facility in a disciplinary matter which cannot be further appealed at the security-based swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent

jurisdiction.

(k) *Designation of agent for non-U.S. member*. (1) A security-based swap execution facility that admits a non-U.S. person as a member shall be deemed to be the agent of the non-U.S. member with respect to any security-based swaps executed by the non-U.S. member. Service or delivery of any communication issued by or on behalf of the Commission to the security-based swap execution facility shall constitute valid and effective service upon the non-U.S. member. The security-based swap execution facility which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a non-U.S. member shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the non-U.S. member.

(2) It shall be unlawful for a security-based swap execution facility to permit a non-U.S. member to execute security-based swaps on the facility unless the security-based swap execution facility prior thereto informs the non-U.S. member in writing of the requirements of this section.

(3) The requirements of paragraphs (k)(1) and (2) of this section shall not apply if the non-U.S. member has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the security-based swap execution facility prior to effecting any transaction on the security-based swap execution facility. This agreement must authorize the person domiciled in the United States to serve as the agent of the non-U.S. member for purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the non-U.S. member and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the security-based swap execution facility prior to permitting the non-U.S. member to effect any transactions in security-based swaps. Such agreements shall be filed in a manner specified by the Commission.

(4) A non-U.S. member shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the security-based swap execution facility knows or should know that the agreement has expired, been terminated, or is no longer in effect, the security-based swap execution facility shall notify the Commission immediately.

§ 242.820 Core Principle 3—Security-based swaps not readily susceptible to manipulation.

The security-based swap execution facility shall permit trading only in security-based swaps that are not readily susceptible to manipulation.

§ 242.821 Core Principle 4—Monitoring of trading and trade processing.

(a) *General*. The security-based swap execution facility shall:

(1) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(i) Trading procedures to be used in entering and executing orders traded on or through the facilities of the security-based swap execution facility; and

(ii) Procedures for trade processing of security-based swaps on or through the facilities of the security-based swap execution facility; and

(2) Monitor trading in security-based swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(b) *Market oversight obligations.* A security-based swap execution facility shall:

(1) Collect and evaluate data on its members' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions, and, where possible, disruptions of the physical-delivery or cash-settlement process;

(2) Monitor and evaluate general market data in order to detect and prevent manipulative

activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(3) Demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities. A security-based swap execution facility shall employ automated alerts to detect abnormal price movements and unusual trading volumes in real time and instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis. The T+1 detection and analysis should incorporate any additional data that becomes available on a T+1 basis, including the trade reconstruction data;

(4) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions; and

(5) Have rules in place that allow it to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the security-based swap execution facility shall take steps to prevent the market disruption or reduce its severity.

(c) *Monitoring of physical-delivery security-based swaps.* For physical-delivery security-based swaps, the security-based swap execution facility shall demonstrate that it:

(1) Monitors a security-based swap's terms and conditions as they relate to the underlying asset market; and

(2) Monitors the availability of the supply of the asset specified by the delivery requirements of the security-based swap.

(d) *Additional requirements for cash-settled security-based swaps*. (1) For cash-settled security-based swaps, the security-based swap execution facility shall demonstrate that it monitors the pricing of the reference price used to determine cash flows or settlement.

(2) For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price is formulated and computed by the security-based swap execution facility, the security-based swap execution facility shall demonstrate that it monitors

the continued appropriateness of its methodology for deriving that price and shall promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions.

(3) For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price relies on a third-party index or instrument, including an index or instrument traded on another venue, the security-based swap execution facility shall demonstrate that it monitors for pricing abnormalities in the index or instrument used to calculate the reference price and shall conduct due diligence to ensure that the reference price is not susceptible to manipulation.

(e) *Ability to obtain information*. (1) A security-based swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in security-based swaps listed on its market, in the index or instrument used as a reference price, or in the underlying asset for its listed security-based swaps is being used to affect prices on its market. The security-based swap execution facility shall demonstrate that it can obtain position and trading information directly from members that conduct substantial trading on its facility or through an information-sharing agreement with other venues or a third-party regulatory service provider. If the position and trading information is not available directly from its members but is available through information-sharing agreements with other trading venues or a third-party regulatory service provider, the security-based swap execution facility should cooperate in such information-sharing agreements.

(2) A security-based swap execution facility shall have rules that require its members to keep records of their trading, including records of their activity in the underlying asset, and related derivatives markets, and make such records available, upon request, to the security-based swap execution facility or, if applicable, to its regulatory service provider and the Commission. The security-based swap execution facility may limit the application of this requirement to only

those members that conduct substantial trading on its facility.

(f) *Risk controls for trading*. A security-based swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the security-based swap execution facility. Such risk control mechanisms shall be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The security-based swap execution facility may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, daily price limits, and intraday position limits related to financial risk to the clearing member, or design other types of controls, as well as clear error-trade and order-cancellation policies. Within the specific array of controls that are selected, the security-based swap execution facility shall set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions.

(g) *Trade reconstruction*. A security-based swap execution facility shall have the ability to comprehensively and accurately reconstruct all trading on its facility. All audit-trail data and reconstructions shall be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

(h) *Regulatory service provider*. A security-based swap execution facility shall comply with the rules in this section through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 242.819(e).

§ 242.822 Core Principle 5—Ability to obtain information.

(a) *General*. The security-based swap execution facility shall:

(1) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 3D of the Act;

(2) Provide the information to the Commission on request; and

(3) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

(b) *Establish and enforce rules*. A security-based swap execution facility shall establish and enforce rules that will allow the security-based swap execution facility to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under this section, including the capacity to carry out international information-sharing agreements as the Commission may require.

(c) *Collection of information*. A security-based swap execution facility shall have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its members, and allow for its examination of books and records kept by members on its facility.

(d) *Provide information to the Commission*. A security-based swap execution facility shall provide information in its possession to the Commission upon request, in a form and manner specified by the Commission.

(e) *Information-sharing agreements*. A security-based swap execution facility shall share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established with such entities, or the Commission can act in conjunction with the security-based swap execution facility to carry out such information sharing.

§ 242.823 Core Principle 6—Financial integrity of transactions.

(a) *General*. The security-based swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of security-based swaps entered on or through the facilities of the security-based swap execution facility, including the clearance and settlement of security-based swaps pursuant to section 3C(a)(1) of the Act.

(b) *Required clearing*. Transactions executed on or through the security-based swap execution facility that are required to be cleared under section 3C(a)(1) of the Act or are voluntarily cleared by the counterparties shall be cleared through a registered clearing agency or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for security based swaps.

(c) *General financial integrity*. A security-based swap execution facility shall provide for the financial integrity of its transactions:

(1) By establishing minimum financial standards for its members, which shall, at a minimum, require that each member qualify as an eligible contract participant;

(2) For transactions cleared by a registered clearing agency:

(i) By ensuring that the security-based swap execution facility has the capacity to route transactions to the registered clearing agency in a manner acceptable to the clearing agency for purposes of clearing; and

(ii) By coordinating with each registered clearing agency to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing.

(d) *Monitoring for financial soundness*. A security-based swap execution facility shall monitor its members to ensure that they continue to qualify as eligible contract participants.

§ 242.824 Core Principle 7—Emergency authority.

(a) The security-based swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any security-based swap or to suspend or curtail trading in a security-based swap.

(b) To comply with this core principle, a security-based swap execution facility shall adopt rules that are reasonably designed to:

(1) Allow the security-based swap execution facility to intervene as necessary to maintain

markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the security-based swap execution facility's market or as part of a coordinated, cross-market intervention;

(2) Have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the security-based swap execution facility are made in good faith to protect the integrity of the markets;

(3) Take market actions as may be directed by the Commission, including, in situations where a security-based swap is traded on more than one platform, emergency action to liquidate or transfer open interest as directed, or agreed to, by the Commission or the Commission's staff.;

(4) Include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest;

(5) Include alternate lines of communication and approval procedures to address emergencies associated with real-time events;

(6) Allow the security-based swap execution facility, to address perceived market threats, to impose or modify position limits, impose or modify price limits, impose or modify intraday market restrictions, impose special margin requirements, order the liquidation or transfer of open positions in any contract, order the fixing of a settlement price, extend or shorten the expiration date or the trading hours, suspend or curtail trading in any contract, transfer customer contracts and the margin, or alter any contract's settlement terms or conditions, or, if applicable, provide for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

(c) A security-based swap execution facility shall promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the security-based swap execution facility considered the effect of its emergency action on

the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a security-based swap execution facility's emergency authority shall be included in a timely submission of a certified rule pursuant to § 242.807.

§ 242.825 Core Principle 8—Timely publication of trading information.

(a)(1) The security-based swap execution facility shall make public timely information on price, trading volume, and other trading data on security-based swaps to the extent prescribed by the Commission.

(2) The security-based swap execution facility shall be required to have the capacity to electronically capture and transmit and disseminate trade information with respect to transactions executed on or through the facility.

(b) A security-based swap execution facility shall report security-based swap transaction data as required by Regulation SBSR.

(c) A security-based swap execution facility shall make available a "Daily Market Data Report" containing the information required in paragraphs (c)(1) and (2) of this section in a manner and timeframe required by this section.

(1) *Contents*. The Daily Market Data Report of a security-based swap execution facility for a business day shall contain the following information for each tenor of each security-based swap traded on that security-based swap execution facility during that business day:

(i) The trade count (including block trades but excluding error trades, correcting trades, and offsetting trades);

(ii) The total notional amount traded (including block trades but excluding error trades, correcting trades, and offsetting trades);

(iii) The number of block trades;

(iv) The total notional amount of block trades;

(v) The opening and closing price;

(vi) The price that is used for settlement purposes, if different from the closing price; and

(vii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the security-based swap execution facility reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

(2) *Additional information*. A security-based swap execution facility must record the following information with respect to security-based swaps on that reporting market:

(i) The method used by the security-based swap execution facility in determining nominal prices and settlement prices; and

(ii) If discretion is used by the security-based swap execution facility in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the security-based swap execution facility and a description of the manner in which that discretion may be employed. Discretionary authority must be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

(3) *Form of publication.* A security-based swap execution facility shall publicly post the Daily Market Data Report on its website:

(i) In a downloadable and machine-readable format using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website;

(ii) Without fees or other charges;

(iii) Without any encumbrances on access or usage restrictions; and

(iv) Without requiring a user to agree to any terms before being allowed to view or download the Daily Market Data Report, such as by waiving any requirements of this paragraph (c)(3). Any such waiver agreed to by a user shall be null and void.

(4) *Timing of publication*. A security-based swap execution facility shall publish the Daily Market Data Report on its website no later than the security-based swap execution

facility's commencement of trading on the next business day after the day to which the information pertains.

(5) *Duration*. A security-based swap execution facility shall keep each Daily Market Data Report available on its website in the same location as all other Daily Market Data Reports for no less than one year after the date of first publication.

§ 242.826 Core Principle 9—Recordkeeping and reporting.

(a) *In general*. (1) A security-based swap execution facility shall:

(i) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years; and

(ii) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act.

(2) The Commission shall adopt data collection and reporting requirements for security-based swap execution facilities that are comparable to corresponding requirements for clearing agencies and security-based swap data repositories.

(b) *Required records*. A security-based swap execution facility shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to its business with respect to security-based swaps. Such records shall include, without limitation, the audit trail information required under § 242.819(f) and all other records that a security-based swap execution facility is required to create or obtain under Regulation SE.

(c) *Duration of retention.* (1) A security-based swap execution facility shall keep records of any security-based swap from the date of execution until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of not less than five years, the first two years in an easily accessible place, after such date.

(2) A security-based swap execution facility shall keep each record other than the records

described in paragraph (c)(1) of this section for a period of not less than five years, the first two years in an easily accessible place, from the date on which the record was created.

(d) *Record retention*—(1) A security-based swap execution facility shall retain all records in a form and manner that ensures the authenticity and reliability of such records in accordance with the Act and the Commission's rules thereunder.

(2) A security-based swap execution facility shall, upon request of any representative of the Commission, promptly furnish to the representative legible, true, complete, and current copies of any records required to be kept and preserved pursuant to this section.

(3) (i) An electronic record shall be retained in a form and manner that allows for prompt production at the request of any representative of the Commission.

(ii) A security-based swap execution facility maintaining electronic records shall establish appropriate systems and controls that ensure the authenticity and reliability of electronic records, including, without limitation:

(A) Systems that maintain the security, signature, and data as necessary to ensure the authenticity of the information contained in electronic records and to monitor compliance with the Act and the Commission's rules thereunder;

(B) Systems that ensure that the security-based swap execution facility is able to produce electronic records in accordance with this section, and ensure the availability of such electronic records in the event of an emergency or other disruption of the security-based swap execution facility's electronic record retention systems; and

(C) The creation and maintenance of an up-to-date inventory that identifies and describes each system that maintains information necessary for accessing or producing electronic records.

(e) *Record examination.* All records required to be kept by a security-based swap execution facility pursuant to this section are subject to examination by any representative of the Commission pursuant to section 17(b) of the Act (15 U.S.C. 78q).

(f) *Records of non-U.S. members*. A security-based swap execution facility shall keep a

record in permanent form, which shall show the true name, address, and principal occupation or business of any non-U.S. member that executes transactions on the facility. Upon request, the security-based swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such non-U.S. member.

§ 242.827 Core Principle 10—Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, the security-based swap execution facility shall not:

(a) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading or clearing.

§ 242.828 Core Principle 11—Conflicts of interest.

(a) The security-based swap execution facility shall:

(1) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(2) Establish a process for resolving the conflicts of interest.

(b) A security-based swap execution facility shall comply with the requirements of § 242.834.

§ 242.829 Core Principle 12—Financial resources.

(a)(*In general.* (1) The security-based swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the security-based swap execution facility, as determined by the Commission.

(2) The financial resources of a security-based swap execution facility shall be considered to be adequate if the value of the financial resources:

(i) Enables the organization to meet its financial obligations to its members notwithstanding a default by a member creating the largest financial exposure for that

organization in extreme but plausible market conditions; and

(ii) Exceeds the total amount that would enable the security-based swap execution facility to cover the operating costs of the security-based swap execution facility for a one-year period, as calculated on a rolling basis.

(b) *General requirements*. A security-based swap execution facility shall maintain financial resources on an ongoing basis that are adequate to enable it to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules. Financial resources shall be considered adequate if their value exceeds the total amount that would enable the security-based swap execution facility to cover its projected operating costs necessary for the security-based swap execution facility to comply with section 3D of the Act and applicable Commission rules for a one-year period, as calculated on a rolling basis pursuant to paragraph (e) of this section.

(c) *Types of financial resources*. Financial resources available to satisfy the requirements of this section may include:

(1) The security-based swap execution facility's own capital, meaning its assets minus its liabilities calculated in accordance with generally accepted accounting principles in the United States; and

(2) Any other financial resource deemed acceptable by the Commission.

(d) *Liquidity of financial resources.* The financial resources allocated by a security-based swap execution facility to meet the ongoing requirements of paragraph (b) of this section shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least the greater of three months of projected operating costs, as calculated on a rolling basis, or the projected costs needed to wind down the security-based swap execution facility's operations, in each case as determined under paragraph (e) of this section. If a security-based swap execution facility lacks sufficient unencumbered, liquid financial assets to satisfy its obligations under this section, the security-based swap execution facility may satisfy this

requirement by obtaining a committed line of credit or similar facility in an amount at least equal to such deficiency.

(e) *Computation of costs to meet financial resources requirement*. (1) A security-based swap execution facility shall, each fiscal quarter, make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under this section. The security-based swap execution facility shall have reasonable discretion in determining the methodologies used to compute such amounts.

(i) *Calculation of projected operating costs.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if it includes all expenses necessary for the security-based swap execution facility to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules, and if the calculation is based on the security-based swap execution facility's current level of business and business model, taking into account any projected modification to its business model (*e.g.*, the addition or subtraction of business lines or operations or other changes), and any projected increase or decrease in its level of business over the next 12 months. A security-based swap execution facility may exclude the following expenses ("excludable expenses") from its projected operating cost calculations:

(A) Costs attributable solely to sales, marketing, business development, product development, or recruitment and any related travel, entertainment, event, or conference costs;

(B) Compensation and related taxes and benefits for personnel who are not necessary to ensure that the security-based swap execution facility is able to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules;

(C) Costs for acquiring and defending patents and trademarks for security-based swap execution facility products and related intellectual property;

(D) Magazine, newspaper, and online periodical subscription fees;

(E) Tax preparation and audit fees;

(F) The variable commissions that a voice-based security-based swap execution facility may pay to its trading specialists, calculated as a percentage of transaction revenue generated by the voice-based security-based swap execution facility; and

(G) Any non-cash costs, including depreciation and amortization.

(ii) *Prorated expenses.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if an expense is prorated and the security-based swap execution facility:

(A) Maintains sufficient documentation that reasonably shows the extent to which an expense is partially attributable to an excludable expense;

(B) Identifies any prorated expense in the financial reports that it submits to the Commission pursuant to paragraph (g) of this section; and

(C) Sufficiently explains why it prorated any expense. Common allocation methodologies that may be used include actual use, headcount, or square footage. A security-based swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies to support its determination to prorate an expense.

(iii) *Expenses allocated among affiliates.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if it prorates any shared expense that the security-based swap execution facility pays for, but only to the extent that such shared expense is attributable to an affiliate and for which the security-based swap execution facility is reimbursed. To prorate a shared expense, the security-based swap execution facility shall:

(A) Maintain sufficient documentation that reasonably shows the extent to which the shared expense is attributable to and paid for by the security-based swap execution facility and/or affiliated entity. The security-based swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation

methodologies, that reasonably shows how expenses are attributable to, and paid for by, the security-based swap execution facility and/or its affiliated entities to support its determination to prorate an expense;

(B) Identify any shared expense in the financial reports that it submits to the Commission pursuant to paragraph (h) of this section; and

(C) Sufficiently explain why it prorated the shared expense.

(2) Notwithstanding any provision of paragraph (e)(1) of this section, the Commission may review the methodologies and require changes as appropriate.

(f) *Valuation of financial resources*. No less than each fiscal quarter, a security-based swap execution facility shall compute the current market value of each financial resource used to meet its obligations under this section. Reductions in value to reflect market and credit risk ("haircuts") shall be applied as appropriate.

(g) *Reporting to the Commission*. (1) Each fiscal quarter, or at any time upon Commission request, a security-based swap execution facility shall provide a report to the Commission that includes:

(i) The amount of financial resources necessary to meet the requirements of this section, computed in accordance with the requirements of paragraph (e) of this section, and the market value of each available financial resource, computed in accordance with the requirements of paragraph (f) of this section; and

(ii) Financial statements, including the balance sheet, income statement, and statement of cash flows of the security-based swap execution facility.

(A) The financial statements shall be prepared in accordance with generally accepted accounting principles in the United States, prepared in English, and denominated in U.S. dollars.

(B) The financial statements of a security-based swap execution facility that is not domiciled in the United States, and is not otherwise required to prepare financial statements in accordance with generally accepted accounting principles in the United States, may satisfy the

requirement in paragraph (g)(1)(ii)(A) of this section if such financial statements are prepared in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard as the Commission may otherwise accept in its discretion.

(2) The calculations required by this paragraph (g) shall be made as of the last business day of the security-based swap execution facility's applicable fiscal quarter.

(3) With each report required under paragraph (g) of this section, the security-based swap execution facility shall also provide the Commission with sufficient documentation explaining the methodology used to compute its financial requirements under this section. Such documentation shall:

(i) Allow the Commission to reliably determine, without additional requests for information, that the security-based swap execution facility has made reasonable calculations pursuant to paragraph (e) of this section; and

(ii) Include, at a minimum:

(A) A total list of all expenses, without any exclusion;

(B) All expenses and the corresponding amounts, if any, that the security-based swap execution facility excluded or prorated when determining its operating costs, calculated on a rolling basis, required under this section, and the basis for any determination to exclude or prorate any such expenses;

(C) Documentation demonstrating the existence of any committed line of credit or similar facility relied upon for the purpose of meeting the requirements of this section (*e.g.*, copies of agreements establishing or amending a credit facility or similar facility); and

(D) All costs that a security-based swap execution facility would incur to wind down its operations, the projected amount of time for any such wind-down period, and the basis of its determination for the estimation of its costs and timing.

(4) The reports and supporting documentation required by this section shall be filed not

later than 40 calendar days after the end of the security-based swap execution facility's first three fiscal quarters, and not later than 90 calendar days after the end of the security-based swap execution facility's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the security-based swap execution facility.

(5) A security-based swap execution facility shall provide notice to the Commission no later than 48 hours after it knows or reasonably should know that it no longer meets its obligations under paragraph (b) and (d) of this section.

(6) A security-based swap execution facility shall provide the report and documentation required by this section to the Commission electronically using the EDGAR system as an Interactive Data File in accordance with § 232.405.

§ 242.830 Core Principle 13—System safeguards.

(a) *In general*. The security-based swap execution facility shall:

(1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(i) Are reliable and secure; and

(ii) Have adequate scalable capacity;

(2) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(i) The timely recovery and resumption of operations; and

(ii) The fulfillment of the responsibilities and obligations of the security-based swap execution facility; and

(3) Periodically conduct tests to verify that the backup resources of the security-based swap execution facility are sufficient to ensure continued:

(i) Order processing and trade matching;

(ii) Price reporting;

(iii) Market surveillance; and

(iv) Maintenance of a comprehensive and accurate audit trail.

(b) *Requirements*. (1) A security-based swap execution facility's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(i) *Enterprise risk management and governance.* This category includes, but is not limited to: Assessment, mitigation, and monitoring of security and technology risk; security and technology capital planning and investment; governing board and management oversight of technology and security; information technology audit and controls assessments; remediation of deficiencies; and any other elements of enterprise risk management and governance included in generally accepted best practices.

(ii) *Information security.* This category includes, but is not limited to, controls relating to: Access to systems and data (including least privilege, separation of duties, account monitoring, and control); user and device identification and authentication; security awareness training; audit log maintenance, monitoring, and analysis; media protection; personnel security and screening; automated system and communications protection (including network port control, boundary defenses, and encryption); system and information integrity (including malware defenses and software integrity monitoring); vulnerability management; penetration testing; security incident response and management; and any other elements of information security included in generally accepted best practices.

(iii) *Business continuity-disaster recovery planning and resources.* This category includes, but is not limited to: Regular, periodic testing and review of business continuity-disaster recovery capabilities; the controls and capabilities described in paragraphs (b)(3) and (10) of this section; and any other elements of business continuity-disaster recovery planning and resources included in generally accepted best practices.

(iv) *Capacity and performance planning.* This category includes, but is not limited to:

Controls for monitoring the security-based swap execution facility's systems to ensure adequate scalable capacity (including testing, monitoring, and analysis of current and projected future capacity and performance, and of possible capacity degradation due to planned automated system changes); and any other elements of capacity and performance planning included in generally accepted best practices.

(v) *Systems operations.* This category includes, but is not limited to: System maintenance; configuration management (including baseline configuration, configuration change and patch management, least functionality, and inventory of authorized and unauthorized devices and software); event and problem response and management; and any other elements of system operations included in generally accepted best practices.

(vi) *Systems development and quality assurance.* This category includes, but is not limited to: Requirements development; pre-production and regression testing; change management procedures and approvals; outsourcing and vendor management; training in secure coding practices; and any other elements of systems development and quality assurance included in generally accepted best practices.

(vii) *Physical security and environmental controls.* This category includes, but is not limited to: Physical access and monitoring; power, telecommunication, and environmental controls; fire protection; and any other elements of physical security and environmental controls included in generally accepted best practices.

(2) In addressing the categories of risk analysis and oversight required under paragraph (b)(1) of this section, a security-based swap execution facility shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(3) A security-based swap execution facility shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and back-up facilities sufficient to enable timely recovery and resumption of its operations and

resumption of its ongoing fulfillment of its responsibilities and obligations as a security-based swap execution facility following any disruption of its operations. Such responsibilities and obligations include, without limitation: Order processing and trade matching; transmission of matched orders to a registered clearing agency for clearing, where appropriate; price reporting; market surveillance; and maintenance of a comprehensive audit trail. A security-based swap execution facility's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of security-based swaps executed on or pursuant to the rules of the security-based swap execution facility during the next business day following the disruption. A security-based swap execution facility shall update its business continuity-disaster recovery plan and emergency procedures at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

(4) A security-based swap execution facility satisfies the requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations by maintaining either:

(i) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a security-based swap execution facility following any disruption of its operations; or

(ii) Contractual arrangements with other security-based swap execution facilities or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of security-based swaps executed on the security-based swap execution facility, and ongoing fulfillment of all of the security-based swap execution facility's responsibilities and obligations with respect to such security-based swaps, in the event that a disruption renders the security-based swap execution facility temporarily or permanently unable to satisfy this requirement on its own behalf.

(5) A security-based swap execution facility shall notify Commission staff promptly of

all:

(i) Electronic trading halts and material system malfunctions;

(ii) Cyber-security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(iii) Activations of the security-based swap execution facility's business continuity-disaster recovery plan.

(6) A security-based swap execution facility shall provide Commission staff timely advance notice of all material:

(i) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(ii) Planned changes to the security-based swap execution facility's program of risk analysis and oversight.

(7) As part of a security-based swap execution facility's obligation to produce books and records in accordance with Core Principle 9 and § 242.826, the security-based swap execution facility shall provide to the Commission the following system-safeguards-related books and records, promptly upon the request of any Commission representative:

(i) Current copies of its business continuity-disaster recovery plans and other emergency procedures;

(ii) All assessments of its operational risks or system safeguards-related controls;

(iii) All reports concerning system safeguards testing and assessment required by this chapter, whether performed by independent contractors or by employees of the security-based swap execution facility; and

(iv) All other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission rules, or in connection with Commission maintenance of a current profile of the security-based swap execution facility's automated systems.

(v) Nothing in paragraph (b)(7) of this section shall be interpreted as reducing or limiting in any way a security-based swap execution facility's obligation to comply with Core Principle 9 and § 242.826.

(8) A security-based swap execution facility shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. A security-based swap execution facility shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Such testing and review shall include, without limitation, all of the types of testing set forth in this paragraph (b)(8).

(i) *Definitions*. As used in this paragraph (b)(8):

Controls means the safeguards or countermeasures employed by the security-based swap execution facility to protect the reliability, security, or capacity of its automated systems or the confidentiality, integrity, and availability of its data and information, and to enable the security-based swap execution facility to fulfill its statutory and regulatory responsibilities.

Controls testing means assessment of the security-based swap execution facility's controls to determine whether such controls are implemented correctly, are operating as intended, and are enabling the security-based swap execution facility to meet the requirements of this section.

Enterprise technology risk assessment means a written assessment that includes, but is not limited to, an analysis of threats and vulnerabilities in the context of mitigating controls. An enterprise technology risk assessment identifies, estimates, and prioritizes risks to security-based swap execution facility operations or assets, or to market participants, individuals, or other entities, resulting from impairment of the confidentiality, integrity, and availability of data and information or the reliability, security, or capacity of automated systems.

External penetration testing means attempts to penetrate the security-based swap execution facility's automated systems from outside the systems' boundaries to identify and

exploit vulnerabilities. Methods of conducting external penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Internal penetration testing means attempts to penetrate the security-based swap execution facility's automated systems from inside the systems' boundaries, to identify and exploit vulnerabilities. Methods of conducting internal penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Security incident means a cybersecurity or physical security event that actually jeopardizes or has a significant likelihood of jeopardizing automated system operation, reliability, security, or capacity, or the availability, confidentiality or integrity of data.

Security incident response plan means a written plan documenting the security-based swap execution facility's policies, controls, procedures, and resources for identifying, responding to, mitigating, and recovering from security incidents, and the roles and responsibilities of its management, staff, and independent contractors in responding to security incidents. A security incident response plan may be a separate document or a business continuity-disaster recovery plan section or appendix dedicated to security incident response.

Security incident response plan testing means testing of a security-based swap execution facility's security incident response plan to determine the plan's effectiveness, identify its potential weaknesses or deficiencies, enable regular plan updating and improvement, and maintain organizational preparedness and resiliency with respect to security incidents. Methods of conducting security incident response plan testing may include, but are not limited to, checklist completion, walk-through or table-top exercises, simulations, and comprehensive exercises.

Vulnerability testing means testing of a security-based swap execution facility's automated systems to determine what information may be discoverable through a reconnaissance analysis of those systems and what vulnerabilities may be present on those systems.

(ii) *Vulnerability testing.* A security-based swap execution facility shall conduct

vulnerability testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such vulnerability testing at a frequency determined by an appropriate risk analysis.

(B) Such vulnerability testing shall include automated vulnerability scanning, which shall follow generally accepted best practices.

(C) A security-based swap execution facility shall conduct vulnerability testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(iii) *External penetration testing.* A security-based swap execution facility shall conduct external penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such external penetration testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility shall conduct external penetration testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(iv) *Internal penetration testing.* A security-based swap execution facility shall conduct internal penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such internal penetration testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility shall conduct internal penetration testing by engaging independent contractors, or by using employees of the security-based swap execution

facility who are not responsible for development or operation of the systems or capabilities being tested.

(v) *Controls testing.* A security-based swap execution facility shall conduct controls testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct controls testing, which includes testing of each control included in its program of risk analysis and oversight, at a frequency determined by an appropriate risk analysis. Such testing may be conducted on a rolling basis.

(B) A security-based swap execution facility shall conduct controls testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(vi) *Security incident response plan testing.* A security-based swap execution facility shall conduct security incident response plan testing sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such security incident response plan testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility's security incident response plan shall include, without limitation, the security-based swap execution facility's definition and classification of security incidents, its policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, and the hand-off and escalation points in its security incident response process.

(C) A security-based swap execution facility may coordinate its security incident response plan testing with other testing required by this section or with testing of its other business continuity-disaster recovery and crisis management plans.

(D) A security-based swap execution facility may conduct security incident response plan

testing by engaging independent contractors or by using employees of the security-based swap execution facility.

(vii) *Enterprise technology risk assessment.* A security-based swap execution facility shall conduct enterprise technology risk assessment of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct enterprise technology risk assessment at a frequency determined by an appropriate risk analysis. A security-based swap execution facility that has conducted an enterprise technology risk assessment that complies with this section may conduct subsequent assessments by updating the previous assessment.

(B) A security-based swap execution facility may conduct enterprise technology risk assessments by using independent contractors or employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being assessed.

(9) To the extent practicable, a security-based swap execution facility shall:

(i) Coordinate its business continuity-disaster recovery plan with those of its members that it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the security-based swap execution facility's business continuity-disaster recovery plan;

(ii) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of members that it depends upon to provide liquidity; and

(iii) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(10) The scope for all system safeguards testing and assessment required by this section shall be broad enough to include the testing of automated systems and controls that the security-based swap execution facility's required program of risk analysis and oversight and its current

cybersecurity threat analysis indicate is necessary to identify risks and vulnerabilities that could enable an intruder or unauthorized user or insider to:

(i) Interfere with the security-based swap execution facility's operations or with fulfillment of its statutory and regulatory responsibilities;

(ii) Impair or degrade the reliability, security, or adequate scalable capacity of the security-based swap execution facility's automated systems;

(iii) Add to, delete, modify, exfiltrate, or compromise the integrity of any data related to the security-based swap execution facility's regulated activities; or

(iv) Undertake any other unauthorized action affecting the security-based swap execution facility's regulated activities or the hardware or software used in connection with those activities.

(11) Both the senior management and the governing board of a security-based swap execution facility shall receive and review reports setting forth the results of the testing and assessment required by this section. A security-based swap execution facility shall establish and follow appropriate procedures for the remediation of issues identified through such review, as provided in paragraph (b)(12) of this section, and for evaluation of the effectiveness of testing and assessment protocols.

(12) A security-based swap execution facility shall identify and document the vulnerabilities and deficiencies in its systems revealed by the testing and assessment required by this section. The security-based swap execution facility shall conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, to determine and document whether to remediate or accept the associated risk. When the security-based swap execution facility determines to remediate a vulnerability or deficiency, it must remediate in a timely manner given the nature and magnitude of the associated risk.

§ 242.831 Core Principle 14—Designation of chief compliance officer.

(a)(1) *In general.* Each security-based swap execution facility shall designate an individual to serve as a chief compliance officer.

(2) *Duties.* The chief compliance officer shall:

(i) Report directly to the board or to the senior officer of the facility;

(ii) Review compliance with the core principles in this subsection;

(iii) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(iv) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(v) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 3D of the Act; and

(vi) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints; and

(vii) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) *Annual reports*—(i) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(A) The compliance of the security-based swap execution facility with the Act; and

(B) The policies and procedures, including the code of ethics and conflict of interest policies, of the security-based swap execution facility.

(ii) [Reserved]

(4) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in paragraph (a)(3) of this section with the appropriate financial report of the security-based swap execution facility that is required to be submitted to the Commission pursuant to this section; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(b) *Authority of chief compliance officer.* (1) The position of chief compliance officer shall carry with it the authority and resources to develop, in consultation with the governing board or senior officer, the policies and procedures of the security-based swap execution facility and enforce such policies and procedures to fulfill the duties set forth for chief compliance officers in the Act and the Commission's rules thereunder.

(2) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(c) *Qualifications of chief compliance officer.* (1) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position.

(2) No individual that would be disqualified from serving on a security-based swap execution facility's governing board or committees pursuant to the criteria set forth in § 242.819(i) may serve as a chief compliance officer.

(3) In determining whether the background and skills of a potential chief compliance officer are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, a security-based swap execution facility has the discretion to base its determination on the totality of the qualifications of the potential chief compliance officer, including, but not limited to, compliance experience, related career experience, training, potential conflicts of interest, and any other relevant factors to the position.

(d) *Appointment and removal of chief compliance officer.* (1) Only the governing board or the senior officer may appoint or remove the chief compliance officer.

(2) The security-based swap execution facility shall notify the Commission within two business days of the appointment or removal, whether interim or permanent, of a chief compliance officer.

(e) *Compensation of the chief compliance officer.* The governing board or the senior officer shall approve the compensation of the chief compliance officer.

(f) *Annual meeting with the chief compliance officer.* The chief compliance officer shall meet with the governing board or senior officer of the security-based swap execution facility at least annually.

(g) *Information requested of the chief compliance officer.* The chief compliance officer shall provide any information regarding the regulatory program of the security-based swap execution facility as requested by the governing board or the senior officer.

(h) *Duties of chief compliance officer.* The duties of the chief compliance officer shall include, but are not limited to, the following:

(1) Overseeing and reviewing compliance of the security-based swap execution facility with section 3D of the Act and the Commission rules thereunder;

(2) Taking reasonable steps, in consultation with the governing board or the senior officer of the security-based swap execution facility, to resolve any material conflicts of interest that may arise, including, but not limited to:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the security-based swap execution facility provide fair, open, and impartial access as set forth in § 242.819(c); and

(iii) Conflicts between a security-based swap execution facility's management and members of the governing board;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission;

(5) Establishing procedures reasonably designed to handle, respond, remediate, retest, and resolve noncompliance issues identified by the chief compliance officer through any means,

including any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written code of ethics for the security-based swap execution facility designed to prevent ethical violations and to promote honesty and ethical conduct by personnel of the security-based swap execution facility;

(7) Supervising the regulatory program of the security-based swap execution facility with respect to trade practice surveillance; market surveillance; real-time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities (including taking reasonable steps to ensure compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and

(8) Supervising the effectiveness and sufficiency of any regulatory services provided to the security-based swap execution facility by a regulatory service provider in accordance with § 242.819(e).

(i) *Preparation of annual compliance report.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that covers the prior fiscal year. The report shall, at a minimum, contain:

(1) A description and self-assessment of the effectiveness of the written policies and procedures of the security-based swap execution facility, including the code of ethics and conflict of interest policies, to reasonably ensure compliance with the Act and applicable Commission rules;

(2) Any material changes made to compliance policies and procedures during the coverage period for the report and any areas of improvement or recommended changes to the compliance program;

(3) A description of the financial, managerial, and operational resources set aside for

compliance with the Act and applicable Commission rules;

(4) Any material non-compliance matters identified and an explanation of the corresponding action taken to resolve such non-compliance matters; and

(5) A certification by the chief compliance officer that, to the best of their knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete in all material respects.

(j) *Submission of annual compliance report and related matters*—(1) *Furnishing the annual compliance report prior to submission to the Commission.* Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report for review to the governing board or, in the absence of a governing board, to the senior officer. Members of the governing board and the senior officer shall not require the chief compliance officer to make any changes to the report.

(2) *Submission of annual compliance report to the Commission.* The annual compliance report shall be submitted electronically to the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405 not later than 90 calendar days after the end of the security-based swap execution facility's fiscal year. The security-based swap execution facility shall concurrently file the annual compliance report with the fourth-quarter financial report pursuant to § 242.829(g).

(3) *Amendments to annual compliance report.* (i) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. The chief compliance officer shall submit the amended annual compliance report to the governing board, or in the absence of a governing board, to the senior officer, pursuant to paragraph (j)(1) of this section.

(ii) An amendment shall contain the certification required under paragraph (i)(5) of this section.

(4) *Request for extension.* A security-based swap execution facility may request an extension of time to file its annual compliance report from the Commission. Reasonable and valid requests for extensions of the filing deadline may be granted at the discretion of the Commission.

(k) *Recordkeeping.* A security-based swap execution facility shall maintain all records demonstrating compliance with the duties of the chief compliance officer and the preparation and submission of annual compliance reports consistent with Core Principle 9 and § 242.826.

§ 242.832 Application of the trade execution requirement to cross-border security-based swap transactions.

(a) The trade execution requirement set forth in section 3C(h) of the Act shall not apply in connection with a security-based swap unless at least one counterparty to the security-based swap is a "covered person" as defined below in paragraph (b) of this rule.

(b) A "covered person" means, with respect to a particular security-based swap, any person that is:

(1) A U.S. person;

(2) A non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person; or

(3) A non-U.S. person who, in connection with its security-based swap dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute a transaction.

§ 242.833 Cross-border exemptions.

(a) *Exemptions for foreign trading venues for security-based swaps*. An application for an order for exemptive relief under section 36(a)(1) of the Act (15 U.S.C. 78mm(a)(1)) relating to the registration status under the Act of a foreign trading venue for security-based swaps that has one or more members who are covered persons, as defined in § 242.832, with respect to security-based swaps transacted on that venue may state that the application also is submitted

pursuant to this paragraph (a). In such case, the Commission will consider the submission as an application to exempt the foreign trading venue, with respect to its providing a market place for security-based swaps, from:

(1) The definition of "exchange" in section 3(a)(1) of the Act (15 U.S.C. 78c(a)(1));

(2) The definition of "security-based swap execution facility" in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77));

(3) The definition of "broker" in section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)); and

(4) Section 3D(a)(1) of the Act (15 U.S.C. 78c-4(a)(1)).

(b) *Exemptions relating to the trade execution requirement.* (1) An application for an order for exemptive relief under section 36(a)(1) of the Act (15 U.S.C. 78mm(a)(1)) relating to the application of the trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c-3(h)) to security-based swaps executed on a foreign trading venue, may state that the application also is submitted pursuant to this paragraph (b).

(2) When considering an application under section 36 of the Act (15 U.S.C. 78mm) and this paragraph (b), the Commission may consider:

(i) The extent to which the security-based swaps traded in the foreign jurisdiction covered by the request are subject to a trade execution requirement comparable to that in section 3C(h) of the Act (15 U.S.C. 78c-3(h)) and the Commission's rules thereunder;

(ii) The extent to which trading venues in the foreign jurisdiction covered by the request are subject to regulation and supervision comparable to that under the Act, including section 3D of the Act (15 U.S.C. 78c-4), and the Commission's rules thereunder;

(iii) Whether the foreign trading venue or venues where covered persons, as defined in § 242.832, intend to trade security-based swaps have received an exemption order contemplated by paragraph (a) of this section; and

(iv) Any other factor that the Commission believes is relevant for assessing whether the exemption is in the public interest and consistent with the protection of investors.

§ 242.834 Mitigation of conflicts of interest of security-based swap execution facilities and certain exchanges.

(a) For purposes of this section:

Family relationship of a person means the person's spouse, former spouse, parent, step-parent, child, step-child, sibling, step-brother, step-sister, grandparent, grandchild, uncle, aunt, nephew, niece, or in-law.

Major disciplinary committee means a committee of persons who are authorized by a security-based swap execution facility to conduct disciplinary hearings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the security-based swap execution facility except those which:

(i) Are related to decorum or attire, financial requirements, or reporting or recordkeeping; and

(ii) Do not involve fraud, deceit, or conversion.

Member's affiliated firm is a firm in which the member is a principal or an employee.

Named party in interest means a person or entity that is identified by name as a subject of any matter being considered by a governing board, disciplinary committee, or oversight panel.

Significant action includes any of the following types of actions or rule changes by a security-based swap execution facility or SBS exchange that can be implemented without the Commission's prior approval:

(i) Any actions or rule changes which address an emergency; and

(ii) Any changes in margin levels that are designed to respond to extraordinary market conditions such as an actual or attempted corner, squeeze, congestion, or undue concentration of positions, or that otherwise are likely to have a substantial effect on prices in any contract traded or cleared at such security-based swap execution facility or SBS exchange; but does not include any rule not submitted for prior Commission approval because such rule is unrelated to the terms and conditions of any security-based swap traded at such security-based swap execution facility

or SBS exchange.

(b) Each security-based swap execution facility and SBS exchange shall not permit any of its members, either alone or together with any officer, principal, or employee of the member, to:

(1) Own, directly or indirectly, 20 percent or more of any class of voting securities or of other voting interest in the security-based swap execution facility or SBS exchange; or

(2) Directly or indirectly vote, cause the voting of, or give any consent or proxy with respect to the voting of, any interest that exceeds 20 percent of the voting power of any class of securities or of other ownership interest in the security-based swap execution facility or SBS exchange.

(c) The rules of each security-based swap execution facility and SBS exchange must be reasonably designed, and have an effective mechanism, to:

(1) Deny effect to the portion of any voting interest held by a member in excess of the limitations in paragraph (b) of this section;

(2) Compel a member who possesses a voting interest in excess of the limitations in paragraph (a) of this section to divest enough of that voting interest to come within those limitations; and

(3) Obtain information relating to its ownership and voting interests owned or controlled, directly or indirectly, by its members.

(d) Each security-based swap execution facility and SBS exchange shall ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process. Each major disciplinary committee or hearing panel thereof shall include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel.

(e) Each security-based swap execution facility and SBS exchange shall ensure that:

(1) 20 percent or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) are:

(i) Knowledgeable of security-based swap trading or financial regulation, or otherwise capable of contributing to governing board deliberations;

(ii) Not members of the security-based swap execution facility or SBS exchange;

(iii) Not salaried employees of the security-based swap execution facility or SBS exchange;

(iv) Not primarily performing services for the security-based swap execution facility or SBS exchange in a capacity other than as a member of the governing board; and

(v) Not officers, principals, or employees of a firm which holds a membership at the security-based swap execution facility or SBS exchange, either in its own name or through an employee on behalf of the firm; and

(2) The membership of the governing board includes a diversity of groups or classes of its members. The security-based swap execution facility or SBS exchange must be able to demonstrate that the board membership fairly represents the diversity of interests at such security-based swap execution facility or SBS exchange and is otherwise consistent with the composition requirements of this section.

(f) *Providing information about the board to the Commission*. Each security-based swap execution facility and SBS exchange shall submit to the Commission, within 30 days after each governing board election, a list of the governing board's members, the groups or classes of its members that they represent, and how the composition of the governing board otherwise meets the requirements of this section.

(g) *Voting by interested members of governing boards and various committees of security-based swap execution facilities and SBS exchanges*—(1) *Rules required.* Each security-based swap execution facility and SBS exchange shall maintain in effect rules to address the

avoidance of conflicts of interest in the execution of its regulatory functions. Such rules must provide for the following:

(i) *Relationship with named party in interest*—(A) *Nature of relationship.* A member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must abstain from such body's deliberations and voting on any matter involving a named party in interest where such member:

(*1*) Is a named party in interest;

(*2*) Is an employer, employee, or fellow employee of a named party in interest;

(*3*) Has any other significant, ongoing business relationship with a named party in interest, not including relationships limited to executing security-based swaps opposite of each other or to clearing security-based swaps through the same clearing member; or

(*4*) Has a family relationship with a named party in interest.

(B) *Disclosure of relationship.* Prior to the consideration of any matter involving a named party in interest, each member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must disclose to the appropriate staff of the security-based swap execution facility or SBS exchange whether they have one of the relationships listed in paragraph (g)(1)(i)(A) of this section with a named party in interest.

(C) *Procedure for determination.* Each security-based swap execution facility and SBS exchange must establish procedures for determining whether any member of its governing board, disciplinary committees, or oversight committees is subject to a conflicts restriction in any matter involving a named party in interest. Taking into consideration the exigency of the committee action, such determinations should be based upon:

(*1*) Information provided by the member pursuant to paragraph (g)(1)(i)(B) of this section; and

(*2*) Any other source of information that is held by and reasonably available to the

security-based swap execution facility or SBS exchange.

(ii) *Financial interest in a significant action*—(A) *Nature of interest.* A member of the governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must abstain from such body's deliberations and voting on any significant action if the member knowingly has a direct and substantial financial interest in the result of the vote based upon either exchange or non-exchange positions that could reasonably be expected to be affected by the action.

(B) *Disclosure of interest.* Prior to the consideration of any significant action, each member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must disclose to the appropriate staff of the security-based swap execution facility or SBS exchange the position information referred to in paragraph (g)(1)(ii)(C) of this section that is known to them. This requirement does not apply to members who choose to abstain from deliberations and voting on the subject significant action.

(C) *Procedure for determination.* Each security-based swap execution facility and SBS exchange must establish procedures for determining whether any member of its governing board, disciplinary committees, or oversight committees is subject to a conflicts restriction under this section in any significant action. Such determination must include a review of any positions, whether maintained at that security-based swap execution facility, SBS exchange, or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm that the security-based swap execution facility or SBS exchange reasonably expects could be affected by the significant action.

(D) *Bases for determination.* Taking into consideration the exigency of the significant action, such determinations should be based upon:

(*1*) Information provided by the member with respect to positions pursuant to paragraph (f)(2)(ii)(B) of this section; and

(*2*) Any other source of information that is held by and reasonably available to the

security-based swap execution facility or SBS exchange.

(iii) *Participation in deliberations.* (A) Under the rules required by this section, a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange may permit a member to participate in deliberations prior to a vote on a significant action for which they otherwise would be required to abstain, pursuant to paragraph (g)(1)(ii) of this section, if such participation would be consistent with the public interest and the member recuses from voting on such action.

(B) In making a determination as to whether to permit a member to participate in deliberations on a significant action for which they otherwise would be required to abstain, the deliberating body shall consider the following factors:

(*1*) Whether the member's participation in deliberations is necessary for the deliberating body to achieve a quorum in the matter; and

(*2*) Whether the member has unique or special expertise, knowledge, or experience in the matter under consideration.

(C) Prior to any determination pursuant to paragraph (g)(1)(iii)(A) of this section, the deliberating body must fully consider the position information which is the basis for the member's direct and substantial financial interest in the result of a vote on a significant action pursuant to paragraph (g)(1)(ii) of this section.

(iv) *Documentation of determination.* The governing boards, disciplinary committees, and oversight panels of each security-based swap execution facility and SBS exchange must reflect in their minutes or otherwise document that the conflicts determination procedures required by this section have been followed. Such records also must include:

(A) The names of all members who attended the meeting in person or who otherwise were present by electronic means;

(B) The name of any members who voluntarily recused themselves or were required to abstain from deliberations and/or voting on a matter and the reason for the recusal or abstention,

if stated; and

(C) Information on the position information that was reviewed for each member.

(h) *Rules required*. (1) A security-based swap execution facility shall maintain in effect rules to comply with this section that have been submitted to the Commission pursuant to § 242.806 or § 242.807.

(2) An SBS exchange shall maintain in effect rules to comply with this section that have been submitted to the Commission pursuant to § 240.19b-4 of this chapter.

§ 242.835 Notice to Commission by security-based swap execution facility of final disciplinary action or denial or limitation of access.

(a) If a security-based swap execution facility issues a final disciplinary action against a member, or takes final action with respect to a denial or conditioning membership, or takes final action with respect to a denial or limitation of access of a person to any services offered by the security-based swap execution facility, the security-based swap execution facility shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person.

(b) For purposes of paragraph (a) of this section:

(1) A disciplinary action shall not be considered "final" unless:

(i) The affected person has sought an adjudication or hearing with respect to the matter, or otherwise exhausted their administrative remedies at the security-based swap execution facility; and

(ii) The disciplinary action is not a summary action permitted under § 242.819(g)(13)(ii).

(2) A disposition of a matter with respect to a *denial or conditioning of membership*, or a *denial or limitation of access* shall not be considered "final" unless such person has sought an adjudication or hearing, or otherwise exhausted their administrative remedies at the security-based swap execution facility with respect to such matter.

(c) A notice required by paragraph (a) of this section shall provide the following

information:

(1) The name of the member and its last known address, as reflected in the security-based swap execution facility's records;

(2) The name of the person, committee, or other organizational unit of the security-based swap execution facility that initiated the disciplinary action or access restriction;

(3) In the case of a final disciplinary action:

(i) A description of the acts or practices, or omissions to act, upon which the sanction is based, including, as appropriate, the specific rules that the security-based swap execution facility has found to have been violated;

(ii) A statement describing the respondent's answer to the charges; and

(iii) A statement of the sanction imposed and the reasons therefor;

(4) In the case of a final action with respect to a denial or conditioning of membership, or a denial or limitation of access:

(i) The financial or operating difficulty of the member or prospective member (as the case may be) upon which the security-based swap execution facility determined that the member or prospective member could not be permitted to do, or continue to do, business with safety to investors, creditors, other members, or the security-based swap execution facility;

(ii) The pertinent failure to meet qualification requirements or other prerequisites for membership or access and the basis upon which the security-based swap execution facility determined that the person concerned could not be permitted to have membership or access with safety to investors, creditors, other members, or the security-based swap execution facility; or

(iii) The default of any delivery of funds or securities to a clearing agency by the member;

(5) The effective date of the final disciplinary action, or final action with respect to a denial or conditioning of membership, or a denial or limitation of access; and

(6) Any other information that the security-based swap execution facility may deem

relevant.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

18. The general authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), and secs. 2 and 3, Pub. L. 116-222, 134 Stat. 1063 (2020), unless otherwise noted.

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19. Add § 249.2001 to read as follows:

§ 249.2001 Form SBSEF, for application for registration as a security-based swap execution facility or to amend such application or registration.

This form shall be used for application for registration as a security-based swap execution facility, pursuant to section 3D of the Securities Exchange Act of 1934 (15 U.S.C. 78c-4) and § 242.803 of this chapter, or to amend such application or registration.

By the Commission.

Dated: April 6, 2022.

Vanessa A. Countryman,

Secretary.

APPENDIX A

Note: Form SBSEF will not appear in the Code of Federal Regulations.

SECURITIES AND EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY APPLICATION FOR REGISTRATION (and AMENDMENT TO APPLICATION)

REGISTRATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute Federal criminal violations or grounds for disqualification from registration.

DEFINITIONS

All terms used in this Form SBSEF—which includes instructions, a Cover Sheet, and required Exhibits—shall have the same meaning as in Regulation SE (17 CFR 242.800 *et seq*.) promulgated under section 3D of the Securities Exchange Act (the "Act") by the Securities and Exchange Commission ("Commission").

The term "Applicant" shall include any person submitting an application for registration as a security-based swap execution facility under section 3D of the Act and Regulation SE thereunder, and any person who is amending a pending application.

GENERAL INSTRUCTIONS

1. This Form SBSEF shall be filed with the Commission by any person applying to register with the Commission as a security-based swap execution facility. Upon the filing of an application for registration in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form SBSEF filed with the Commission may be executed electronically. If this Form SBSEF is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent (*i.e.*, a duly authorized

person who directs or manages, or who participates in the directing or managing of, its affairs).

4. If this Form SBSEF is being filed as an application for registration, all applicable items must be answered in full. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate. If this Form SBSEF is being filed as an amendment to an application for registration, only the coversheet and the amended exhibits need to be filed in full.

5. Under section 3D of the Act and the Commission's rules thereunder, the Commission is authorized to solicit the information required to be supplied by this Form SBSEF from any Applicant seeking registration as a security-based swap execution facility. Disclosure by the Applicant of the information specified on this Form SBSEF is mandatory prior to the start of the processing of an application for registration as a security-based swap execution facility. The information provided in this Form SBSEF will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. **A Form SBSEF which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SBSEF, however, shall not constitute a finding that the Form SBSEF has been filed as required or that the information submitted is true, current, or complete**.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission, information supplied on this Form SBSEF will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. An Applicant may amend a pending application for registration as a security-based swap execution facility to correct, update, or supplement its initial submission.

2. When filing this Form SBSEF for purposes of amending a pending application, an Applicant shall re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

MANNER OF FILING

This Form SBSEF must be filed electronically using the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. The disclosures on this Form SBSEF must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T (17 CFR 232.405).

SECURITIES EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

COVER SHEET

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, list all items that are amended and check here.

_____

_____

_____

_____

GENERAL INFORMATION

1. Name under which the business of the security-based swap execution facility is or will be conducted, if different from name specified above (include acronyms, if any):

_____

2. If name of security-based swap execution facility is being amended, state previous security-based swap execution facility name:

_____

3. Contact information, including mailing address if different from address specified above:

_____

Number and Street

_____

City State Country Zip Code

_____

Main Phone Number Fax (if applicable)

_____

Website URL Email Address

4. List of principal office(s) and address(es) where security-based swap execution facility activities are/will be conducted:

Office	**Address**
_____	_____
_____	_____
_____	_____

5. If the Applicant is a successor to a previously registered security-based swap execution facility, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor registrant

_____
Name

_____
Number and Street

_____
City State Country Zip Code

_____
Main Phone Number Website URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify) _____

7. Date of incorporation or formation:_____

8. State of incorporation or jurisdiction of organization:_____

9. The Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

_____
Print Name and Title

_____
Name of Applicant

_____

Number and Street

_____

City State

Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form SBSEF and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____

Name of Applicant

_____

Signature of Duly Authorized Person

_____

Print Name and Title of Signatory

SECURITIES AND EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

EXHIBITS INSTRUCTIONS

The following Exhibits must be filed with the Commission by an Applicant applying for registration as a security-based swap execution facility, or by a registered security-based swap execution facility amending its registration, pursuant to Section 3D of the Act and the Commission's rules thereunder. The Exhibits must be labeled according to the items specified in this Form SBSEF.

The application must include a Table of Contents listing each Exhibit required by this Form SBSEF and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 9 and 10 (Exhibits I and J) of this Form SBSEF, the Applicant should provide *pro forma* financial statements for the most recent six months or since inception, whichever is less.

LIST OF EXHIBITS

EXHIBITS – BUSINESS ORGANIZATION

1. Attach as **Exhibit A,** the name of any person who owns ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the Applicant.

   Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B,** a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees, grouped by committee), or persons performing functions similar to any of the foregoing, of the security-based swap execution facility or of any entity that performs the regulatory activities of the Applicant, indicating for each:

   a. Name
   b. Title
   c. Dates of commencement and termination of present term of office or position
   d. Length of time each present officer, director, or governor has held the same office or position
   e. Brief account of the business experience of each officer and director over the last five years

f. Any other business affiliations in the derivatives and securities industry
g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
h. Whether the person has been subject to a disciplinary action of any type noted in § 242.819(i) of Regulation SE and, if so, describe.

3. Attach as **Exhibit C,** a narrative that sets forth the fitness standards for the governing board and its composition.

4. Attach as **Exhibit D,** a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. If the security-based swap execution facility activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision, or separate entity, as applicable. Additionally, state any jurisdictions in which the Applicant or any affiliated entity is doing business, and its registration status in that jurisdiction, including pending registrations (*e.g.*, jurisdiction, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as **Exhibit E,** a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant, as described in Item 4.

6. Attach as **Exhibit F,** an analysis of staffing requirements necessary to carry out the operations of the Applicant as a security-based swap execution facility and the name and qualifications of each key staff person.

7. Attach as **Exhibit G,** a copy of the constitution; articles of incorporation, formation, or association, with all amendments thereto; partnership or limited liability agreements; and existing by-laws, operating agreement, rules, or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form SBSEF.

8. Attach as **Exhibit H,** a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. For each such proceeding, include the name of the court or agency where the proceeding is pending, the date instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any proceeding known to be contemplated by a governmental agency.

EXHIBITS —FINANCIAL INFORMATION

9. Attach as **Exhibit I:**

   a. (i) Balance sheet; (ii) Statement of income and expenses; (iii) Statement of cash flows; and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an

independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.

b. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least six months' operating costs.

c. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

d. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as **Exhibit J,** a balance sheet and an income and expense statement for each affiliate of the security-based swap execution facility that also engages in security-based swap execution facility activities or is a national securities exchange as of the end of the most recent fiscal year of each such affiliate.

11. Attach as **Exhibit K,** the following:

a. A complete list of all dues, fees, and other charges imposed, or to be imposed, by or on behalf of the Applicant for its security-based swap execution facility services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

b. A description of the basis and methods used in determining the level and structure of the dues, fees, and other charges listed in paragraph (a) of this item.

c. If the Applicant differentiates, or proposes to differentiate, among its members in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, describe and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services and any other factors that account for such differentiations.

EXHIBITS —COMPLIANCE

12. Attach as **Exhibit L,** a narrative and any other form of documentation that may be provided under other Exhibits herein, that describes the manner in which the Applicant is able to comply with each Core Principle. Such documentation must include a regulatory compliance chart setting forth each Core Principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each Core Principle. To the extent that the application raises issues that are novel or for which compliance with a Core Principle is not self-evident, include an explanation of how that item and the application satisfy the Core Principles.

13. Attach as **Exhibit M,** a copy of the Applicant's rules and any technical manuals, other guides, or instructions for members, including minimum financial standards for members. Include rules on publication of daily trading information with regards to the requirements of Regulation SBSR (§§ 242.900 through 242.909). The Applicant should include an

explanation and any other form of documentation that the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides, or instructions for members or minimum financial standards for members, as provided in this Exhibit M, help support the security-based swap execution facility's compliance with the Core Principles.

14. Attach as **Exhibit N,** executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third-party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable Core Principles. Identify: (1) the services that will be provided; and (2) the Core Principles addressed by such agreement.

15. Attach as **Exhibit O,** a copy of any compliance manual and any other document that describes with specificity the manner in which the Applicant will conduct trade practice, market, and financial surveillance.

16. Attach as **Exhibit P,** a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and, if applicable, the arrangements for alternative dispute resolution.

17. Attach as **Exhibit Q,** an explanation regarding the operation of the Applicant's trading system(s) or platform(s) and the manner in which the system(s) or platform(s) satisfy any Commission rules, interpretations, or guidelines regarding a security-based swap execution facility's execution methods, including the minimum trading functionality requirement in § 242.803 of the Commission's regulations. This explanation should include, as applicable, the following:

    a. For trading systems or platforms that enable members to engage in transactions through an order book:
        (1) How the trading system or platform displays all orders and trades in an electronic or other form, and the timeliness in which the trading system or platform does so;
        (2) How all market participants have the ability to see and have the ability to transact on all bids and offers; and
        (3) An explanation of the trade matching algorithm, if applicable, and examples of how that algorithm works in various trading scenarios involving various types of orders.

    b. For trading systems or platforms that enable members to engage in transactions through a request-for-quote system:
        (1) How a member transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all members may respond;
        (2) How resting bids or offers from the Applicant's Order Book are communicated to the requester; and
        (3) How a requester may transact on resting bids or offers along with the responsive orders.

    c. How the timing delay described under § 242.815(b) of Regulation SE is incorporated into the trading system or platform.

18. Attach as **Exhibit R,** a list of rules prohibiting specific trade practices.

19. Attach as **Exhibit S,** a discussion of how trading data will be maintained by the security-based swap execution facility.

20. Attach as **Exhibit T,** a list of the name of the clearing organization(s) that will clear the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as **Exhibit U,** any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to Securities Exchange Act Rule 24b-2, 17 CFR 240.24b-2.

APPENDIX B

19. Add § 249.2002 to read as follows:

§ 249.2002 Submission cover sheet, for rule and product submissions.

This submission cover sheet shall be used by registered security-based swap execution facilities for making submissions pursuant to Rules 804 through 807, 809, and 816 (§ 242.804 through 242.807, 242.809, and 242.816).

Note: The submission cover sheet will not appear in the Code of Federal Regulations.

§ 249.2002–Cover Sheet and Instructions for Rule and Product Submissions

SECURITY-BASED SWAP EXECUTION FACILITY

SUBMISSION COVER SHEET

IMPORTANT: Check box if Confidential Treatment is requested ☐

Name of Security-Based Swap Execution Facility:_____

Platform ID of Security-Based Swap Execution Facility: _____

Filing Date (mm/dd/yy): _____

Filing Description (See Instructions):

_____

SPECIFY FILING TYPE Please note only ONE choice allowed per Submission.

Rules and Rule Amendments (except where relating to product terms and conditions – see below)

☐ Self-Certification Rule 807(a)
☐ Approval Rule 806(a)
☐ Notification Rule 807(d)

Rule Numbers: _____

New Product Please note only ONE product per Submission.
☐ Self-Certification Rule 804(a)
☐ Approval Rule 805(a)

Official Product Name: _____

Please check the following box if you intend to submit a request for a joint interpretation from

the Commission and the Commodity Futures Trading Commission regarding whether the new product is a swap, security-based swap, or mixed swap pursuant to Rule 3a68-2 under the Securities Exchange Act: ☐

Product Terms and Conditions (product-related Rules and Rule Amendments)

☐ Certification	Rule 807(a)
☐ Certification – Made Available to Trade Determination	Rule 816(a)
☐ Delisting (No Open Interest)	Rule 807(a)
☐ Approval	Rule 806(a)
☐ Approval – Made Available to Trade Determination	Rule 816(a)
☐ Notification	Rule 807(d)

Official Name(s) of Product(s) Affected:_____

Rule Numbers: _____

Submission Cover Sheet and Instructions for Rule and Product Filings

(a) A properly completed submission cover sheet shall accompany all rule and product submissions submitted electronically to the Commission by a security-based swap execution facility using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T (17 CFR 232.405). A properly completed submission cover sheet shall include all of the following:

(1) *Organization*. The name of the security-based swap execution facility filing the submission.

(2) *Date*. The date of the filing.

(3) *Type of Filing*. An indication as to whether the filing is a new rule, rule amendment, or new product. The security-based swap execution facility should check the appropriate box to indicate the applicable category under that heading.

(4) *Rule Numbers*. For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

(5) *Description*. For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the security-based swap execution facility, its members, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

(b) *Other Requirements*. A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The filing of the submission cover sheet does not obviate the security-based swap execution facility's responsibility to comply with applicable filing requirements (*e.g.*, rules submitted for Commission approval under Rule 806 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) Checking the box marked "confidential treatment requested" on the submission cover sheet does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment in Securities Exchange Act Rule 24b-2, 17 CFR 240.24b-2, and will not substitute for notice or full compliance with such requirements.

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